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The Crisis and Force Majeure Regulation: Will the EU's Latest Attempt at Addressing Migrant Crises Live Up to Expectations?

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Abstract

The EU adopted the New Pact on Migration and Asylum in 2024, and with it, its latest attempt at addressing migrant crises: the Crisis and Force Majeure Regulation. This thesis analyses whether the Crisis and Force Majeure regulation will be adequate once it becomes applicable in 2026. This thesis thus undertakes an ex ante analysis, and identifies challenges and issues regarding the possible future invocation of the measures and derogations set out in the Regulation. This thesis will critically analyse the Regulation's definition of crisis, as well as undertaking a critical analysis of its legal design and governance structures. Furthermore, in determining whether it is adequate, a legal analysis of whether the regulation is compliant with international human rights will be carried out, in order to determine whether it ensures compliance with Member State's international and EU obligations. Thus, using both normative as well as doctrinal methods, this thesis determines whether the Regulation is adequate for addressing migrant crises.

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1 Introduction

1.1 Problem statement

In 2024 the New Pact on Migration and Asylum (hereinafter 'the Pact') entered into force.¹ The Pact is a set of legislative instruments aimed at completely overhauling the old Common European Asylum System.² The Common European Asylum System (CEAS) was criticised by a number of scholars, notably being labelled 'good weather' legislation.³ With this, it was said that while under 'normal' conditions the CEAS worked well, as soon as there was some form of crisis, or strain (bad weather), the system stopped functioning effectively.⁴

Over the past decade, the CEAS has faced such 'storms' on multiple occasions, exposing the CEAS and establishing the criticism as well founded. For example, the 2015-16 Refugee crisis instigated by the war in Syria exposed the lack of solidarity amongst Member States, with frontline countries struggling disproportionately with the influx of migrants.⁵ The lack of mechanisms, especially the lack of an effective solidarity mechanism, was a glaring deficiency that was put under the spotlight by the 2015-16 crisis.

Another such crisis that highlighted the deficiencies of the CEAS was the 2021 Poland-Belarus border crisis.⁶ This crisis was instigated by Lukashenko's regime following EU sanctions on Belarus.⁷ Poland responded to the fabricated crisis on the border with a policy of systematic pushbacks, with the Commission seemingly turning a blind eye to the widespread violations of EU and international law.⁸

¹ 'Pact on Migration and Asylum' (*European Commission*, 21 May 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed 8 April 2025.

² *ibid.*

³ Hailbronner described the CEAS as such - see Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 *Common Market Law Review* 607, 613.

⁴ *ibid.*

⁵ William Spindler, '2015: The year of Europe's refugee crisis' (*UNHCR*, 8 December 2015) <<https://www.unhcr.org/news/stories/2015-year-europes-refugee-crisis>> accessed 11 August 2025; Den Heijer, Rijpma and Spijkerboer (n3) 612-614.

⁶ Human Rights Watch (HRW), 'Violence and Pushbacks at Poland-Belarus Border' (*Human Rights Watch*, 7 June 2022) <<https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>> accessed 11 August 2025.

⁷ Scott Neuman, 'How a political standoff trapped hundreds of migrants at the Belarus-Poland border' (*NPR*, 17 November 2021) <<https://www.npr.org/2021/11/17/1056129127/poland-belarus-eu-migrant-border-crisis>> accessed 8 April 2025.

⁸ HRW (n6); Marcej Grzeskowiak, 'The "Guardian of the Treaties" is No More? The European Commission and the 2021 Humanitarian Crisis on Poland-Belarus Border' (2023) 42 *Refugee Survey Quarterly* 81, 101.

In response to these crises, and the subsequent criticisms from various corners of society, including academics and politicians, the EU legislator felt a need to reform the system, thus adopting the Pact.⁹ One of the instruments in the Pact has been specifically designed to create mechanisms that enable Member States to respond to these crises within the framework of EU law: the Crisis and Force Majeure Regulation (hereinafter: CFMR or the Regulation).¹⁰ This Regulation 'intends to enhance the preparedness and resilience of the Union to manage situations of crisis and to facilitate operational coordination, capacity support and the availability of funding in situations of crisis.'¹¹ It is, however, not yet clear how suitable this Regulation will be for addressing migrant crises once it is applicable from 1 July 2026 onwards.¹²

1.2 Research Question

As stated previously the Union has recently adopted the CFMR in response to the crises that it has faced. The aim of the Regulation is to provide Member States with mechanisms to address such crises more effectively, and in compliance with fundamental rights.¹³ As a result, the research question of this thesis is 'Is the Crisis and Force Majeure Regulation adequate to address migrant crises?'

The novelty of the Regulation makes it incredibly relevant to discuss as it only entered into force in 2024 and will take effect from 1 July 2026 onwards.¹⁴ As a result, no empirical research on its implementation can be done yet. It is thus a useful exercise to research the potential implications and effectiveness of the Regulation beforehand. By doing so, potential pitfalls can already be identified and possibly Member States could adapt their implementation accordingly.

1.3 Methodology and Structure

As this thesis will be addressing whether or not the CFMR is 'adequate', it can be considered a normative judgement. This is because a value judgement on the CFMR is being made, and as the method is normative, a normative framework must naturally be

⁹ For criticism, see for example - Den Heijer, Rijpma and Spijkerboer (n3), Sandra Lavenex, 'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System' (2018) 56 *Journal of Common Market Studies* 1195, 1196-1197; Eleni Karageorgiou and Grego Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4 *Jus Cogens : A Critical Journal of Philosophy of Law and Politics* 131.

¹⁰ Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 2024/1359 (CFMR), rn 3.

¹¹ *Ibid* rn 5.

¹² *Ibid* art 20.

¹³ *Ibid* rn 1.

¹⁴ *Ibid* art 20.

set out detailing what this thesis understands as 'good' or 'adequate'.¹⁵ Within this normative framework doctrinal methods and legal analysis are used to identify indicators and assess the Regulation against them. This section will set out this normative framework as well as the relevant techniques and methods used within the chapters of the thesis. Through this, the structure of the thesis will simultaneously be explained.

Before setting out the normative framework, some key definitions must be set out. Firstly, in a general sense this thesis understands an adequate instrument as one that meets its own policy goals. As such, relying on the preamble of the CFMR, an adequate instrument to deal with migratory crises is one that allows Member States to rely on and invoke mechanisms that alleviate pressure on its asylum, reception or returns systems whilst still ensuring compliance with that states' obligations under both EU and international law.¹⁶

Alongside adequacy, another key term that must be addressed is what is understood as a 'migrant crisis'. This will be addressed in chapter 2, where the CFMR's definitions of crisis will be discussed and criticised. By critically analysing the CFMR's understanding of 'migrant crisis', an assessment can be made whether there are any shortcomings, thus enabling a determination on whether the CFMR can address migrant crises.

Furthermore, it must be set out that the Regulation will only enter into force from 1 July 2026 onwards.¹⁷ As such, this thesis entails an *ex ante* assessment of the Regulation and this must be reflected in how the Regulation is analysed. This thesis will thus be limited to assessing the adequacy of the legal design of the Regulation only, and will not assess the effectiveness of the implementation of the Regulation in practice. Assessing the implementation in practice at this point in time is impossible, as the Regulation has not yet been applied by any Member State. Empirical research once the Regulation is duly applicable, and has been implemented by Member States, is a more appropriate avenue to assess the effectiveness of the derogations and mechanisms of the Regulation in practice.

The normative framework will thus be framed in order to test two key notions, (i) whether the CFMR has been formulated in a manner that Member States have the opportunity to rely on the derogations and mechanisms in times of crisis, and (ii) whether those derogations and mechanisms foster compliance with international and

¹⁵ Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' [2018] *Law and Method* <10.5553/REM/.000031> accessed 11 August 2025, 6-7.

¹⁶ CFMR (n10), rn 1, 2, 7 and 8.

¹⁷ *Ibid* art 20.

EU obligations. Should this be the case, then the CFMR would be considered adequate from an *ex ante* perspective. In order to test these, a set of indicators will be identified, either from the law or from policy objectives of the CFMR. By identifying indicators against which the Regulation will be tested, it allows for the research question to be tested in a reliable manner, as it is clear how this thesis understands adequacy. As such, the normative framework is primarily internal, as the indicators are identified from within the law.¹⁸

The framework will be based on three pillars, which the structure of the thesis will follow. Thus each chapter of the thesis will assess a different pillar of the normative framework. Each of these pillars will assess a different aspect of adequacy, and so can be considered proxies.

The first of these pillars, and thus chapter 2, will assess how broad the scope of the Regulation is. As set out in the preamble of the CFMR, the CFMR aims to equip Member States with tools 'to respond to *all* types of situations' (emphasis added).¹⁹ While this is a policy goal of the CFMR, this thesis will not adopt a specific normative understanding of whether a broad definition of 'crisis' is inherently good or bad. It is recognised that while a broad definition may allow for increased flexibility, it could also lead to abusive invocations of the Regulation. As such, this thesis does not seek to adopt a stance on this debate, but instead focuses on critically analysing the definitions as such and identifying potential challenges that may arise. In order to do so, in chapter 2 the key elements of the definitions as set out in article 1 CFMR will be identified. These elements will be analysed, identifying potential problems that may occur with the interpretation thereof. As such, the techniques employed to assess the definitions against the standard will rely on textual interpretation.

The second pillar is built on human rights compliance. As previously stated, human rights compliance in times of crisis has been a major concern for Member States.²⁰ As such, compliance with human rights has been chosen as a proxy to assess whether the CFMR allows for states to comply with their obligations under international and EU law.

In chapter 3, human rights indicators will be deductively identified on the basis of three different legal systems, (i) the International Covenant on Civil and Political Rights (ICCPR), (ii) the European Convention on Human Rights (ECHR) and (iii) the

¹⁸ Taekema (n15) 7.

¹⁹ CFMR (n10) rn 3.

²⁰ See for example pushbacks during the Poland-Belarus Crisis in 2021, or the worsening reception conditions leading to violations of article 3 ECHR in Greece in the *MSS v Belgium and Greece* case - HRW (n6); *M.S.S. v Belgium and Greece* ECHR app no 30696/09 (ECtHR, 21 January 2011) (*M.S.S.* case), para 263.

Charter of Fundamental Rights of the European Union (CFR) with the reasoning behind these legal systems being chosen being set out in the chapter. Each of these three will be assessed, alongside relevant case law, to identify indicators that the derogations and mechanisms of the CFMR can then be tested against. These indicators will form a set of requirements, which if not met, would entail that the derogations or mechanisms do not ensure compliance with that human right.

This thesis will assess two specific rights / principles, namely the principle of *non-refoulement* and the right to liberty and security of the person. These two specific rights have been selected for a number of reasons. Firstly, the principle of *non-refoulement* has been chosen as it underpins the EU asylum system, as set out in the TFEU and CFR, and is a key tenet of international refugee law.²¹ Furthermore, the principle of *non-refoulement* has seemingly been violated in a number of crises in the past, thus making it a pertinent principle to assess whether the CFMR may improve, or worsen, the risk of violations of the principle.²² The right to liberty has been chosen due to the specific measures in the CFMR increasing the risk of violations thereof. Specifically, the potential increased use of the border procedure may lead to more widespread arbitrary deprivations of liberty of asylum seekers, as will be analysed in chapter 3, and so the potential risks thereof should be analysed.²³

As such, the techniques used will initially be a doctrinal analysis to set out to identify the indicators of each right, followed by a legally principled assessment of the derogations and mechanisms against these indicators. This second pillar does, however, rest on a key assumption, namely that human rights and human rights compliance are desirable. While this may not seem controversial, this thesis will accept that human rights as set out in the charter and human rights instruments are desirable in their

²¹ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 78; Charter of Fundamental Rights of the European Union [2000] OJ C 364/1 (CFR), art 19; Penelope Mathew, 'Chapter 50: Non-Refoulement' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021), 899.

²² For example Grzeskowiak argued that Polish pushbacks in the 2021 crisis constituted a 'manifest breach of the principle of *non-refoulement*'. Moreover, pushbacks in the Mediterranean have been widely reported with many arguing that these may also lead to violations of the principle of *non-refoulement* - see Grzeskowiak (n8), 84; Anja Radjenovic, 'Addressing pushbacks at the EU's external borders' (Briefing for the European parliament, *European Parliament*, March 2021)

<[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/738191/EPRS_BRI\(2022\)738191_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/738191/EPRS_BRI(2022)738191_EN.pdf)> accessed 11 August 2025.

²³ CFMR (n10) art 11; Vasiliki Apatzidou, 'Bordering Asylum: Examining the EU's Border Procedures under the Asylum Procedures Regulation (EU) 2024/1348' [2025] *International Journal of Refugee Law* <<https://doi.org/10.1093/ijrl/eeaf014>> accessed 11 August 2025, 16; Alberto-Horst Neidhardt, 'The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?' (Policy Study, *Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung* and *European Policy Centre*, 2024) <<https://www.epc.eu/en/publications/The-Crisis-and-Force-Majeure-Regulation-Towards-future-proof-crisis-m~5bb29c>> accessed 11 August 2025, 19-20.

current state and will not contest this or analyse the debate surrounding specific human rights.

The final pillar, as will be analysed in chapter 4, will assess the governance structures of the Regulation. It thus seeks to assess how a Member State may invoke the Regulation, and the procedures that determine this. In order for the CFMR to be adequate, a Member State must be able to invoke it and apply the measures that it sets out in a manner compliant with its international and EU obligations. As such, in this chapter the procedures to invoke and apply the CFMR's derogations and measures will be analysed in light of the conclusions drawn from chapters 2 and 3.

In order to assess this, the text of the CFMR will be analysed, with the legal design being critically appraised. Furthermore, the CFMR will be compared to another EU instrument designed to address migrant crises, namely the Temporary Protection Directive (hereinafter: TPD or the Directive). The TPD is a legal instrument that has been in force since 2001, with its purpose being to enable Member States to deal with mass influx situations of migrants.²⁴ As the TPD has been in force for more than twenty years, its workings and the subsequent criticism thereof can be an invaluable insight into the governance structures of the CFMR.

Through these three pillars, this thesis will thus be able to test the CFMR against indicators that allow it to answer the research question in a structured manner. As set out, it will enable an assessment of adequacy, as understood for the purposes of this thesis, from an *ex ante* perspective.

²⁴ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 (TPD).

2 Mass arrivals, instrumentalisation and force majeure: critically assessing the definitions of key concepts of the CFMR

2.1 Introduction

Every migration crisis is unique, not a single one has been a carbon copy of the previous. Each brings its own problems, and has characteristics which are specific to it. As such, creating a definition for 'crisis' brings a set of challenges.

Defining what is 'migration crisis' has generated significant debate, both amongst scholars as well as varying definitions set out by international organisations.²⁵ A definition must be broad enough to encompass a wide array of situations which exert pressure on Member States, and may require crisis-related responses, but the definitions cannot be so broad that they are overly ambiguous and may be open to abusive invocation against migrants. The purpose of this chapter is thus to address this very issue. This chapter will critically analyse the definitions as set out in the CFMR, thus determining whether the CFMR will be able to allow states to 'respond to *all* types of situations'.²⁶ As stated in the methodology, however, this thesis will not be adopting a specific normative understanding of how broad 'migration crises' should be. Instead, it seeks to identify challenges through a critical analysis of the elements of the definitions and through this analyse how the regulation defines 'crisis'.

In order to do so, first the legal elements of the definitions of crisis will be set out and examined. Each element will be dissected, with potential ambiguities and problematic interpretations being identified and evaluated. The following section of the chapter will then address the concept of force majeure, and the definition as set out in the CFMR.

²⁵ Céline Cantat, Antoine Pécoud and Hélène Thiollet, 'Migration as Crisis' (2025) 69 *American Behavioral Scientist* 627; Julia Sachseder, Saskia Stachowitsch and Clemens Binder, 'Gender, race, and crisis-driven institutional growth: discourses of 'migration crisis' and the expansion of Frontex' (2022) 48 *Journal of Ethnic and Migration Studies* 4670; Martina Tazzioli and Nicholas De Genova, 'Europe/Crisis: Introducing New Keywords of "the Crisis" and of "Europe"' (*Near Futures Online*, March 2016) <https://nearfuturesonline.org/wp-content/uploads/2016/01/New-Keywords-Collective_12.pdf> accessed 11 August 2025.

²⁶ CFMR (n10) rn 3.

2.2 What constitutes a crisis for the purposes of the CFMR?

In defining what is considered a 'crisis', the CFMR sets out two distinct concepts: 'mass arrivals' and 'instrumentalisation'.²⁷ By setting out two types of crisis, the CFMR indicates that 'migration crises' can take on different dimensions, and is not limited to merely large-scale arrivals of individuals. Instead, it acknowledges that factors such as third countries can play a role in such crises, as will be analysed below.

2.2.1 A Critical Analysis of the Definition of 'Mass Arrivals'

The first type of crisis as set out in the CFMR is a situation of 'mass arrivals'. The Regulation characterises it as 'an exceptional situation' of (a) mass arrivals of third country nationals (TCNs) by land, air or sea (b) of such a scale and nature (c) to render a well prepared asylum, reception or return system non-functional (d) such that there could be serious consequences for the functioning of the CEAS.²⁸ These elements will thus be analysed, assessing potential difficulties in their interpretation.

2.2.1.1 Are secondary movements considered as arrivals into a Member State?

The first element that must be fulfilled for a situation of 'mass arrivals' to be established, is that there should be arrivals of TCNs by land, air or sea.²⁹ When analysing this first element, the primary question that arises is what constitutes an arrival. Is an arrival into a Member State only considered when crossing an external border? Or can arrivals also be through internal borders?

A literal reading of the text seems to suggest that movements across internal borders are not precluded. The text only refers to arrivals 'in a Member State'.³⁰ Furthermore, while for the purposes of 'instrumentalisation' article 1(4) CFMR explicitly references that internal borders are not covered, 'mass arrivals' are not included in such an exclusion.³¹ This differentiation thus seems to be intentional, allowing for a tentative conclusion that movements across internal borders do fall within the CFMR. This is also likely how it will be interpreted, as in past years secondary movements across internal borders have become increasingly common.³² For example, in 2017 out of more than 600,000 registered asylum seekers, around 40% had already made an application in

²⁷ CFMR (n10) art 1.

²⁸ CFMR (n10) art 1(4)(a).

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *Ibid* art 1(4).

³² Advisory Committee on Migration Affairs, "Secondary movements of asylum seekers in the EU: advisory report" (*Advisory Committee on Migration Affairs*, November 2019) <<https://www.adviesraadmigratie.nl/publicaties/publicaties/2019/11/05/increasing-onward-migration-of-asylum-seekers-in-the-eu>> accessed 11 August 2025.

another Member State thus indicating they had travelled across an internal border.³³ As such, it is foreseeable that secondary movements across internal borders could be of such a scale as to put pressure on a Member State, thus potentially requiring the invocation of the CFMR.

It must also be noted that there is no requirement for arrivals to be 'irregular'. In the initial Commission's proposal this was specified, thus the omission of this seems to be an intentional policy choice.³⁴ This thus broadens the scope, allowing for more flexibility in the invocation of the Regulation. This has likely been done to allow for simultaneous invocations of the CFMR and the TPD. As stated in the preamble, the Regulation is complementary to the TPD and so in cases where there are mass arrivals of TCNs through, for example visa facilitation, the CFMR may still be invoked.³⁵ This can be considered a positive development as compared to the proposal, as it broadens the potential invocation of the CFMR alongside other EU crisis instruments.

2.2.1.2 The framing of scale and nature of arrivals in relative terms

While in the previous sections the meaning of 'arrivals' was analysed, as part of the definition when such arrivals become 'mass arrivals' must also be assessed. This will likely be determined by the 'scale and nature' of these arrivals, with this being the second element that must be fulfilled.

It is clear from the definition that the scale and nature of the arrivals is relative to each Member State, depending on the population, GDP and geographic specificities thereof.³⁶ By explicitly setting out that the assessment of scale and nature is relative to the size of the Member State, this ensures that smaller Member States are able to benefit from the CFMR and do not have to argue in absolute terms.

Furthermore, the definition refers to 'geographic specificities' of the Member State.³⁷ It could be suggested that a 'geographical specificity' could for example be whether the mass arrivals occur on an island. An example of this could be Lampedusa, which has been disproportionately affected by influxes of migrants due to its geographic location in the Mediterranean.³⁸ As such, mass arrivals do not need to put pressure on

³³ Erika Colombo, 'EU Secondary Movements of Asylum Seekers: a Matter of Effective Protection and Solidarity' (*Fondazione ISMU*, July 2019) <https://www.ismu.org/wp-content/uploads/2018/10/Colombo-E_Eu-secondary-movements_paper_july2019_ed.pdf> accessed 11 August 2025, 6.

³⁴ European Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of crisis and force majeure in the field of migration and asylum' COM(2020) 613 final.

³⁵ CFMR (n10) rn 3.

³⁶ Ibid art 1(4)(a).

³⁷ Ibid.

³⁸ Santino Severoni, 'Increased influx of migrants in Lampedusa, Italy: Joint report from the Ministry of Health, Italy and the WHO Regional Office for Europe mission of 28-29 March 2011'

the asylum, reception or return systems throughout the country, but may do so in a specific region, or island. This has been confirmed by definition 'including [situations] at local or regional level'.³⁹ By acknowledging this, the definition of 'mass arrivals' can be considered sensitive to the realities of crises, which can disproportionately affect specific regions of a Member State.

2.2.1.3 The introduction of the concept of 'well prepared'

The scale and nature of the arrivals must be of such a level as to render the Member State's well-prepared asylum, reception, or return system non-functional. From this element, two key notions can be identified as being particularly vague, namely 'well prepared' and 'non-functional'.⁴⁰

Firstly, due to how vague 'well prepared' seems to be, the term could be liable to an overly strict interpretation. The European Council on Refugees and Exiles (ECRE) has argued that the Annual Asylum and Migration report as mandated by article 9 Asylum and Migration Management Regulation (AMMR) will constitute 'the main source of information for the assessment of Member States preparedness'.⁴¹ Alongside the report, well preparedness likely also links closely to the implementation of the national strategies as mandated by article 7 of the AMMR and article 16 CFMR.⁴² These strategies include contingency planning and 'preventive measures to reduce the risk of migratory pressure'.⁴³

Furthermore, recital 13 CFMR gives an indication as to what 'well prepared' refers to.⁴⁴ Here it is set out that Member States must have 'sufficient human and financial resources and infrastructure', as well as ensuring coordination between national

(World Health Organisation Regional Office for Europe, 2012) <<https://iris.who.int/bitstream/handle/10665/375368/WHO-EURO-2012-8510-48282-71695-eng.pdf?sequence=1&isAllowed=y>> accessed 11 August 2025; Tony Kushner, 'Lampedusa and the migrant crisis: Ethics, representation and history' (2016) 2 *Mobile Culture Studies*. The journal 59.

³⁹ CFMR (n10) art 1(4)(a).

⁴⁰ CFMR (n10) art 1(4)(a).

⁴¹ ECRE, 'ECRE Comments on the Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum and Amending Regulation (EU) 2021/1147' (*ECRE: European Council on Refugees and Exiles*, May 2024) <https://ecre.org/wp-content/uploads/2024/05/ECRE_Comments_Crisis-and-Force-Majeure-Regulation.pdf> accessed 11 August 2025, 18; Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L 2024/1351 (AMMR), art 9.

⁴² AMMR (n41) art 7; CFMR (n10) art 16.

⁴³ AMMR (n41) art 7.

⁴⁴ CFMR (n10) rn 13.

authorities and authorities of other Member States.⁴⁵ However, once again here what is meant by 'sufficient' and how this should be assessed is unclear.

Considering the above, and only vague notions being referred to as a guideline to assess what 'well prepared' could mean, there is a very real risk that it is interpreted too strictly. In particular, hindsight assessments of measures that should have been taken should be avoided. It is impossible to foresee every challenge that a large-scale situation of arrivals may entail, and as such well preparedness should be based on information known to the Member State at the time. As a result, basing the notion on annual reports about the asylum systems of Member States could be a genuine option to prevent 'hindsight assessments'.

Similar to 'well prepared', the notion of 'non-functional' also brings forth questions regarding its interpretation. A system is not either functional or not, but could be considered as more of a continuum with functioning on one end, and non-functional at the other. No system is ever completely dysfunctional, but certain parts thereof will continue to operate in some capacity. As such, the question becomes: in how far should the system still be operational until it is considered non-functional? How far along the continuum does it need to be, and how is this to be measured? No indications are given, thus giving rise to an array of potential interpretations.

It must, however, be noted that the rendering non-functional of the asylum, reception or return system are alternative, and not cumulative.⁴⁶ Only one of the three needs to be rendered non-functional. This, however, does raise the question whether all three need to be well prepared, or only that system which is now considered non-functional must have been well prepared. It could be suggested that only that system which the Member State deems non-functional needs to have been well prepared in order to be able to invoke the CFMR. This would ensure that an impossible standard is not set where all systems must simultaneously be well prepared.

2.2.1.4 When is the CEAS at risk of being non-functional?

The final element that must be fulfilled is that the mass arrivals must create a risk of serious consequences for the functioning of the CEAS.

In article 13 CFMR, the legislator has given an indication as to what would make the CEAS non-functional. It states that where there is a 'serious risk of serious deficiencies in the treatment of applicants', it would create a risk that the CEAS is 'rendered non-functional'.⁴⁷

⁴⁵ *ibid.*

⁴⁶ ECRE (n41) 7.

⁴⁷ CFMR (n10) art 13.

It must, however, be determined when there is a 'serious' risk to the functioning thereof. In determining when this 'serious' threshold is reached, one could refer to the notion of 'systemic deficiencies' as set out in the *NS* case.⁴⁸ The Court of Justice of the European Union (CJEU) in that case found that 'systemic deficiencies' in asylum procedures or reception conditions that create a risk of inhuman or degrading treatment in the responsible Member State preclude transfers from one Member State to another in the context of the Dublin system.⁴⁹ Reasoning by analogy, such 'systemic' deficiencies could be argued to amount to 'serious' deficiencies that would risk the functioning of the CEAS. This risks the functioning of the CEAS as it undermines a central tenet thereof, namely responsibility sharing amongst Member States.⁵⁰

As such, should conditions be created that would undermine key tenets of the CEAS, such as responsibility sharing, this would have serious consequences for the functioning thereof.

It must, however, be noted that only a risk is required, as the definition holds only that 'there could be serious consequences for the functioning of the CEAS' and not that the CEAS is rendered non-functional in practice.⁵¹ This thus ensures that there is not an impossibly high standard whereby the CEAS is genuinely affected. Nonetheless, the notion of when the CEAS is considered non-functional brings forth similar questions as when the Member States asylum system is rendered non-functional, it is simply unclear when this would be the case.

2.2.1.5 Overall Assessment of Mass Arrivals

The first type of 'migration' crisis as set out in the CFMR is mass arrivals. The CFMR definitions bring with it both strengths and weaknesses.

Firstly, in regard to strengths it is positive that the 'scale and nature' is determined in relative terms to the size of the Member States and incorporates geographic specificities. It is thus sensitive to the realities of situations of mass arrivals. Furthermore, elements such as 'arrivals' have been broadened when compared to the Commission's initial proposal, allowing the CFMR to potentially respond to future crises such as large-scale secondary movements within the Union.

While there are clear positives in the definition, there are also a number of vague terms. While this can allow for flexibility, they may also be liable to being interpreted in

⁴⁸ Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR 2011 ECLI:EU:C:2011:865 (*NS* case), para 89.

⁴⁹ *Ibid* para 94.

⁵⁰ TFEU (n21) para 80.

⁵¹ CFMR (n10) art 1(4)(a).

an overly strict manner. Especially the terms 'well prepared' and 'non-functional' are at risk of this, thus potentially undermining the flexibility of the definition and the potential invocation of the CFMR.

Considering case law regarding large scale arrivals of migrants, however, creates some hope that the CJEU will not be overly strict. Namely, in the *Slovakia and Hungary v Commission* case, the Court found that in the context of the 2015 Refugee crisis, 'the inflow of migrants with which the Greek and Italian asylum systems were confronted in 2015 was on such a scale that it would have disrupted any asylum system, even one without structural weaknesses'.⁵² This gives an indication as to how the CJEU may respond to future crises, and the considerable flexibility that it shows. Should there be one of such a scale as that faced in 2015, it seems that the CJEU is ready to accept the consequences of such a crisis and the effects that it has on Member State's asylum systems. It is hoped that when the CFMR is applied, similar flexibility is shown and that the functioning of the CFMR is not hindered by overly strict interpretations of the definitions.

2.2.2 A Critical Analysis of the Definition of 'Instrumentalisation'

The initial proposal of the CFMR did not include 'instrumentalisation' as a form of crisis, and merely focused on mass arrivals. Following the Poland-Belarus border crisis, however, there seemed to have been a shift with the Commission initially proposing a separate instrument dedicated to instrumentalisation which was later merged into the CFMR.⁵³

The CFMR thus sets out an authoritative definition of instrumentalisation, which occurs when (a) a third country or a hostile non-state actor encourages or facilitates the movement of TCNs (b) with the aim of destabilising the Union or a Member State (c) where such actions are liable to put at risk essential functions of a Member State.⁵⁴

⁵² Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] Court reports – general ECLI:EU:C:2017:631, para 128.

⁵³ European Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of instrumentalisation in the field of migration and asylum' COM(2021) 890 final.

⁵⁴ CFMR (n10) art 1(4)(b).

2.2.2.1 Encouraging or facilitating: to what extent must the third country or hostile non-state actor be involved?

The first element of instrumentalisation entails that there must be another actor which creates the flow of migrants. This can either be a third country, with past examples being Belarus or Russia, or can be a 'hostile non-state actor'.⁵⁵

What constitutes a 'hostile non-state actor' is not immediately clear. From recitals 14 and 15 CFMR, 'hostile' seems to refer to the intention to destabilise the Union or a Member State.⁵⁶ It thus seems that the intention or aim is constitutive, rather than for example the level of organisation or size of the non-state actor. The non-state actor, however, must be able to facilitate or encourage, indicating that at minimum it must have some capacity for influencing the movement of people. It is nevertheless unclear whether any specific elements need to be fulfilled aside from being 'hostile', and as such the term can likely be interpreted broadly.

This actor, whether state or non-state, must then 'facilitate' or 'encourage' the movement of people.⁵⁷ Both of these terms are liable to broad interpretations, and can be considered particularly ambiguous. Taking a literal interpretation of the terms, facilitating seems to imply more active acts than encouragement. For example, it could be argued that facilitating requires material acts that physically aid individuals in attempting to cross the border. An example of this would be Belarus' actions during the 2021 Border crisis where Belarussian authorities enabled migrants to travel to the border by facilitating tourist visas as well as guiding migrants towards the border.⁵⁸

Encouragement, on the other hand, seems to be a weaker notion and could have a lower threshold and can be suggested to refer to an attempt to influence behaviour. Using this as a starting point, it could be suggested that campaigns, such as propaganda campaigns aimed at encouraging migrants to use a particular migrant route, would constitute encouragement for the purposes of instrumentalisation.⁵⁹ This would not require any material act, which would be required for facilitation. By also including a

⁵⁵ CFMR (n10) art 1(4)(b); European Commission, 'Communication from the Commission to the European Parliament and the Council on Countering Hybrid Threats from the Weaponisation of Migration and Strengthening Security at the EU's External Borders' COM(2024) 570 final (Article 72 Communication).

⁵⁶ CFMR (n10) rn 14 and 15.

⁵⁷ *ibid.*

⁵⁸ Human Rights Watch (HRW), "'Die Here or Go to Poland'": Belarus and Poland's Shared Responsibility for Border Abuses' (Human Rights Watch, 24 November 2021) <<https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>> accessed 11 August 2025; Artem Graban, 'Instrumentalisation of fear and securitisation of "Eastern Borders Route": the case of Poland-Belarus "border crisis"' (2024) 33 *European Security* 236, 246.

⁵⁹ *Ibid.*

weaker notion, and not limiting it to merely material acts, the legislator has thus ensured that the definition is not overly strict but can respond to different threats to the Union.

Finally, as found in the ECRE comment, the definition here has changed since the definition in the Schengen Border Code (SBC).⁶⁰ The SBC required 'active' encouragement or facilitation, which would have required some positive action.⁶¹ Omitting this word, however, has lowered the threshold to establish a situation of instrumentalisation, and thus makes the definition broader and more flexible.

2.2.2.2 The introduction of the subjective element

As touched on in the previous section, the third-country or non-state actor must aim to destabilise the Union or a Member State. There is thus a subjective element which must be assessed when establishing whether there is a situation of instrumentalisation. Proving whether there is intent can be particularly difficult depending on the evidentiary threshold required.

It is likely that for the purposes of migration crises only circumstantial evidence, such as statements and policy documents by the relevant actor taken together with their actions, will be the only evidence that a Member State can produce.⁶² Requiring any higher threshold may make a finding of instrumentalisation close to impossible, thus risking undermining the CFMR. As such, it is important that the threshold will not be set too high.

2.2.2.3 The double risk requirement

Finally, the encouragement or facilitation of TCNs must 'be liable to put at risk essential functions of a Member State'.⁶³ The element is strangely formulated, it must be 'liable' to put 'at risk' indicating a double risk requirement.⁶⁴ There does not need to be a direct risk to essential functions of the state, there merely needs to be a possibility that such a risk could occur, thus seemingly indicating a relatively low threshold.

Furthermore, 'essential functions' of a state is a vague term that must be set out. Within the definition, maintenance of law and order or the safeguarding of national

⁶⁰ ECRE (n41) 9.

⁶¹ Ibid.

⁶² Circumstantial evidence refers to indirect evidence from which a logical inference can be made that a fact exists - see Legal information Institute, 'Circumstantial Evidence' (*Cornell Law School*, January 2022) <https://www.law.cornell.edu/wex/circumstantial_evidence> accessed 11 August 2025.

⁶³ CFMR (n10) art 1(4)(b).

⁶⁴ Ibid.

security are set out as essential functions.⁶⁵ These, however, are not exhaustive as evidenced by the word 'including', and so other 'essential functions' must be discussed.

Firstly, article 4(2) TEU refers to essential state functions and similarly connects it with national security and law and order but also includes the 'territorial integrity of the state'.⁶⁶ Furthermore, the CJEU has also expanded on the notion of 'essential functions of the State', interpreting it to include the protection of minors.⁶⁷ Applying this to asylum procedures and migration, it could thus be said that if instrumentalisation of migrants were to affect the state's ability to protect minors, such as through pressure on reception conditions, then this would be fulfilled.

Furthermore, Mercz in her article argues that those functions that 'capture the essence of statehood' can be considered as essential, and this includes 'the maintenance of peace, order and security, the protection of persons and property, and the preservation of external security'.⁶⁸ Mercz further suggests concepts of 'optional' or 'non core' functions of the state, with these being those that are focused at improving general welfare such as education or health and safety standards.⁶⁹ While she herself argues that these are non-essential state functions, an argument could nonetheless be made that these could fall under the state's essential functions under human rights law or constitutional law.⁷⁰ This will, however, be dependent on the interpretation of the CJEU.

2.2.2.4 Other Elements

While not explicitly set out in the definition, there seem to be two other requirements that must be fulfilled should a Member State wish to invoke the CFMR as a result of instrumentalisation. These, however, will be discussed in chapter 3 where governance structures such as invocation of the CFMR will be analysed.

2.2.2.5 Overall Assessment of Instrumentalisation

Overall, similar to the mass arrivals definition, the definition of instrumentalisation is steeped in ambiguity. Key terms lack clear guidance on their meaning. This has both positive and negative implications. On the one hand, it may

⁶⁵ Ibid.

⁶⁶ Consolidated Version of the Treaty on the European Union [2012] OJ C 326/13 (TEU), art 4(2).

⁶⁷ Terezie Boková, 'Exploring the Concept of Essential State Functions on the Basis of the CJEU's Decision on the Temporary Relocation Mechanism' (2022) 7 European Papers 773, 786; Case C-147/17 *Sindicatul Familia Constanța and Others* Court reports - general - 'Information on unpublished decisions' section ECLI:EU:C:2018:926, para 61.

⁶⁸ Monika Mercz, 'The Essential State Functions' Impact on the EU's Integration' (2024) 1 *Studia Iuris Journal of Legal Studies* 95, 106-107.

⁶⁹ Ibid.

⁷⁰ See for example article 2 ICESCR which holds that every State party will undertake steps to ensure realisation of the rights therein thus indicating an obligation on states to fulfil and improve socio-economic rights - International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 2.

allow for flexibility for Member States and room to argue that they are in fact facing a situation of instrumentalisation should broad interpretations be accepted. This is especially true for terms such as encouragement and facilitation.

On the other hand, vague terms are open to overly strict interpretations and could lead to situations where the CFMR may become impossible to invoke for Member States. For example, proof of intention to destabilise is at risk of having a too high threshold depending on the interpretation taken.

2.3 'Force Majeure' - the residual clause?

The application of force majeure in the context of migration is a novel concept.⁷¹ As such, it is imperative that its potential application in this field is discussed prior to the application of the Regulation on 1 July 2026. While not labelled explicitly as a 'crisis' for the purposes of the CFMR, it nonetheless is important for the scope of the CFMR. One could argue that it is used as a residual clause, should a situation not fall under the definitions of crisis, then the CFMR may still be invoked in specific cases that are unforeseeable.

2.3.1 How can Force Majeure be understood for the purposes of the CFMR?

The CFMR has set out a definition of force majeure which mirrors the autonomous definition of force majeure in EU law.⁷² Article 1(5) of the Regulation sets out the definition of force majeure for the purposes of this Regulation, namely it 'refers to abnormal and unforeseeable circumstances outside a Member State's control, the consequence of which could not have been avoided notwithstanding the exercise of all due care'.⁷³ Throughout its case law, the CJEU has consistently held that this definition must be interpreted in light of the legal context in which it is being invoked.⁷⁴ As such, the legal context of force majeure for the purposes of the CFMR must be set out.

Past case law has given an indication as to how the legal context can be determined. Often it is dictated by the provisions, or legal instruments, from which the

⁷¹ ECRE (n41) 14.

⁷² European Commission, 'COMMUNICATION FROM THE COMMISSION TO THE COUNCIL on force majeure and exceptional circumstances in Regulation (EU) 2021/2116 of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy' COM(2024) 225 final (Commission Communication on Force Majeure).

⁷³ CFMR (n10) art 1(5).

⁷⁴ Case C-314/06 *Société Pipeline Méditerranée et Rhône (SPMR) v Administration des douanes et droits indirects and Direction nationale du renseignement et des enquêtes douanières (DNRED)* [2007] ECR 2007 I-12273 ECLI:EU:C:2007:817, para 25; Case C-124/92 *An Bord Bainne Co-operative Ltd and Compagnie Interagra SA v Intervention Board for Agricultural Produce* [1993] ECR 1993 I-5061 ECLI:EU:C:1993:841, para 10; Case C-263/97 *The Queen v Intervention Board for Agricultural Produce, ex parte First City Trading Ltd and Others* [1998] ECR 1998 I-5537 ECLI:EU:C:1998:444, para 41.

force majeure provisions allows derogations.⁷⁵ In the case at hand, as set out in article 2(a)(iii) CFMR, these are articles 27, 45(1) and 51(2) Asylum Procedures Regulation (APR) and articles 39, 40, 41 and 46 AMMR.⁷⁶

These articles refer to the registration of applications for international protection, the application of the border procedure and the procedure of take charge requests.⁷⁷ Take charge requests occur in situations where another Member State is found responsible for assessing the application for international protection, and so is asked to 'take charge' of the applicant.⁷⁸ The elements of force majeure must thus be interpreted in light of these articles to establish the legal context.

The elements of force majeure are the objective element, 'unforeseeable and abnormal circumstances', and the subjective element, 'all due care'.⁷⁹

For the objective element to be fulfilled, the constitutive requirement is that the circumstance in question is beyond the control of the Member State.⁸⁰ As such, a Member State may not invoke force majeure as a result of difficulties of a domestic nature arising from the Member State's political or administrative organisation or due to lack of resources.⁸¹ Thus, for the purposes of migratory crises a Member State may not argue that difficulties which arose from a lack of resources of the countries' asylum system may constitute force majeure. Instead, as recognised in recital 20 CFMR, pandemics and natural disasters have been identified as possibly constituting a situation of force majeure due to their extraneous nature.⁸² Nonetheless, the objective element, due to the requirement of being 'unforeseeable' is difficult to predict, and as such must be assessed on a case by case basis.

What can, however, be assessed in more detail is the subjective element in light of the legal context of the CFMR. It is suggested here that all due care in this case could be equated with the 'well prepared' concept as is required for the purposes of 'mass arrivals'.⁸³ As such, national strategies and contingency planning will be key in determining whether a Member State has taken all due care.⁸⁴ It must, however, be

⁷⁵ Ibid, para 26; Commission Communication on Force Majeure (n69).

⁷⁶ CFMR (n10) art 2(a)(iii).

⁷⁷ AMMR (n41) arts 39, 40, 41 and 46; Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L 2024/1348 (APR), arts 27, 45(1) and 51(2).

⁷⁸ AMMR (n41) art 39.

⁷⁹ Case C-195/91 P *Bayer AG v Commission of the European Communities* [1994] ECR 1994 I-05619 ECLI:EU:C:1994:412, para 32.

⁸⁰ Case C-314/06 (n74) para 24.

⁸¹ Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR 2000 I-05123 ECLI:EU:C:2000:357, para 28.

⁸² CFMR (n10) rn 20.

⁸³ See section 2.2.1.3.

⁸⁴ *ibid*.

noted that 'all due care' (emphasis added) must be taken. As such, this could imply a higher threshold than the asylum system being 'well prepared'. This, however, creates the risk of an impossibly high standard for Member States leading to situations where they may be excluded from relying on the CFMR in unforeseeable scenarios. It is thus hoped that the interpretation of all due care will be similar to that of 'well prepared'.

This thesis thus tentatively suggests that interpreting the two elements in light of the legal context of the CFMR should hold that 'abnormal and unforeseeable circumstances' be assessed on a case by case basis, but that it must not be as a result of domestic difficulties, and that the subject element of 'all due care' should be equated with the 'well preparedness' concept as previously set out for the purposes of 'mass arrivals'.

2.3.2 Force Majeure understood as a general principle of EU law

In the context of the CFMR, the purpose of force majeure is to determine when the Regulation and its derogations may be invoked by Member States. It thus provides a legal framework for such situations should a Member State not be able to comply with its obligations under the APR and AMMR. It can only be invoked if these obligations cannot be fulfilled, but beyond these specific provisions (to which the CFMR provides derogations) the invocation of force majeure takes on a different meaning.

For those situations where a situation of force majeure affects obligations regarding the CEAS that do not fall within the legal framework set out in the CFMR, force majeure can still be invoked in a general sense as it is a general principle of EU law.⁸⁵ As a general principle of EU law, force majeure may be invoked by a Member State as a justification for non-compliance with its EU obligations.⁸⁶ As the purpose of its invocation is altered, it is argued that should it be invoked in a general sense the subjective element should be interpreted in a different light. The objective element, on the other hand, is likely to be interpreted in a largely similar manner. It is still a key requirement that the circumstance be extraneous to the Member State, and this should remain central to the assessment thereof.

The subjective element, however, could be argued to require a stricter interpretation when invoked as a general defence. Here 'all due care' should not be equated with well-preparedness, but instead it could be argued that this should be interpreted with a higher threshold. This is because there would be no legal framework

⁸⁵ Advocate General Medina, Opinion in Case C-97/24 *S.A. and R.J. v The Minister for Children, Equality, Disability, Integration and Youth, Ireland* (Opinion, delivered 10 April 2025, ECLI:EU:C:2025:269), para 51.

⁸⁶ *ibid.*

guiding the Member State on how to address such a situation, thus leading to possible abusive invocation of the concept.

2.3.3 Critical Analysis of Force Majeure for the purposes of the CFMR

Overall, the definition of force majeure within the legal context of the CFMR is one that does raise a number of questions. In particular, how 'all due care' is to be interpreted is one that brings a number of risks. The biggest of these risks is a too strict interpretation, as this could undermine the invocation of the CFMR in cases where it is genuinely required. All due care in a migration context must take into account the complexities and difficulties of preparing an asylum system for unforeseeable events.

As such, in order to ensure the functioning of the CFMR, in the face of such genuinely unforeseeable situations, some leeway and flexibility should be given to Member States in their invocation of force majeure for the purposes of the CFMR. Should a Member State wish to invoke force majeure in a more general sense, however, this should involve a higher threshold.

2.4 Interim Conclusion

In conclusion, the definitions as set out in the CFMR of crisis have one common, glaring issue: vagueness. In each of the definitions, key terms have been left undefined, with little guidance as to how to interpret them. This could lead to either overly broad interpretations, leading to situations which may not require crisis-related measures to invoke the CFMR, or too strict interpretations, which may undermine the functioning of the CFMR in circumstances where it is desperately needed.

Ultimately, each term will rely on practice in order for its scope to become clear. There will likely be disagreements in interpretations between institutions and Member States as will be discussed in chapter 4, thus potentially leading to cases before the CJEU. It is hoped that the CJEU will not shy away from delineating the terms, despite its potentially politically sensitive nature.

As a result, while the CFMR due to its ambiguous terms may be seen as flexible, and thus being able to encompass all types of situations, this push for flexibility also risks being counter-productive, as will be further elaborated on in chapter 4. It must, however, be noted that the fact that 'crisis' includes both instrumentalisation as well as mass arrivals can be seen as positive, as it indicates an understanding of crises as being multi-dimensional and encompassing more than merely large-scale arrivals. This is further strengthened by the inclusion of a residual clause through force majeure, allowing for unforeseeable events to also be addressed.

3 Solidarity for whom? Assessing the compliance of the CFMR's derogations and measures against human rights

3.1 Introduction

In past migration crises, human rights compliance has often been a concern. For instance, the widespread pushbacks at the Polish-Belarusian border during the 2021 border crisis is just one in a long line of examples of repeated human rights violations at the hands of authorities of a Member State.⁸⁷

The CFMR has explicitly set out that the Regulation 'respects the fundamental rights' of migrants.⁸⁸ Consequently, this chapter seeks to set out whether the CFMR does in fact do so, in particular through an analysis of the principle of *non-refoulement* and the right to liberty and security of the person. Using these two as proxies, human rights compliance of the CFMR will thus be tested.

In order to assess compliance, it must first be set out what derogations and mechanisms the CFMR introduces. Following this, indicators are then deductively identified through legal analysis of the relevant human rights treaties and case law. These indicators can then be used to test the derogations and mechanisms in order to determine compliance. These indicators will be identified out through an integrated reading of the ICCPR, CFR and ECHR.

3.2 What derogations and measures does the CFMR introduce?

The CFMR introduces a number of measures which a Member State may invoke should there be deemed to be a situation of crisis or force majeure. In this section, these mechanisms will be split into two, first into solidarity measures and secondly derogations.

It must be noted that not every derogation or measure is immediately applicable upon invocation of the CFMR, instead they must first be requested by the Member State and granted by means of implementing decision from the Council the process of which will be analysed in chapter 4.⁸⁹

3.2.1 Solidarity Measures

The first type of measures that can be requested by Member States are solidarity measures. As set out in article 8 CFMR, a Member State may request relocations, financial contributions or alternative measures as has been set out in article 56(2)(c) of

⁸⁷ HRW (n6); *M.S.S.* case (n20); Grzeskowiak (n8); Radjenovic (n22).

⁸⁸ CFMR (n10) rn 8.

⁸⁹ *Ibid* art 4.

the AMMR, such as operational support, staff support and technical equipment amongst others.⁹⁰

Article 9 CFMR proceeds to set out responsibility offsets, which holds that where a Member State pledges additional solidarity measures to the affected Member State, they may be compensated through reduced future solidarity contributions.⁹¹ While this is undoubtedly an important provision, for the purposes of human rights assessments it is likely to have little impact. As such, the intricacies of the article will not be explained

3.2.2 Derogations

The second types of measures that Member States may request are derogations from the normal procedure for assessing applications for international protection.

The first of these derogations is set out in article 10 CFMR, which holds that the registration of applications for international protection may be delayed.⁹² In normal circumstances, a Member State must register the application within 5 days.⁹³ In a situation of crisis, however, this may be extended to 4 weeks.⁹⁴

The second set of derogations are in relation to the asylum border procedure.⁹⁵ The asylum border procedure is an accelerated procedure set out in the APR.⁹⁶ As part of the border procedure, the applicant for international protection is not authorised to enter the territory of a Member State and is held in a location at or close to the external border.⁹⁷ The accelerated nature of the procedure means a large focus is on speedy assessments of applications.⁹⁸ Furthermore, the border procedure also entails a limited right to remain. For example, there is no suspensive effect or right to remain in appeals in the border procedure.⁹⁹

The first derogation concerning border procedures is set out in article 11(1) CFMR, which holds that the maximum duration of the procedure may be extended by six weeks, thus to a maximum duration of 18 weeks.¹⁰⁰

Article 11(2) and (3) CFMR proceed to set out that a Member State may, in a situation of mass arrivals or force majeure, no longer be required to assess applicants in a border procedure if the state of origin of the applicant 'for which the proportion of

⁹⁰ Ibid art 8; AMMR (n41) art 56.

⁹¹ CFMR (n10) art 9.

⁹² Ibid art 10.

⁹³ APR (n77) art 27(1).

⁹⁴ CFMR (n10) art 10.

⁹⁵ Ibid art 11.

⁹⁶ APR (n77) section IV.

⁹⁷ Ibid art 54.

⁹⁸ Apatzidou (n23) 15.

⁹⁹ APR (n77) art 68(3).

¹⁰⁰ CFMR (n10) art 11(1).

decisions by the determining authority granting international protection is ... 20% or lower'.¹⁰¹ In cases of mass arrivals, this may be lowered to 5%.¹⁰² As such, a Member State may apply the border procedure in fewer cases.

Articles 11(4) and (6) CFMR on the other hand increase the situations in which a Member State may apply the border procedure. Article 11(4) CFMR allows border procedures to be widened to nationals of which the proportion of granting international protection is 50% or lower in a situation of mass arrivals.¹⁰³ Furthermore, article 11(6) CFMR in situations of instrumentalisation may apply the border procedure to any third country national or stateless person who is subject to instrumentalisation.¹⁰⁴

The final set of derogations refer to take charge requests. Article 12 CFMR sets out a number of derogations in this procedure which primarily concern the time limits for submitting or responding to such requests, as well as extended time limits for the transfers of the applicants.¹⁰⁵ Furthermore, transfers to the Member State facing a situation of crisis or force majeure may be suspended until that situation has ended.¹⁰⁶

Article 13 CFMR allows for derogations from the obligation to take back an applicant in cases of mass arrivals if there is a serious risk of deficiencies in the treatment of applicants.¹⁰⁷ This has been suggested to be a solidarity measure 'in all but name' as it in essence makes another Member State responsible for the review of the application for international protection.¹⁰⁸

3.3 Does the CFMR ensure compliance with Human Rights?

3.3.1 The Interrelationship between the ICCPR, ECHR and CFR

The indicators that are to be identified are based on three different human rights systems, namely the ICCPR, the ECHR and the CFR. Despite the focus of this thesis being EU law, it is nonetheless important to engage with both international and regional human rights law as well. This is for a number of reasons.

Firstly, article 78 TFEU holds that the common asylum policy of the EU must be in accordance with the Geneva convention 'and other relevant treaties'.¹⁰⁹ It can be argued that these other treaties include human rights treaties, as the granting of

¹⁰¹ CFMR (n10) art 11(2) and (3); APR (n77) art 42(1)(j).

¹⁰² CFMR (n10), art 11(3).

¹⁰³ Ibid art 11(4).

¹⁰⁴ Ibid art 11(6).

¹⁰⁵ Ibid art 12.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid art 13.

¹⁰⁸ Neidhardt (n23) 16.

¹⁰⁹ TFEU (n21) art 78.

international protection is closely linked with human rights.¹¹⁰ This is reflected in many EU migration instruments, including in the CFMR where recital 1 sets out that the Area of Freedom, Security and Justice (AFSJ) should be 'in full respect of fundamental rights'.¹¹¹ As 'full respect' of fundamental rights is sought, this should not be limited to the understanding thereof under the Charter, but should also include other 'relevant treaties' such as the ICCPR and the ECHR.

Secondly, Member States have international obligations under these treaties that they must comply with. Every EU Member State is individually a party to both the ICCPR and as well as the ECHR.¹¹² These obligations remain even when acting within the confines of EU law, and so must be considered when assessing human rights compliance.

Finally, it must also be noted that the ECHR has been specifically selected because of its special position in EU law.¹¹³ As set out in article 52(3) CFR, in so far as rights correspond to those found in the ECHR, 'the meaning and scope of those rights shall be the same as those' under the ECHR.¹¹⁴ This sets a baseline in regard to protection, with EU law still being allowed to offer more extensive protection.¹¹⁵ Furthermore, as set out in article 6(2) TEU the EU is legally required to accede to the ECHR.¹¹⁶ This thus highlights its prominence in the EU legal system, and as such must be given particular attention when creating human rights standards to test the derogations and mechanisms of the Regulation against.

While it has been set out why these three legal systems will be used, and how they are interrelated, one may question why the 1951 Geneva Convention will not be incorporated into creating standards despite its prominence in article 78 TFEU. This is an important point to address with the primary reason being that while it is a key element of refugee law, it is only applicable to those that fulfil the definition of refugees.¹¹⁷ Considering that the definition to be a refugee is relatively strict, many

¹¹⁰ Chetail in his chapter sets out how refugee law and international human rights law can be considered complementary - see Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed) *Human Rights and Immigration* (Oxford Academic, 2014).

¹¹¹ CFMR (n10) rn 1.

¹¹² OHCHR, 'Human Rights in Europe' (*United Nations Human Rights: Regional Office Europe*) <<https://europe.ohchr.org/human-rights/what-are-human-rights/human-rights-europe>> accessed 11 August 2025; FRA, 'EU Member States and International Obligations' (*European Union Agency for Fundamental Rights*) <<https://fra.europa.eu/en/content/eu-member-states-and-international-obligations>> accessed 11 August 2025.

¹¹³ Victor Davio and Elise Muir, 'Introduction. The ECHR in the ECJ's Case Law Post-Charter: A Dual Perspective' (2023) 8 *European Papers* 317; Šejla Imamović, 'Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine' (2024) 39 *Utrecht Journal of International and European Law* 17, 17

¹¹⁴ CFR (n20) art 52(3).

¹¹⁵ *ibid.*

¹¹⁶ TEU (n66) art 6(2).

¹¹⁷ Convention Relating to the Status of Refugees (adopted 18 July 1951, Entered into force 22 April 1954) 189 UNTS 137 (1951 Geneva Convention), art 1.

applicants seeking international protection that would be impacted by the CFMR would not fall within its scope.¹¹⁸ As such, human rights treaties have been turned to due to their universal nature and expanded protection thus providing for a basis to create standards applicable to all.¹¹⁹

3.3.2 Setting out the Principle of *Non-Refoulement*: identifying the indicators

The principle of *non-refoulement* is one of the core tenets of the CEAS, as explicitly set out in article 78 TFEU.¹²⁰ It holds that a state is prohibited from returning or transferring an individual to a place where they may be at risk of persecution, torture or other ill treatment.¹²¹ Alongside being explicitly set out in the treaties, the CJEU has also held that it constitutes a general principle of EU law linking closely to the value of human dignity as set out in article 2 TEU and article 1 CFR.¹²² The principle has also been read into the right to life and prohibitions against torture and inhuman and degrading treatment in the ECHR and ICCPR.¹²³

The European Court of Human Rights (ECtHR) has held that article 3 of the Convention 'prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct', and has read the principle of *non-refoulement* into this prohibition in the *Soering* case.¹²⁴ The Human Rights Committee (HRC) has similarly read *non-refoulement* into the right to life and prohibition against torture and inhuman and degrading treatment.¹²⁵

This prohibition not only entails directly returning an individual to a state where they may face this risk, but it also prohibits indirect *refoulement*.¹²⁶ Indirect *refoulement* holds that a state may not transfer an individual to a country where there is a risk that that country may then proceed to *refoulement* that individual.¹²⁷

¹¹⁸ Chetail (n110) 23-24.

¹¹⁹ Ibid.

¹²⁰ TFEU (n21) art 78.

¹²¹ Mathew (n21) 900-901; Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press 2016), 89-91.

¹²² Case C-156/23 *K and Others v Staatssecretaris van Justitie en Veiligheid* (Court (Third Chamber), 17 October 2024) ECLI:EU:C:2024:892, para 36; Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR 2009 I-00921 ECLI:EU:C:2009:94, para 28; Mungianu (n121) 113.

¹²³ Mathew (n21) 900-901; Mungianu (n121) 89-91.

¹²⁴ *M.S.S.* case (n20) para 218; FRA, 'Fundamental rights of refugees, asylum applicants and migrants at the European Borders' (*European Agency for Fundamental Rights*, 2020) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf> accessed 22 August 2025.

¹²⁵ Aoife Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373, 382.

¹²⁶ Mathew (n21) 901.

¹²⁷ Ibid.

By making a direct link to the right to life and prohibition against torture and inhuman and degrading treatment, the HRC and ECtHR have made it possible to expansively interpret violations of other rights, such as socio-economic rights, to fall under the principle of *non-refoulement*. For example, the ECtHR has found that a severe violation of socio-economic rights could amount to inhuman and degrading treatment as it notably held in the *MSS v Belgium and Greece* case.¹²⁸ Similarly, in the *Kindler v Canada* case the HRC held that should a person be removed to a state where it is foreseeable that a right set out in the ICCPR were to be violated, 'the State party itself may be in violation of the Covenant' if there is a real risk of irreparable harm.¹²⁹ While the 'real risk of irreparable harm' notion has been criticised for its obscurity, it can be argued that it should be interpreted in a similar manner as done in the ECtHR, should violations be so severe as to constitute inhuman or degrading treatment, then removal is prohibited in absolute terms.¹³⁰

While in general the principle of *non-refoulement* entails a negative obligation, namely refraining from *refouling* an individual, it has also been argued that the principle entails a number of positive obligations.¹³¹ As Mavronicola argues, there is a knowledge requirement to the principle of *non-refoulement*.¹³² She argues the central wrong is 'knowingly' placing someone at risk of torture or inhuman and degrading treatment, and as such the Member State must take steps to determine whether there is such a risk. Should they not take these steps to determine such a risk, thus entailing a positive obligation for states, then the Member State would be violating the principle of *non-refoulement*.¹³³

As such there is an obligation to ensure an individual assessment of the applicant's claim that there is a risk should they be returned.¹³⁴ In order to do so, applicants must have access to determination procedures and the ability to submit an application for asylum.¹³⁵ Furthermore, there is an obligation on the state to assess the validity of such a claim.¹³⁶

¹²⁸ *M.S.S.* case (n20) para 263.

¹²⁹ Duffy (n125) 382; Human Rights Committee, *Kindler v Canada* (Communication number 470/1991, 30 July 1993) CCPR/C/48/D/470/1991, para 6.2; Santhosh Persaud, 'Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights' (Research Paper no. 132, *UNHCR Policy Development and Evaluation Service*, November 2006) <<https://www.unhcr.org/sites/default/files/legacy-pdf/4552f0d82.pdf>> accessed 11 August 2025, 7-8.

¹³⁰ Persaud (n128) 7-8.

¹³¹ Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing 2022) 221.

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ Apatzidou (n23) 14.

¹³⁵ *M.A. and others v Lithuania* App No 59793/17 (ECtHR, 11 December 2018) para 115.

¹³⁶ *ibid.*

Furthermore, the right to an effective remedy is key in upholding the principle of *non-refoulement*.¹³⁷ It is closely linked to the obligation to ensure an individual assessment of the claim, but nonetheless forms a distinct requirement.¹³⁸ The ECtHR has held that an 'independent and rigorous' scrutiny of the claim is required, as well as a 'prompt response'.¹³⁹ Furthermore, as held by both the ECtHR as well as the CJEU, the remedy sought must have automatic suspensive effect.¹⁴⁰ The CJEU has held that the applicant must be afforded the 'right to an effective remedy enabling automatic suspensory effect, before at least one judicial body'.¹⁴¹ The Court emphasised that automatic suspensory effect is only required at one jurisdictional level.¹⁴²

3.3.3 Assessing the compliance of the derogations and solidarity measures against the principle of *Non-Refoulement*

It must be set out that the principle of *non-refoulement* always applies, also when transferring individuals between EU Member States, as it is an absolute prohibition as set out above. As such, there are no exceptions to the Member States obligations also in the context of solidarity relocations, a measure which may be taken pursuant to article 8 CFMR.¹⁴³

As a result, solidarity measures which involve relocations to other Member States must always take into account the conditions in the contributing Member State. This principle has been established in the *NS* judgement in the context of transfers for the purposes of the Dublin Regulation, 'where [the Member State] cannot be unaware of systemic deficiencies in the asylum procedure and in the reception conditions', the Member State is under an obligation not to transfer the applicant.¹⁴⁴

As stated in article 8 CFMR, the procedure to be followed in the case of relocations is set out in articles 67 and 68 AMMR.¹⁴⁵ Article 67 AMMR sets out the procedure, with paragraph 13 holding that there is the right to an effective remedy against a transfer decision pursuant to article 43 AMMR.¹⁴⁶ Article 43(3) AMMR, however, states that the individual must request suspensive effect of the appeal, and this is not granted automatically. As such, this could be a violation of the effective remedy requirement as

¹³⁷ *M.K. and Others v Poland* App nos 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020), para 143; Case C-175/17, *X v Belastingdienst/Toeslagen* [2018] Court reports – general – 'Information on unpublished decisions' section ECLI:EU:C:2018:776, paras 32 and 33.

¹³⁸ *M.K. and Others v Poland* (n137) para 143.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *X v Belastingdienst/Toeslagen* (n137) para 33

¹⁴² *Ibid* para 36.

¹⁴³ CFMR (n10) art 8.

¹⁴⁴ *NS* case (n48) para 94.

¹⁴⁵ CFMR (n10) art 8; AMMR (n41) arts 67 and 68.

¹⁴⁶ AMMR (n41) arts 43 and 67.

set out above, which requires automatic suspensive effect of appeal at least at one judicial level.

Not only do relocation solidarity measures raise concerns regarding *non-refoulement*, but the border procedure has also been highlighted by scholars for its potential to violate the principle.

The limited procedural safeguards in particular have been highlighted as a potential risk. Firstly, the shortened timelines of the border procedure when compared to the normal asylum procedure have been flagged by scholars.¹⁴⁷ While the CFMR allows for the extension of the border procedure to a maximum of 18 weeks, there is nonetheless a continued emphasis on speediness and efficiency.¹⁴⁸ This would likely be heightened in times of crisis where there are an inflated number of applications. As such, there is a real risk that the assessment of applications could be compromised thus leading to a potential risk of *refoulement* should key information not be properly assessed by the determining authority in the course of individual assessments.¹⁴⁹

Not only does the emphasis on speed bring concerns regarding *non-refoulement*, but also the altered appeal procedure thus bringing concerns in regard to the right to an effective remedy as an obligation for the principle of *non-refoulement*.¹⁵⁰ Subject to article 68 APR, there is no right to remain in cases where an application for international protection is rejected in the course of the border procedure and is subsequently appealed.¹⁵¹ As such, there is no automatic suspensive effect of such a decision, with the applicant being required to request it.¹⁵² The lack of automatic suspensive effect of an appeal once again is likely in violation of the requirements as set out above.

The expanded use of the border procedure which is possible as part of the CFMR thus raises significant questions in regard to the principle of *non-refoulement*. While expanding the use of the border procedure increases these risks, it must be noted that there is also the possibility for Member States to reduce the use of the border procedure. Should this be the case, then naturally this would be a positive development in regard to the principle of *non-refoulement*.

¹⁴⁷ Apatzidou (n23) 15; Vasiliki Apatzidou, 'The Complex Landscape of Asylum Border Procedures in the new Asylum Procedures Regulation' (*European Law Blog*, 25 June 2024) <<https://www.europeanlawblog.eu/pub/pmbqs5w7/release/1>> accessed 11 August 2025; Evangelia (Lilian) Tsourdi, 'The New Screening and Border Procedures: Towards a Seamless Migration Process' (Policy Study, Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre, June 2024) <https://epc-website.s3.amazonaws.com/content/FEPS-Policy_Study_-_The_New_Screening_and_Border_Procedure_-_DP_66__9_.pdf> accessed 11 August 2025, 12.

¹⁴⁸ *ibid*

¹⁴⁹ Apatzidou (n23) 14.

¹⁵⁰ *Ibid* 16.

¹⁵¹ APR (n77) art 68.

¹⁵² *Ibid* art 68(4).

Finally, while solidarity measures, such as relocations, and expanded use of the border procedure may create concerns in regard to *non-refoulement*, it must also be noted that the CFMR also may provide for a positive development in regard to *non-refoulement*. This is especially the case for the derogations concerning take charge requests, in particular the suspension of transfers to the Member State in a situation of crisis or force majeure.¹⁵³ In past situations of large scale arrivals, certain Member States have been under such pressure that their reception conditions system have become deficient.¹⁵⁴ This has led to cases before the ECtHR, such as the aforementioned *MSS v Belgium and Greece* case, which has subsequently found there to be a violation of the principle of *non-refoulement*, through article 3 ECHR.¹⁵⁵ As such, by suspending the obligation to take charge of applicants in times of crisis, when such deficiencies may start to emerge, it reduces the risk of individuals being transferred to a Member State where there is a heightened risk of systemic deficiencies and thus provides for a safeguard to the principle of *non-refoulement*.

3.3.4 Setting out the Right to Liberty and Security of the Person: identifying the indicators

The right to liberty is considered as one of the foundations of a democratic society. It holds that no one may be arbitrarily deprived of their liberty, and primarily focuses on the physical freedom/liberty of the person.¹⁵⁶ It is codified in article 9 ICCPR, article 5 ECHR and article 6 CFR.¹⁵⁷

It is important to note that the right to liberty is distinct from the right to freedom of movement. The right to liberty is much more narrow, an interference with the right to liberty 'occurs only if a person is forced to remain at a certain narrowly confined space'.¹⁵⁸ Freedom of movement on the other hand encompasses all less serious restrictions on movement.¹⁵⁹ The difference between the two, as held by the ECtHR, 'is one of degree or intensity, and not one of nature or substance'.¹⁶⁰ This section will only be discussing deprivation of liberty.

¹⁵³ CFMR (n10) arts 12 and 13.

¹⁵⁴ *M.S.S.* case (n20); *NS* case (n48).

¹⁵⁵ *Ibid.*

¹⁵⁶ ECHR, 'Guide on Article 5 of the European Convention on Human Rights: Right to liberty and security' (*European Court of Human Rights*, 28 February 2025) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_5_eng> accessed 11 August 2025.

¹⁵⁷ CFR (n20), art 6; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR), art 5; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 9.

¹⁵⁸ Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill | Nijhoff 2010), 250.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Austin and others v. the United Kingdom* app nos 39692/09, 40713/09 and 41008/09 (ECtHR, 15 March 2012), para 57.

While in general it is recognised that a state's sovereign right to control immigration flows is a legitimate aim, whether or not deprivation of liberty is lawful often hinges on whether it is arbitrary or not.¹⁶¹ While there are overlaps, each legal system has slightly different understandings of what arbitrariness entails. As such, in this section 'arbitrariness' will be analysed, as well as other obligations and safeguards that form the right to liberty.

Firstly, the ECHR sets out an exhaustive list of justifications to derogate from the right to liberty, with article 5(2)(f) ECHR allowing for 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of person against whom action is being taken with a view to deportation or extradition'.¹⁶² This sets out two situations in which a migrant may be detained: (i) to prevent unauthorised entry into the country, and (ii) where action is being taken with a view to deportation or extradition.

For the purposes of preventing unauthorised entry, in *Saadi v UK*, the ECtHR found that there was no need to show that detention was considered necessary as part of the proportionality assessment.¹⁶³ The ECtHR argued that states enjoy the right to control entry into its territory and so have discretion to use detention of asylum seekers to maintain this sovereign right.¹⁶⁴ While in the ECtHR system necessity is not required in such cases, under both EU law as well as under the ICCPR necessity is a requirement. As held by the HRC in the *C v Australia* case, in determining whether detention is arbitrary or not, elements that must be assessed alongside whether there is a domestic legal basis include whether it is 'reasonable, necessary, proportionate, appropriate and justifiable in the particular case'.¹⁶⁵ Furthermore, as Moreno-Lax has argued, under EU law the deprivation of liberty requires a full proportionality assessment.¹⁶⁶ Article 52(1) CFR sets out that any restriction on a right set out in the CFR is 'subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest'.¹⁶⁷ As such, necessity is a requirement for deprivation of liberty to not be arbitrary.

¹⁶¹ Cornelisse (n158) 250.

¹⁶² ECHR (n157) art 5(1)(f).

¹⁶³ *Saadi v The United Kingdom* app no 13229/03 (ECtHR, 29 January 2008), para 72; Violeta Moreno-Lax, 'Beyond Saadi v UK: Why the Unnecessary Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 5 Human Rights and International Legal Discourse 166, 168; Juan Ruiz Ramos, 'The right to liberty of asylum-seekers and the European Court of Human Rights in the aftermath of the 2015 refugee crisis' (2019) 39 REEI <https://digibug.ugr.es/bitstream/handle/10481/63036/39_10_Estudio_Ruiz_Juan.pdf?sequence=1&isAllowed=y> accessed 11 August 2025, 7-12.

¹⁶⁴ *ibid*.

¹⁶⁵ Human Rights Committee, *C v Australia* (Communication No. 900/1999, 28 October 2002), para 4.23.

¹⁶⁶ Moreno-Lax (n163).

¹⁶⁷ CFR (n21) art 52.

Aside from the necessity requirement, the ECtHR in *Saadi* set out a number of other conditions that must be met for detention not to be arbitrary. It set out that the detention must be carried out in (i) good faith, (ii) it must be connected to the legitimate aim of preventing unauthorised entry, and (iii) the detention conditions and length of detention should be appropriate.¹⁶⁸

In regard to deprivation of liberty where action has been taken with a view to deportation or extradition, this may be used as a justification with the requirement that there is a realistic prospect of removal.¹⁶⁹ Furthermore, the arbitrariness requirements as set out in *Saadi* similarly apply.¹⁷⁰

Furthermore, there are a number of other procedural safeguards which have been set out in both article 5 ECHR as well as article 9 ICCPR.¹⁷¹ For example article 5(2) ECHR and 9(2) ICCPR set out a right to information that includes reasons for arrest and any charges that may be faced.¹⁷² Further, article 5(4) ECHR and article 9(4) ICCPR set out the right to review detention before an independent and impartial court or tribunal, and provide fundamental guarantees of judicial procedure.¹⁷³ Finally, as Cornelisse has argued a 'right to legal aid can also be deduced from the requirement that the Convention rights need to be practical and effective', with Cornelisse relying on a reading of the ECtHR *Čonka* case.¹⁷⁴

3.3.5 Assessing the compliance of the derogations and solidarity measures against the Right to Liberty

Once again, in assessing solidarity measures the relocations of applicants for international protection to other Member States raises concerns.

The procedure for relocating applicants prescribes the possibility for detention. As set out in article 44 AMMR, 'where there is a risk of absconding or where the protection of national security or public order so requires' detention is permissible.¹⁷⁵ While it does set limitations such as proportionality and an individual assessment of the individual's circumstances, there could still be a risk of arbitrary detention.¹⁷⁶ 'Risk of absconding' or 'public order' are notions that can be interpreted in an incredibly broad manner, and thus are liable to be exploited.¹⁷⁷ As such, it could violate the 'good faith'

¹⁶⁸ *Saadi v The United Kingdom* (n163) para 74.

¹⁶⁹ *S.Z. v Greece* app no 66702/13 (ECtHR, 21 June 2018) para 54.

¹⁷⁰ *Nabil and Others v Hungary* app no 62116/12 (ECtHR, 22 September 2015) para 34.

¹⁷¹ ECHR (n157) art 5; ICCPR (n157) art 9.

¹⁷² *ibid.*

¹⁷³ *Ibid*; Cornelisse (n158) 256-259.

¹⁷⁴ Cornelisse (n158) 290.

¹⁷⁵ AMMR (n41) art 44.

¹⁷⁶ *ibid.*

¹⁷⁷ See for example the CJEU case C-528/15 in which the CJEU set out that for the purposes of the Dublin III regulation, Member States are required to establish objective criteria of a 'risk of

requirement of detention as set out in the *Saadi* principles. As a result, while on paper in article 44 AMMR the necessary safeguards are set out, such as the right to information and judicial review, as well as the principles of proportionality and necessity, in practice the legal bases may be cause for concern.

The expanded use of the border procedure has also once again been highlighted by many scholars as having potential concerns in regard to the deprivation of liberty.¹⁷⁸

The first concern regarding the border procedure is the fact that applicants are required to 'reside at or in proximity to the external border or transit zones'.¹⁷⁹ Thus, by definition, this entails a restriction of movement for such applicants. It is conceivable that by restricting applicants to the confines of a specific area, such as that of a transit zone, this may constitute a deprivation of liberty. This, for example, was found in the *Hungary Transit Zones* case, where restricting individuals to transit zones with a closed perimeter and in which individuals cannot legally leave voluntarily constituted a deprivation of liberty.¹⁸⁰ This is not the only example of such *de facto* detention, which is becoming more and more normalised by provisions such as that found in the APR regarding the border procedure.¹⁸¹ Thus, expanding the use of the border procedure is liable to increase this risk of arbitrary deprivation of liberty, whereby applicants are *de facto* detained at borders and being misrepresented as restriction on movement as opposed to deprivation of liberty.¹⁸²

While this risk exists in practice, it must be set out that on paper it is specified in the APR that the conditions for detention in the Reception Conditions Directive (RCD) must be followed.¹⁸³ As follows from the RCD, applicants may not be detained for the sole reason that they are an applicant for international protection, and the principles of proportionality and necessity are clearly emphasised.¹⁸⁴ It must be noted however that article 10(4)(d) RCD explicitly provides for a legal basis for detention in the context of the border procedure, stating that an applicant may be detained in order to decide 'on

absconding' as a safeguard to the right to liberty - Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others* (2017) Court reports – general ECLI:EU:C:2017:213, paras 39-31.

¹⁷⁸ See for example - Tsourdi (n147) 13; Apatzidou (n23) 16.

¹⁷⁹ APR (n77) art 54.

¹⁸⁰ Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* (Grand Chamber, 14 May 2020) ECLI:EU:C:2020:367 (Hungary Transit Zones case), para 231.

¹⁸¹ Apatzidou (n23) 16; Izabella Majcher, 'The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty' [2018] *Border Criminologies* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204379> accessed 11 August 2025.

¹⁸² Tsourdi (n147) 14.

¹⁸³ APR (n77) arts 53-54.

¹⁸⁴ Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection [2024] OJ L 2024/1346 (RCD), arts 10(1) and 11.

the applicant's right to enter the territory' in the context of such a procedure.¹⁸⁵ This essentially opens the door to detention for administrative convenience as the purpose of the border procedure is to determine the right to enter the territory. It could thus apply to any and all applicants, especially if applied in the case of instrumentalisation where the border procedure may be applied to anyone subject to instrumentalisation.¹⁸⁶

This raises a number of concerns. The first of these is that it could be argued that detention in such cases, should it be for administrative convenience, is not done in good faith. As such, it could be in violation of *Saadi* arbitrariness principles as set out above.

Another concern in the context of the CFMR is the fact that the border procedure may be extended to 18 weeks.¹⁸⁷ Should the applicants be detained for the purpose of the border procedure, one may question whether this length of detention is appropriate when applying the *Saadi* principles, and under a proportionality test. When the duration is considered, reasonable varies on a case by case basis, and often depends on the complexity of the case.¹⁸⁸ It has been argued that it is difficult to find a general trend in case law as to what is considered excessive, and as such it remains possible that 18 weeks may be considered unreasonable.¹⁸⁹

Finally, concerns may be raised regarding the right to legal aid as identified above. As previously stated, the border procedure takes place at the border or transit zones. This may lead to cases where the border procedure is applied in remote places, thus hindering the possible provision of adequate legal support to applicants for international protection.¹⁹⁰ Furthermore, the short time limits of the border procedure have similarly been highlighted as a concern for ensuring access to legal aid.¹⁹¹ It has been argued that the limited timeframe may restrict lawyers in supporting all asylum applicants.¹⁹² As such, the expanded use of the border procedure may also lead to concerns regarding access to legal aid thus leading to potential violations of the right to liberty.

¹⁸⁵ Ibid art 10(4)(d).

¹⁸⁶ As stated in article 43 APR, the Border procedure only applies when the applicant has not yet been authorised to enter the territory. As such, the right to enter will always need to be determined in relation to these applicants, thus leading to a situation where all those subject to the border procedure may be detained - APR (n77) art 43; RCD (n184) art 10(4)(d); CFMR (n10) art 11(6).

¹⁸⁷ CFMR (n10) art 11(1).

¹⁸⁸ Ramos (n163) 27-30.

¹⁸⁹ Ibid.

¹⁹⁰ Apatzidou (n147).

¹⁹¹ Apatzidou (n23) 15.

¹⁹² Ibid.

3.4 Interim Conclusion

In conclusion, as has been shown in this section some of the derogations and measures may lead to human rights compliance concerns. In particular, the expanded use of the border procedure can lead to possible violations of the principle of *non-refoulement* and right to liberty.

While in the legal instruments emphasis is often placed on safeguards such as ensuring the principle of proportionality, as has been shown in practice these safeguards are not always abided by. As such, there is a real risk that the derogations set out in the CFMR may lead to normalising practices such as the border procedure in times of crisis, thus leading to increased risks of human rights violations.

4 3 + 3 = 12? Evaluating the governance structures of the CFMR

4.1 Introduction

One of the novelties of the CFMR is the governance structures that it has introduced. While it is acknowledged that governance has a wide array of meanings, for the purposes of this thesis the governance structures set out in 'Chapter II: Governance' of the CFMR will be focused on.¹⁹³ In this section the procedures, and which actors are involved in those procedures, are set out and will thus be analysed. These procedures can be split into two main groups: how the CFMR is invoked and those that apply once it is in force.

Through this analysis, any potential strength or challenges will be identified. This will largely be done through a critical evaluation of the text of the Regulation itself. It will, however, not only be limited to textual evaluations but this section will also seek to incorporate comparisons with the TPD.

4.2 A critical analysis of the invocation procedures of the CFMR

4.2.1 The Trigger mechanism - A Reasoned Request by a Member State

The triggering of the CFMR is dependent on the Member State that is facing a situation of crisis or force majeure. In order to trigger the Regulation and thus start the invocation procedure, they must submit a reasoned request to the Commission indicating they are facing such a situation.¹⁹⁴

This reasoned request should consist of a description of the crisis in question, and how this crisis fulfils the elements of the definition as set out in article 1 CFMR.¹⁹⁵ Alongside a description of the crisis, or situation of force majeure, the Member State must also set out the solidarity measures or derogations that it believes are necessary in order to address the crisis.¹⁹⁶

Finally, it is interesting to note that should the Member State believe there is a situation of instrumentalisation and seek to apply the derogation in article 11(6) CFMR (thus applying the border procedure to all those subject to instrumentalisation), the Member State must also set out whether it intends to provide for the exclusion of applicants as referred to in article 11(7) or 11(9) CFMR, for example those that have

¹⁹³ CFMR (n10) chapter II.

¹⁹⁴ Ibid art 2.

¹⁹⁵ Ibid art 2(2).

¹⁹⁶ Ibid.

medical reasons.¹⁹⁷ This is interesting as it seems to make it optional whether to exclude certain categories of people from the border procedure or not. This seems to be at odds with article 53(2) APR, which states that the Member States 'shall not apply' the border procedure in such cases.¹⁹⁸ As such, it seems to narrow the exclusions to the border procedures significantly thus potentially increasing the risks of human rights concerns as identified in chapter 3.¹⁹⁹

Another potential issue regarding the reasoned request could be the amount of information that the Member State needs to include as evidence. As identified in chapter 2, depending on the interpretation of certain elements of the definition, the amount of evidence required can vary. An example of this is the evidentiary requirement for setting out the 'aim' of the third country or non-state actor for the purposes of instrumentalisation. The Regulation gives little to no guidance on the requirements in this sense.

Furthermore, the fact that the trigger mechanism is wholly dependent on Member States' willingness to invoke the CFMR can be open to both praise as well as criticism. On the one hand from the perspective of the subsidiarity principle, this could be considered positive, as it can be argued that the Member State itself is in the best position to identify what derogations and mechanisms are required as well as whether the invocation of the CFMR is needed or not.²⁰⁰

On the other hand, one may question what the incentive for triggering the Regulation is. While it may be argued that the derogations and solidarity measures may aid the Member State in addressing the crisis, Member States could derogate from their obligations through national measures instead. For example, some Member States have even gone so far as to use measures such as suspending the right to asylum or utilising pushbacks at the border.²⁰¹ In such cases, the Commission as 'guardian of the treaties'

¹⁹⁷ Ibid art (2)(d)

¹⁹⁸ APR (n77) art 53.

¹⁹⁹ See chapter 3.

²⁰⁰ Raimondo Cagiano de Azevedo and Angela Papparuso, 'Migration policies in times of crisis: a subsidiarity approach' (2019) 86 *Rivista di Studi Politici Internazionali* 97.

²⁰¹ HRW (n6); HRW (n58); Eva Cossé, 'Greece's Asylum Suspension Denies Rights, Puts Lives at Risk' (*Human Rights Watch*, July 16 2025) <<https://www.hrw.org/news/2025/07/16/greeces-asylum-suspension-denies-rights-puts-lives-at-risk>> accessed 12 August 2025; UNHCR, 'UNHCR deeply concerned by Greece's suspension of asylum applications' (*UNHCR*, 10 July 2025) <<https://www.unhcr.org/gr/en/news/press-releases/unhcr-deeply-concerned-greece-s-suspension-asylum-applications>> accessed 12 August 2025; ECRE, 'EU EASTERN BORDERS: Polish president signs asylum suspension law — Finland plans to extend its asylum suspension law — 18 reception centres to close in Finland — Tighter controls at checkpoints on Latvia's borders — Pushback accusation in Lithuania' (*European Council on Refugees and Exiles*, 3 April 2025) <<https://ecre.org/eu-eastern-borders-polish-president-signs-asylum-suspension-law-%E2%80%95-finland-plans-to-extend-its-asylum-suspension-law-%E2%80%95-18-reception-centres-to-close-in-finland-%E2%80%95-tighter-control/>> accessed 12 August 2025; ECRE, 'NORDIC COUNTRIES: Finland maintains closure of border with Russia — Proposals to deter asylum applications and encourage voluntary returns in Sweden — Norway resumes forced

has often remained silent thus creating a sense of tacit agreement.²⁰² As a result, if Member States are being tacitly permitted to derogate from their obligations under EU law to such an extent, one may question why invoke the CFMR? Whilst potentially providing solidarity, which is not guaranteed as it depends on measures being granted by the Council as will be discussed below, it also brings with it increased scrutiny and monitoring. The potential benefits of additional solidarity, which may not even be granted, may not be enough to incentivise Member States thus leading to a risk that the CFMR may not be invoked by Member States.

4.2.2 The central role of the Commission in deciding whether there is a situation of Crisis or Force Majeure

Once a reasoned request has been submitted by a Member State, the next step in the process of invoking the CFMR falls to the Commission. Once the Commission receives a reasoned request, it must then assess whether there is a situation of crisis or force majeure as set out in article 1 of the Regulation, and must do so at the latest two weeks after receipt of the request.²⁰³ In doing so, it should work closely with 'the relevant Union agencies and international organisations, in particular UNHCR and IOM'.²⁰⁴ Furthermore, the Commission will rely on the information provided for by the Member State in the reasoned request as well as the European Annual Asylum and Migration Report, as set out in the AMMR.²⁰⁵ Article 3(6) CFMR then proceeds to set out what the Commission 'shall determine in particular'.²⁰⁶ These guidelines, however, merely repeat the elements as set out in the definitions of crisis and force majeure in article 1 CFMR, and discussed in chapter 2.

Regarding instrumentalisation, however, article 3 CFMR does set out a number of other elements, as referred to in chapter 2. The first of these is that there must be 'an unexpected increase in the caseload of applications for international protection' at external borders as compared to the average number.²⁰⁷ This seems to be a straightforward calculation based on statistics, but the threshold of when there is an 'unexpected increase' may be open to debate. Furthermore, a question that may arise is whether repeat applicants, who file applications for international protection in quick

returns to Lebanon' (*European Council on Refugees and Exiles*, 8 May 2025) <<https://ecre.org/nordic-countries-finland-maintains-closure-of-border-with-russia-%E2%80%95-proposals-to-deter-asylum-applications-and-encourage-voluntary-returns-in-sweden-%E2%80%95-norway-resumes-forced-returns-to/>> accessed 12 August 2025.

²⁰² Grześkowiak in his article argues that the Commission has been passive in enforcing safeguards for applicants of international protection both following the 2015 Refugee crisis as well as the 2021 Polish-Belarusian border crisis - Grześkowiak (n8) 95-101.

²⁰³ CFMR (n10) art 3(1).

²⁰⁴ *ibid.*

²⁰⁵ CFMR (n10) art 3(5); AMMR (n41) art 9;

²⁰⁶ CFMR (n10) art 3(6).

²⁰⁷ *Ibid* art 3(4)(c).

succession, would amount to a sudden increase. It is foreseeable that this would be considered a sudden increase as taking into account past situations which likely would amount to instrumentalisation, a third country often pushes migrants back to the EU's external border to sustain pressure.²⁰⁸ As such, these would amount to repeat applications and so indicate a situation of instrumentalisation. It can thus be argued that they should in any case be included.

The second requirement, as set out in article 3(4)(d) CFMR is whether the Permanent EU Migration Support Toolbox as set out in article 6(3) of the AMMR is not sufficient to address the crisis.²⁰⁹ This will have to be assessed by the Commission on a case by case basis with each of the possible 'tools' being country specific.

One concern that can be identified stems from the conclusions drawn from chapter 2, namely that the elements of the definitions on which the Commission must decide are markedly vague. As such, there is a high likelihood that there will be disagreements between the Commission and the affected Member State as to the existence of a crisis.

In such cases it is likely that the Member State in question will seek to appeal the implementing decisions holding that a crisis does not exist before the CJEU through an action for annulment.²¹⁰ This would of course cause significant delays in any response to the crisis. These delays could have serious consequences, as the situation on the ground is prone to changing rapidly in times of crisis.

As such, it is questioned whether a procedure should have been included within the CFMR to challenge the implementing decision in an expedited manner. Whilst it is noted that the implementing decision should be made 'in close cooperation with the requesting Member State', this does not preclude disagreement and thus the need for an alternative procedure than judicial review of the implementing decision.²¹¹

Finally, the Commission may also adopt a recommendation on whether the Member State should apply an expedited procedure for granting international protection, as set out in article 14 CFMR.²¹² The expedited procedure would entail that the personal interview part of the asylum procedure is omitted, and the examination of applications is prioritised if they are likely to be well-founded.²¹³

²⁰⁸ For example Belarussian border guards pushed back migrants to the Polish border to sustain pressure - see HRW (n6); HRW (n58); Graban (n58) 246.

²⁰⁹ CFMR (n10) art 3(4)(d); AMMR (n41) art 6(3).

²¹⁰ For example through the action for annulment procedure under article 263 TFEU - TFEU (n21) art 263.

²¹¹ CFMR (n10) art 3(1).

²¹² Ibid art 3(2) and 14.

²¹³ Ibid art 14.

Tan and Ineli-Ciger have argued that this expedited procedure is a form of '*prima facie*' procedure.²¹⁴ They argue that this could be a positive response in times of crisis, as it can reduce asylum caseload for those Member States that are under pressure by streamlining the process of granting asylum.²¹⁵ They further find that the expedited procedure is necessary to ensure that expanded use of border procedures is a sustainable solution, as otherwise bottlenecks could ensue.²¹⁶ It must, however, be noted that this is entirely discretionary and so relies on the Member State accepting the recommendation. Nonetheless, it is a useful option to have to ensure pressure is taken off of Member States, without creating an EU wide pull factor as would occur with the TPD.²¹⁷

4.2.3 The role of the Council: risk of politicisation?

Should the Commission consider that the situation amounts to crisis or force majeure, it must submit a proposal for a Council implementing decision.²¹⁸ In this proposal, the Commission will set out what it deems the appropriate derogations and solidarity measures.

Should it consider there to be a situation of instrumentalisation against a Member State, the Commission must also identify the group of people subject to being instrumentalised.²¹⁹ In this regard, it can be asked how detailed this identification should be. The provision states that the proposal must include the 'identification of third-country nationals or stateless persons'.²²⁰ Would it be necessary for the commission to identify specific nationalities? Or specific ethnic, or religious groups? It is unclear, beyond the fact that the individuals should be third country or stateless on the basis of what features they should be identified.

When compared to the invocation of the TPD, in which the Commission must also identify the groups to which the Directive will apply, protection was granted on the basis of nationality.²²¹ As a result, the Directive applied to all Ukrainian nationals, with more

²¹⁴ Nikolas Feith Tan and Meltem Ineli-Ciger, 'Beyond Derogations in the EU Crisis Regulation: Making Expedited Procedures for Manifestly Well-Founded Asylum Claims Work in Practice' (2024) 26 *European Journal of Migration and Law* 421, 438-440.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ As Ineli-Ciger explains in her book, the TPD may cause a pull factor as it may attract more migrants and refugees to the EU as a result of being granted immediate protection in every Member State of the Union - Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill | Nijhoff 2018), 160-161.

²¹⁸ CFMR (n10) art 4(1).

²¹⁹ *Ibid* art 4(2)(c).

²²⁰ *ibid.*

²²¹ Katrien Luyten, 'Temporary protection Directive' (*European Parliamentary Research Service*, July 2024) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762373/EPRS_BRI\(2024\)762373_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762373/EPRS_BRI(2024)762373_EN.pdf)> accessed 12 August 2025.

than 4 million benefitting from temporary protection.²²² It, however, must be noted that while the TPD grants rights, the CFMR has the potential to restrict them through the derogations that may be applied. As such, when invoking the CFMR, identifications of broad groups of people could have serious consequences on human rights compliance as set out in chapter 3. Thus, it could be suggested that identifications should be more specific. This, however, could create situations of discrimination and differential treatment of applicants, which would similarly be contrary to EU law as it would violate the principle of non-discrimination as set out in article 21 CFR.²²³ As such, the identification of groups of people subject to being instrumentalised brings serious risks and difficulties.

An issue that can be identified in granting solidarity measures is the fact that in the Commission's proposal for an implementing decision it is explicitly stated that the draft Solidarity Response Plan must ensure 'full discretion of contributing Member States in choosing between the types of solidarity measures'.²²⁴ As such, Member States may pledge additional solidarity measures as part of the Solidarity Response plan. Should additional pledges, alongside the Annual Solidarity pool, not be sufficient to cover the additional needs identified in the Council implementing decision, contributing Member States may be required to contribute above their fair share.²²⁵ While this does set out potentially mandatory additional solidarity for Member States, it is nonetheless dependent on the implementing decision by the Council identifying whether additional solidarity measures are necessary in the first place.²²⁶

The decision to do so thus remains a political one, to be decided by representatives of the Member States in the Council. It thus rests on the political will of the Union to implement such measures. When compared to the TPD, it has often been argued that the politicisation of its invocation has hindered its use greatly.²²⁷ As shown, at least in terms of solidarity measures, this may also prove to be a stumbling block for the CFMR.

²²² Ibid.

²²³ CFR (n21) art 21.

²²⁴ CFMR (n10) art 2(b).

²²⁵ Ibid art 9(1)(b).

²²⁶ Ibid arts 4 and 9.

²²⁷ Marco Notarbartolo di Sciara, 'Temporary Protection Directive, dead letter or still option for the future? An overview on the reasons behind its lack of implementation' (*Eurojus.it rivista*, 2 December 2015) <<https://rivista.eurojus.it/temporary-protection-directive-dead-letter-or-still-option-for-the-future-an-overview-on-the-reasons-behind-its-lack-of-implementation/?print=pdf>> accessed 12 August 2025; Danielle Gluns and Janna Wessels, 'Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis"' (2017) 36 *Refugee Survey Quarterly* 57, 64; H. Deniz Genç and Nedime Asli Sirin Oner, 'Why not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union' (2019) 7 *International Journal of Political Science and Urban Studies* 1, 8-9.

Finally, the time limits of the proposal together with the implementing decision must be briefly discussed. In total, the maximum time that may be taken is four weeks. The Commission's proposal must be submitted at the same time as the implementing decision establishing crisis or force majeure, and so must be submitted no later than two weeks following the receipt of the reasoned request.²²⁸ Following the proposal, the Council then has a further two weeks to decide whether to adopt an implementing decision allowing for the derogations or solidarity measures as proposed by the Commission.²²⁹

While it may be argued that this is too long of a time period, as in times of crisis the situation on the ground can change rapidly, it may also be argued that a four week time period is necessary for the Commission and Council to properly assess the crisis as well as the proportionality and necessity of the measures as mandated by the CFMR.²³⁰ Should the time limits be reduced, the assessments may become too rushed thus leading to disproportionate or unnecessary responses which could have human rights implications as identified in chapter 3.

These time limits, however, seem to be at odds with one of the derogations the Member States may take. As set out in article 10 CFMR, Member States may delay the registration of applications for international protections and may apply this derogation for 10 days following the submission of a reasoned request without approval from the Council.²³¹ However, should the Council implementing decision take the four weeks, this would create a situation of 18 days where the Member State is in a state of uncertainty. They will have applied the derogation for 10 days, and then must wait a further 18 to see whether they can continue applying the derogation or not. This creates a scenario rife with legal uncertainty, potentially leading to different treatments of applicants for international protection from one day to the next.

4.2.4 Reflection on the procedure for invoking the CFMR

Taking a step back and assessing the invocation procedure indicates a positive development when compared to the trigger mechanism and invocation procedure of the TPD. While at first glance, the trigger and invocation of the TPD seems to be similar, for example in both Member States may request the Commission to submit a proposal which must then be decided upon by the Council, key differences in the workings of the instruments indicate that the CFMR may be more likely to be successfully invoked.²³²

²²⁸ CFMR (n10) art 4(1).

²²⁹ Ibid art 4(3).

²³⁰ CFMR (n10) art 4(2) and (5).

²³¹ Ibid art 10.

²³² CFMR (n10) arts 2-4; TPD (n24) art 5.

The key difference in this regard is the geographic scope of the measures that are applied once the instrument is in force. While the TPD covers the entire union, the measures that could be set out pursuant to the CFMR are limited geographically to the Member State in question.²³³ The TPD has been criticised in this regard, as some argue that the measures create a pull-factor into the Union, thus making Member States reluctant to invoke it for regionalised crises.²³⁴ It could therefore be argued that the TPD requires a *de facto* EU wide crisis before it can be invoked.²³⁵

The CFMR on the other hand is sensitive to the potential that certain crises may be at a local or regional level, as identified in chapter 2. By setting out in the definitions that this should be considered, as well as the derogations and mechanisms only being applicable to the affected Member State, one could argue that there is a higher likelihood that the CFMR will be successfully invoked. This can thus be considered to be a positive development in migration crisis management for the EU.

While this is undoubtedly positive, it must still be noted that similar to the TPD, certain procedures can become highly politicised. In particular, as previously identified, this may become a problem with additional solidarity measures.

Furthermore, a comparison can also be drawn with the governance structures of the Schengen Border Code (SBC) in the process of reintroducing internal borders.²³⁶ In this regard, Member States may reintroduce internal borders in exceptional circumstances without requiring a decision from either the Commission or the Council.²³⁷ This has thus led to a situation of widespread invocations, with some authors arguing that this has led to abusive invocations where internal borders have become the new normal, rather than the exception.²³⁸

Comparing this to the invocation procedure of the CFMR, it could be argued that requiring decisions from both the Commission and Council can be considered in a positive light, as it ensures a set of safeguards against abusive invocations. On the other

²³³ TPD (n24) art 8; CFMR (n10) arts 2-4.

²³⁴ Ineli-Ciger (n217) 160-161.

²³⁵ *ibid.*

²³⁶ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L 77/1 (SBC), chapter II.

²³⁷ *ibid.*

²³⁸ Anna Kompatscher, 'Border controls and pushbacks as the new normal? The tension between freedom of movement and migration management under the reformed Schengen Border Control Regulation' (*Il Blog di AISDUE*, 16 January 2025) <<https://www.aisdue.eu/en/anna-kompatscher-border-controls-and-pushbacks-as-the-new-normal-the-tension-between-freedom-of-movement-and-migration-management-under-the-reformed-schengen-border-control-regulation/>> accessed 29 August 2025; Marie de Somer, 'Schengen and internal border controls' in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration* (European Policy Center, 2019) <https://epc-web-s3.s3.amazonaws.com/content/PDF/2019/Tampere_WEB.pdf> accessed 29 August 2025.

hand, however, it must be highlighted that the incorporation of these other actors can lead to delayed invocations in times of crisis, especially as a result of diverging interpretations of the definitions in determining whether there is a crisis or not. The roles of the Commission and Council in the invocation procedure can thus be seen as both positively as well as negatively.

4.3 Critically analysing the implementation and monitoring of the CFMR

4.3.1 The 3+3 system: analysing the duration and extension procedure of the CFMR

The extension procedure set out in the implementing decision is referred to in this thesis as the 3+3 system, as will be explained in this section.

The initial implementing decision applies for three months.²³⁹ At the end of these three months, the Commission may decide to extend the measures by a further three months.²⁴⁰ Once these three months are up, and so after a total of six months, should the Member State request further extension, the Commission must submit another proposal to the Council for an implementing decision.²⁴¹ Should this proposal be accepted, the implementing decision may apply for another three months, which once again may be extended for a further three months by the Commission.²⁴² As such, the total maximum duration the measures may apply for would be one year.

This system could be seen as a set of safeguards. As the CFMR can lead to derogations from the normal asylum procedure, with potential consequences for human rights, by subjecting the measures to checks every three months it ensures that the principles of proportionality and necessity are assessed and hopefully respected. Article 5(3) CFMR even specifically emphasises that the derogations should not be applied longer than strictly necessary, and so ensures that either the Commission, or the Commission together with the Council, assesses this.²⁴³

The maximum duration of one year, however, leads to the question of what if the Member State believes the crisis to continue beyond that one year. Could that Member State submit a new reasoned request for the same crisis? Or would there need to be a new crisis in order to extend beyond the one year?

²³⁹ CFMR (n10) art 5(1).

²⁴⁰ *ibid.*

²⁴¹ *Ibid* art 5(2).

²⁴² *Ibid.*

²⁴³ *Ibid* art 5(3).

In this regard, reasoning by analogy, the *NW* case can be referred to.²⁴⁴ Here, in the context of temporary reintroductions of internal border checks derogating from the SBC, the Court found that should a Member State wish to prolong the reintroduction of internal border checks beyond the limits set out in the SBC, a new threat must be identified as justification.²⁴⁵ The persistence of the initial threat was not considered sufficient, as the Court found that the legislator deemed the time limit prescribed sufficient for the Member State to adopt measures to address that threat.²⁴⁶

As such, applying this reasoning by analogy to the CFMR, should the affected Member State wish to invoke the measures beyond the maximum one year time limit, it can be argued that a new crisis must be identified, as opposed to the persistence of a crisis as the legislator has deemed one year sufficient to address such a crisis.

This, however, does raise a key question. What if the crisis, or situation, genuinely lasts longer than one year. For example, some Member States along the eastern border believe that they are still at risk of instrumentalisation and that this has been a persistent risk for a number of years.²⁴⁷ Should this be the case, the CFMR is ill equipped for longer term crises such as these, or the Member State in question would need to submit a new reasoned request with new circumstances to justify extending derogations beyond a year.

4.3.2 The monitoring regime of the CFMR: complementing the 3+3 system

The monitoring regime of the CFMR is closely linked to the 3+3 system. As set out in article 6(1) CFMR, the Commission and Council 'shall constantly monitor whether a situation of crisis or force majeure ... persists'.²⁴⁸ Thus while constant monitoring is required, at the minimum it will occur every three months as set out above. Should the Commission believe there no longer to be a crisis or force majeure, it must submit a proposal to the Council in order to repeal the implementing decision.²⁴⁹ The Commission therefore cannot unilaterally repeal the decision, thus ensuring a system of checks and balances amongst the institutions.

As stated previously, this monitoring system can be regarded as a safeguard for the purposes of human rights concerns, ensuring that the principles of proportionality and necessity are respected. This is also explicitly set out in article 6(2) CFMR, which states that the Commission 'shall pay particular attention to the compliance with

²⁴⁴ Case C-368/20 *NW v Landespolizeidirektion Steiermark* [2022] Court reports – general – 'Information on unpublished decisions' section ECLI:EU:C:2022:298 (*NW* Case).

²⁴⁵ *Ibid* para 94.

²⁴⁶ *Ibid* para 77.

²⁴⁷ Article 72 Communication (n55) 2.

²⁴⁸ CFMR (n10) art 6(1).

²⁴⁹ *Ibid* art 6(3).

fundamental rights'.²⁵⁰ Furthermore, mandating both the Commission as well as the Council to 'constantly monitor' the situation can be considered an additional safeguard. This is a particularly important addition, as the Commission has been criticised in the past for its inactivity in times of migration crises in the face of human rights violations.²⁵¹

While from a human rights perspective it may be positive, the 3+3 system alongside constant monitoring can highlight concerns that have previously been set out, namely the vagueness of the definitions. Just like with the invocation of the CFMR, its continuing appliance relies on interpretations whether the definitions have been fulfilled. Considering the vagueness of many elements as identified in chapter 2, and concerns identified previously in this chapter, the interpretation of such elements is liable to disagreement. As such, there is a real risk that the Commission may no longer determine there to be a situation of crisis based on its interpretation, while the Member State may not agree. This could lead to situations where the implementing decision may be repealed preemptively, thus potentially negatively affecting the effectiveness of the Regulation.

4.3.3 Coordinating what? The role of the Solidarity Coordinator in times of Crisis

The solidarity coordinator's primary tasks outside of situations of crisis are set out in the AMMR. They are largely centered on supporting Member States, aiding coordination and communication between Member States' agencies as well as keeping an overview of the solidarity system.²⁵² The coordinator is also tasked with operationalising solidarity contributions, and ensuring a fair distribution amongst Member States.²⁵³

Alongside these tasks, the coordinator's role in the CFMR is focused on supporting relocation activities should they be granted by the Council as well as promoting 'a culture of preparedness, cooperation and resilience among Member States'.²⁵⁴

In its supporting role in relocations, the coordinator is tasked with providing a bulletin every two weeks on the implementation and functioning of the relocation mechanism.²⁵⁵ Considering the concerns regarding the relocation mechanism as set out

²⁵⁰ CFMR (n10) art 6(2).

²⁵¹ See fn 201 - Grześkowiak (n8) 95-101.

²⁵² AMMR (41) art 15.

²⁵³ *ibid.*

²⁵⁴ CFMR (n10) art 7.

²⁵⁵ *Ibid.*

in chapter 3, ensuring there is bi-weekly monitoring of the implementation thereof can be considered a useful safeguard to ensure human rights compliance.

4.4 Interim Conclusion

In conclusion, while the novel governance structures of the CFMR bring positive advancements when compared to the TPD, they still suffer from some key challenges.

In particular, when compared to the TPD, the CFMR has a far improved trigger mechanism. Due to the crises being framed as being relative to the Member State, and the derogations and mechanisms not being applied EU wide, a *de facto* EU wide crisis is not required to trigger the instrument. As such, especially smaller Member States, will be more likely to benefit from the measures set out in the Regulation. Furthermore, the monitoring and 3+3 system of the CFMR ensures a set of safeguards for potential human rights violations.

While there are some clear positives to the governance structures, there are also some glaring issues that may undermine the smooth invocation and implementation of the CFMR. While the trigger mechanism can increase the chance of successful invocation, the process of invoking the CFMR raises concerns. These concerns are primarily based on the definitions of crisis and force majeure, with the vagueness of key elements potentially leading to disagreements in interpretation, thus undermining its smooth invocation. These concerns continue when assessing the 3+3 system, which requires a review of whether a crisis persists every three months. The disagreements in interpretation will continue to be an issue throughout, especially considering the fact that the Member States, Commission and Council all play a role and will have different understandings thereof.

Furthermore, in determining which measures and derogations are appropriate, there is a risk of politicisation of the decision making, especially in regard to additional solidarity contributions. It is exactly the highly politicised decision making of the TPD which has been criticised by scholars, and so this raises another concern regarding the legal design of the governance structures of the CFMR.

5 Conclusion

5.1 Conclusion

When questioned whether the CFMR is adequate to address migrant crises, it can be concluded that in its present state it is not. As stated in the introduction, an adequate instrument to deal with migratory crises is one that allows Member States to rely on and invoke mechanisms that alleviate pressure on its asylum, reception or returns systems whilst still ensuring compliance with that states' obligations under both EU and international law.

Firstly, as set out in chapter 2 the CFMR's definitions of migrant crises, and the inclusion of a residual clause to also cover unforeseeable events through a force majeure clause, leads to a certain degree of flexibility. The definitions of 'crisis' include broad terms which are open to interpretation, thus allowing for possible broad readings thereof thus covering a wide array of potential crises. While such vague terms may allow for flexibility, they may turn out to be counter-productive. As they are open to interpretation, it is a very real possibility that they will be subject to strict interpretations, as little guidance is given in the CFMR to prevent this. As such, its biggest strength may also be its biggest weakness and may in fact greatly hinder the CFMR's ability to address migrant crises, as its understanding of 'migrant crisis' is at risk of being underinclusive.

Taking these conclusions together with those set out in chapter 4 highlights that this can greatly undermine the CFMR's functioning. It may lead to situations where invocations, or prolongation, of the CFMR is not possible or greatly hindered. As such, the ability to 'invoke mechanisms that alleviate pressure' as set out in this thesis's understanding of adequacy may not be fulfilled as there is a real risk that Member States may not be able to rely on the CFMR in the first place.

As regards whether the Regulation ensures compliance with international and EU obligations, as shown in chapter 3, using human rights as a proxy, the CFMR raises significant concerns. Especially through the potential of expanding the use of the border procedure, the principle of *non-refoulement* and the right to liberty and security may not be respected. While, as shown in chapter 4, the legal design of the Regulation ensures for a set of safeguards through assessments by the Commission and Council, concerns remain whether the Commission will be vigilant in protecting human rights, as it may continue its recent trend of passivity in regard to safeguarding migrants rights.²⁵⁶

²⁵⁶ Grześkowiak (n8) 95-101.

As such, the CFMR cannot be said to ensure compliance with the Member States international and EU obligations.

Finally, the legal design of CFMR not only may lead to problems in its invocation, but there is also a real risk of politicisation in the granting of additional solidarity to Member States in need. Politicisation of decision making is a problem that has plagued the successful use of the TPD, and as such can be highlighted as a real concern whether Member States will be able to 'invoke mechanisms that alleviate pressure on its asylum, reception or returns systems'.

It has thus been shown that the CFMR is not adequate to address migrant crises under this thesis's understanding of adequacy. Not only does the CFMR not ensure compliance with international and EU obligations, but it may even lead to violations thereof. Furthermore, there are real questions regarding whether Member States will duly be able to rely on, and invoke, the mechanisms set out in the Regulation.

5.2 Further Research

As has been noted in the introduction, this thesis is limited to an *ex ante* assessment of the CFMR. It thus leaves significant room for further research to be conducted.

The first area of further research could be to assess the CFMR's position in the broader migration crisis management system of the EU. In particular, what could be researched is how it functions alongside other crisis related instruments. As briefly mentioned previously, the CFMR is intended to work alongside the TPD, as stated in the preamble they are viewed as complementary.²⁵⁷ As such, it would be interesting to assess how the mechanisms and governance structures of the two may interact.

Another area for further research could be possible empirical research once the CFMR is applicable. As mentioned in the introduction, it is currently impossible to assess the effectiveness of the implementation of the CFMR in practice. Empirical research on the effectiveness of the derogations and mechanisms, and the effects they have in practice, would thus be an interesting prospect for future research.

²⁵⁷ CFMR (n10) rn 3.

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