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From:	Presidency
To:	Permanent Representatives Committee
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Subject:	Balance between solidarity and responsibility under the Pact on Migration and Asylum - Discussion paper

The Swedish Presidency compromise text for the AMMR was discussed at the meetings of the Asylum Working Party on 18-19 January, 10 February, and 28 February to 1 March, as well as at the meetings of the JHA Counsellors on 27-28 March, 18 April, 10,15 and 30 May 2023. Regarding the APR, the Presidency proposed key elements at the SCIFA meeting on 16 February 2023. The outcomes of that discussion were translated into a legislative text for the APR, which was discussed on 15 March at JHA Counsellors level. New compromise texts were discussed at the JHA Counsellors meetings on 5 and 27 April, 23 May and 1 June 2023.

Following the policy debates in COREPER on 3, 17 and 31 May on the essential building blocks of AMMR and APR, the Presidency is presenting some further revisions of the draft texts of AMMR and APR, set out in documents 9711/1/23 REV 1 and 9710/1/23 REV 1.

Following the COREPER debates on 3, 17 and 31 May 2023, the Presidency has taken good note of the generally expressed need for a sustainable, predictable and practicable system of flexible responsibility and solidarity. Based on the reactions from delegations, the Presidency is confident that the refined texts that it is putting forward form a good basis for a balance between solidarity and responsibility and should pave the way towards reaching a general approach on both the AMMR and the APR at the 8-9 June JHA Council meeting. The Presidency is also determined to make quick progress on the Crisis and *force majeure* Regulation, including the Instrumentalisation Regulation proposal, which is also part of the overall equation.

On the clear understanding that nothing is agreed until everything is agreed, the Presidency presents the following elements as the basis for a broad compromise.

For the border procedure in the APR:

- The **adequate capacity at national level** will be calculated on the basis of the formula set out in the APR and will be stable for three years.
- The definition of adequate capacity to examine applications in the border procedure ‘at any given moment’ is combined with **an annual cap**.
- The extent of the obligation of the Member State to set up the adequate capacity should take appropriate account of Member States’ concerns regarding **national security and public order**.
- A Member State should always be able, within the border procedure, to **prioritise cases with a high probability of prompt return**.
- While the border procedure shall be carried out at the border as a general rule, the Member States will have the possibility to **designate facilities** dedicated to the border procedure at **other locations within the territory** (i.e. not at or in the proximity of the border) in a similar way as in the negotiation mandate on the Screening Regulation.

- A single **substantiated notification** to the Commission to allow a Member State to temporarily not apply the border procedure beyond the adequate capacity is provided, along with **an increased monitoring role of the Commission. Further details on the reporting obligations have been provided in the latest APR text.**
- Families with children of 12 years of age or younger **should not be automatically exempted from the border procedure.** The **APR text is aligned with the RCD** text regarding the reception conditions applicable to applicants, including the fact that detention of minors may only be imposed under the conditions and guarantees for detention as set out in the RCD.
- In applying the APR, in particular the setting up of adequate capacity, Member States will be able to benefit from existing **financial resources**, in particular through the Asylum, Migration and Integration Fund (AMIF), the Integrated Border Management Fund including, where applicable, additional support under the Thematic Facilities.

For the AMMR:

- **Take-back notifications** will replace the current take back requests in cases where responsibility has already been established, with a possibility for the notified Member States to object in a clearly defined and limited number of cases. There will be no shift of responsibility in the event that the notifying Member State does not comply with the time limit to send the take-back notification.
- There will be **no extension of the definition of family members to cover siblings**, and no new criterion on diplomas and other qualifications. This will, however, be subject to a review by the Commission three years after the entry into application of the AMMR.
- Regarding **beneficiaries of international protection**, the current *acquis*, according to which beneficiaries of international protection are **excluded** from the take-back procedure, will be retained. **Resettled persons** will be **included**, as in the Commission proposal.

- The discussions on how long **beneficiaries** of international protection must be legally resident in order to be able to opt for **long-term residence** will take place in the context of the negotiations on the Long-Term Residence Directive recast.
- There will be a **flexible solidarity mechanism** in which the contributing Member State has full discretion about the type of solidarity contribution – relocation, financial or other measures where relevant – which are of equal value. No Member State will ever be obliged to carry out relocations or contribute more than its fair share.
- Member States can **pledge alternative solidarity measures** even if the Commission Recommendation does not provide for it, provided that the benefitting Member State requests such measures (otherwise the pledge will become financial contributions).
- The time limit for the **shift of responsibility for all cases of absconding** will be set at three years.
- Responsibility will cease when the applicant **leaves the territory of the EU for at least nine months** during the examination of the application.
- **Voluntary responsibility offsets** can be made only when relocation pledges reach 50% of the relocation figure set out in the Commission Recommendation.
- **Mandatory responsibility offsets** should be triggered when the relocation pledges do not reach 60% of the total relocation needs identified in the Council implementing act or are below the minimum threshold set out in the Regulation, whichever number is higher. In any case, mandatory offsets will remain as the ultimate backstop also where, during the year, due to full or partial reductions, the implementable pledges for relocation fall below the minimum threshold or below 60% of the total relocation needs.

- Safeguards will be in place as regards the **mandatory responsibility offsets**: on the one hand, they shall not be triggered to the benefit of a Member State with regard to which AMMR/Dublin transfers are effectively not taking place. On the other hand, mandatory offsets shall be available to a benefitting Member State in case a contributing Member State is not implementing its relocation pledges. The latest text also clarifies that the responsibility offsets are counted as part of the Member States' fair share.

An important element in the debate on the two texts are the numbers in APR and AMMR. Having listened to the discussions in COREPER, the Presidency remains convinced that the numbers it proposed strike a good balance between solidarity and responsibility:

- The **XXX number proposed by the Presidency for the adequate capacity** for carrying out the border procedure at Union level is ambitious enough to significantly enhance the efficient processing of asylum applications.
- The **X number proposed by the Presidency for the annual cap**, regarding the maximum number of applications, takes due account of the duration of the border procedure of a maximum of six months. There is a general support that applications of applicants considered a danger to national security or public order of the Member States should always be dealt with in the border procedure, regardless of whether the cap is reached. However, the Presidency has removed the exemption from the cap for applications of applicants with a high probability of return.
- The **XXX minimum annual number proposed by the Presidency for relocation** is ambitious enough to relieve pressure on benefitting Member States and also takes into consideration the operational challenges linked to the implementation of relocations.
- The **XXX minimum annual amount proposed by the Presidency for financial contributions** is based on an objective and realistic assessment and is considered as having an equivalent level of ambition to relocation.

Whilst many delegations have stated their satisfaction with the progress that has been made in the negotiations over the past weeks, there still is a need to further refine the balance between solidarity and responsibility on a number of issues. The Presidency therefore submits the following **amended compromises** on the main outstanding issues. The Presidency wants to **limit the COREPER discussion to the issues set out below**.

For the APR:

- The **connection criterion shall** be mandatory for Member States to apply in relation to the safe third country concept. This will ensure greater harmonisation and is in line with the recent EUCO's call on achieving a more coordinated approach on the use of the concepts of safe third countries. A connection between the applicant and the safe third country should also be considered established in case of a stay or a transit. The new wording of the APR further clarifies the meaning of the connection requirement.

For the AMMR:

- The Presidency proposes to further reduce the period after which there will be a **cessation of responsibility** of the Member State which **rejected an application in the border procedure**, from 2 years to 18 months from the decision becoming final. In this way the use of the border procedure will be further incentivised and the additional efforts that are demanded from frontline Member States are duly taken into account by this new ground of cessation of responsibility, which hitherto does not exist.
- The Presidency also suggests reducing the time limit for the responsibility of the **country of irregular entry** from 3 to 2.5 years.
- The Presidency suggests extending the current **review clause** so that the Commission will present a report three years following the entry into force of the AMMR in which it will examine the overall functioning of the responsibility part of the AMMR, including whether the definition of family members should be extended to include siblings.

- The latest AMMR and APR texts also provide for a clear obligation for the Commission to draw up a common **implementation plan** for the entry into application of both legislative texts. It will also identify the financial and operational needs of Member States and will obviously rely on the cooperation by Member States, which will have to establish their own national implementation plans.
- The Presidency also suggests making it clear in the text that for a Member State that has been identified in the Commission decision as being at **risk of migratory pressure**, the Commission will take this into account in its assessment, if that risk materialises during the year.

The Presidency invites COREPER to discuss the above package of amended compromise proposals with a view to finding an agreement that can be the basis for a general approach on both the AMMR and the APR.