



Brussels, 18 November 2022
(OR. en)

14416/1/22
REV 1

LIMITE

JAI 1424
FRONT 413
ASILE 100
RELEX 1483
MIGR 336

NOTE

From:	Presidency
To:	Delegations
Subject:	Presidency concept for balanced solidarity and responsibility

Following the conclusions of the SCIFA meeting held on 4 October and the JHA Counsellors meetings held on 16 September, 24 October and 11 November, where the Presidency concept *Way forward on EU migration solidarity and crisis response mechanism* was discussed further, the Presidency is presenting an amended version of its discussion paper. The paper develops further on the two key principle elements of the concept - (i) guarantees of predictable and adequate solidarity and (ii) the possible scope of adequate responsibility.

The same balanced approach outlined for the solidarity mechanism is followed for responsibility. As a result, adequate assurances should be provided on both key elements of the reform, thus allowing, as the next step, this concept to be translated into respective legislative proposals.

This discussion paper should be read together with the Presidency concept “*Way forward on EU migration solidarity and crisis response mechanism*” in its latest version¹.

¹ See Annex II. to document no. 13110/22.

The aim of the JHA Counsellors meeting on 23 November is to conclude the discussions on the solidarity and responsibility concept at Counsellors level in order to prepare for the upcoming meeting of SCIFA (29. 11.) and the JHA Council meeting (8. 12.).

I. AREA OF MANDATORY SOLIDARITY

The Presidency proposes a system of three safeguards described below to secure enough predictability, assurances and flexibility in terms of the solidarity mechanism encompassing relocations as well as, direct financial and other direct solidarity support.

The mechanism should be based on a premise that the EU as a whole shares the responsibility to manage migration, governed by a set of common European rules (CEAS). When drafting the Annual Migration Report and the attached recommendations for annual solidarity, the Commission shall take this duly into account, in order to provide a comprehensive picture of the migratory situation in the EU and its Member States and when setting the level of ambition for annual solidarity at EU level. The level of shared responsibility should take into account, among other quantitative and qualitative criteria, primarily the overall number of annual arrivals, the average recognition rates as well as the average return rates. Such comprehensive picture should be also a useful tool for Member States when considering their own migratory challenges and deciding about their solidarity support.

1) Minimum threshold for predictable annual solidarity contributions

- A minimum annual threshold necessary for people's solidarity, as well as for direct financial support, could be set in the Asylum and Migration Management Regulation to reflect the solidarity needs arising from various structural challenges in the area of migration.
- This would allow predictable planning by contributing Member States. It would also provide minimum guarantees in terms of people's solidarity and financial support for the benefiting Member States.

- Such minimum thresholds should be understood as a starting point on which the Commission should base its annual solidarity recommendation.
- These thresholds should be set for both relocations and financial contributions and should reflect the structural and sustained nature of various migratory pressures on the EU.
- While relocations should primarily apply to persons in need of international protection, with priority for those most vulnerable, its application should be kept flexible. Given its voluntary nature, relocating and benefiting Member States should be able to put forward their preferences in terms of persons to be considered for relocations.
- Regarding the other forms of solidarity (focusing primarily on capacity building, services, skilled personnel, facilities and technical equipment - in fields such as registration, reception, border management, screening, detention and return), these would not be included in these thresholds, for practical reasons. However, during the pledging exercise itself, their financial (market) value should be assessed and applied, recognising that the various types of solidarity are of equal value.
- Irrespective of these minimum annual thresholds, the Commission will always have the possibility to propose, through the recommendations to be included in the Annual Migration Report, a higher annual relocation or financial target, as well as concrete proposals for the other forms of solidarity, if necessary and based on projected needs.

- Those needs would be based on the overall assessment of the past and current situation in all Member States. When assessing the overall situation in the EU and its Member States, the Commission should take into account the set of information to be agreed under Article 50 of the AMMR proposal, taking into account the annual level of shared responsibility. Member States would also have an opportunity to express their solidarity needs for the coming year, to be taken into account by the Commission.
- In the same vein, in exceptional situations, where there would be no projected need for people's and/or financial solidarity for the coming year or a possibility to implement it (e.g. a health-related crisis with cross-border effect), the Commission could propose that the above-mentioned thresholds are not (fully) applied.
- A review clause could be included in the AMMR, allowing for an amendment of these minimal thresholds, should the overall migratory situation substantially change at EU level. Both the Commission and the Council could have the possibility to initiate such targeted amendment of AMMR.

2) Fair share as a distribution key for calculating solidarity commitments

- On the basis of the Commission recommendation for solidarity (people's solidarity, financial support and the *other* forms of solidarity), when pledging to the Solidarity Pool or the Solidarity Response Plan, Member States should follow a distribution key (fair share) based on a formula to be agreed. However, Member States would retain the right to choose which solidarity measure(s) they wish to contribute with.

- Should there be a need for the *other* forms of solidarity support, its financial (market) value would be assessed, allowing the fair share principle to be applied.
- The fair share principle could be established as a:
 - a) Guiding principle
 - b) Mandatory principle
- Should it be agreed that the fair share principle is applied mandatorily, Member States will still be able to request a partial or full reduction of their contribution as committed to in the Solidarity Pool or the Plan.
- In order to do so, such Member States should demonstrate clearly that a significant migratory situation on its own territory, leading to their reduced capacities in the area of asylum, reception and/or irregular migration, does not allow for (full) participation in providing solidarity to other Member States. The Commission should be able to confirm this, through a simplified and speedy assessment.
- When a Member State is a recipient of solidarity measures, it is also excluded from providing solidarity to others.
- Such a fair share should also serve as one of the guiding indicators to be used by the Commission when assessing Member States' notifications/requests for solidarity and when considering the significance of the migratory pressure or a crisis (compared with the EU average over the last 12 (rolling) months of all irregular arrivals to the EU) in an affected Member State.

3) Supplementary people's solidarity for situations where there are not enough relocation pledges – Dublin transfer offsets:

- If the annual relocation target recommended by the Commission in the Annual Report is not met in full by Member States, the mechanism would allow for a topping-up of the remaining unfulfilled relocation pledges, when providing people's solidarity. This would provide an option for the Member States that are under particular pressure/crisis, to also benefit from a corresponding reduction of the Dublin cases under the Dublin rules for which they would be otherwise responsible. This would shift the responsibility to Member States providing solidarity.
- Under such scenario, all relevant Member States could consider to assume responsibility and cancel a proportional number of Dublin transfers to Member States under a particular pressure/crisis, in addition to their relocation, financial or *other* forms of solidarity pledges.
- Such offsets would only be possible as a *second level* solidarity support, while relocations should always be considered as the preferred option, in terms of people's solidarity. The preferences of the benefiting Member States should be taken into account in this regard. These offsets would therefore be possible only when the recommendations by the Commission regarding relocations, financial or other solidarity support are not met by the Member States to a satisfactory level (therefore after the annual pledging exercise is concluded). Such level could be set (for example at 75 % of the Commission's recommendations on relocations).

- To motivate Member States to primarily pledge for relocations, financial support and the *other* alternative solidarity support, the Dublin offsets would not be considered when calculating the fair share/distribution key.
- The Dublin offsets could work as a supplementary solidarity tool on:
 - a) Voluntary basis
 - b) Mandatory basis
- For this proposal to work in practice, a system of guarantees is necessary, to avoid to the extent possible, a negative effect on secondary movements in the EU and the functioning of the Dublin system.
- Therefore, (some of) the following rules could be envisaged regarding the scope:
 - Persons subject to a transfer (accepted requests/notification), where the time limit from the acceptance of the request by the responsible Member States has not yet reached 6 months.
 - Persons who have absconded from the Dublin procedure in the second (requesting) Member States would not be included in the scope.
 - Cases in which the obligation to register a person in the Eurodac database is not fulfilled by a Member State would be excluded from the scope.
 - Persons that were resettled or relocated would not be included in the scope in order not to undermine these frameworks.
 - Unaccompanied minors and family unity related requests and transfers would be excluded from the scope.
 - Additionally, and on a voluntary basis, cases where the application has already been finally rejected in the first Member State could be included, so that the second Member State could consider the application as subsequent and carry out the return.

- The offsetting and benefiting Member States should be able to put forward their preferences in terms of persons to be considered for these offsets.
- It is also important to note that the tools making the fight against secondary movements more effective have to be considered comprehensively throughout the proposed reform (see part II. 3).

II. AREA OF RESPONSIBILITY

In order to create a functional and sustainable system, a balance must be struck between Member States' commitments towards responsibility and solidarity. It is therefore a prerogative that any such system is based on a set of functional and sustainable rules, well adaptable to ever-evolving migratory circumstances that can be followed and implemented by all.

It is the understanding of the Council that the following pillars stand at the core of the responsibility area and its rules.

- 1) *Fast and effective migration procedures at the external borders*
- 2) *Rules on responsibility determination*
- 3) *The fight against secondary movements*

The above-mentioned pillars must be well balanced in terms of usability and adaptability, taking into account the specificities of the migratory situation in all Member States, while maintaining the necessary and stable level of responsibility. This stable responsibility should be, on the other hand, adaptable enough to reflect operational needs and realities, without compromising the whole system as such. As with the solidarity component of the system, the responsibility component should be designed with simplicity, practicability and predictability in mind.

- The Presidency is in close contact with the European Parliament in order to continue implementing the joint Roadmap signed between the rotating Presidencies (CZ, SE, ES, BE and FR) and the EP in order to make progress on the inter-institutional negotiations of all legislative proposals of the reformed CEAS.

1) **Fast and effective migration procedures at external borders**

i. The screening procedure

An initial screening procedure, which is a necessary step to allow for proper identification, fingerprinting and channelling of the person to the adequate procedure, be it return or asylum, including where applicable to a border procedure is a key element of the responsibility part of the system. In this respect, a balanced compromise was reached by the French Presidency regarding the Screening Regulation, which should contribute to an effective and controlled migration management at the external borders.

- The Presidency is in close contact with the European Parliament in order to start the inter-institutional negotiations as soon as possible.

ii. The mandatory border procedure

While the discussion on the border procedure is still to take place based on the Commission proposal for the Asylum Procedures Regulation, in order to reflect the operational reality and sustainability of the border procedure, an adaptable system could be considered taking into account both the adequate capacity to process applications within the border procedure of each Member State, as well as the prospects for return. Such a system should allow, on the one hand, for greater adaptability to the actual situation of a Member State facing migratory pressure, while, on the other hand, establishing a rigorous system for normal situations. The Presidency is presenting the following ideas for Member States' consideration.

a) **Setting up the maximum nationality threshold for normal situations**

The purpose of the asylum border procedure is to quickly assess, at the external border, whether applications are unfounded or inadmissible and to swiftly return those with no right to stay, while ensuring that those with well-founded claims are channelled into the regular procedure and provided quick access to international protection.

Establishing a maximum nationality threshold is an element that allows for a simple and quick identification during the screening of those who should be channelled to the border procedure.

Therefore, to provide for a balanced, but adaptable system, the below options for the nationality threshold for normal situations could be considered:

- a) 20% (*as proposed in the current APR proposal*)
- b) 25%
- c) 30%

b) A possibility to reduce the nationality threshold by half in clearly defined cases of exceeded adequate capacity in a Member State under migratory pressure

A Member State finding itself under migratory pressure with direct effect on its capacity to process eligible applications in the mandatory border procedure, including its reception capacities, would have the option of lowering the percentage threshold for nationalities subject to such procedure by half, by requesting an assessment to be done by the Commission.

- The requesting Member State should be able to clearly demonstrate that given a significant migratory situation on its own territory, its annual adequate capacity to process relevant cases in the border procedure has been exhausted.
- The Commission will confirm such request through a simplified and speedy assessment, focusing notably on the overall adequate capacity of that Member State to process applicants subject to the border procedure, taking into account a last XX-year average number of persons subject to border procedure in a given Member State, the overall reception capacity and other relevant criteria².
- The possibility to lower the threshold could be accompanied by other measures, aiming at alleviating the pressure and improving the overall situation.

² For example, by taking into account the set of information to be agreed under Article 50 of the AMMR proposal.

c) Not including nationalities with low return rates from the mandatory border procedure

An additional element that could be considered in terms of the scope of the mandatory border procedure is not to include nationalities with low return rates. This would mean that even if the applicant falls under the nationality threshold, the Member State concerned will not be required to apply the border procedure if there are no prospects of returning the person to the country of origin. Alternatively, this idea could be linked to the adequate capacity (see point II.1.ii.b) and situations of migratory pressure.

The basis for such non-application could be:

- a) The Commission's assessment report on the application of Article 25a of the Visa Code - only nationals of countries that would be considered in this report as non-cooperative by the Commission could be excluded.
- b) Based on a list to be periodically agreed by the High-level EU Return Network.
 - For the whole system to work efficiently and reflecting the current situation, it must work swiftly and with up-to-date data.
 - There should also be a bi-annual evaluation of the list of nationalities that are excluded from the mandatory border procedure.

d) Possible derogation from the mandatory border procedure in exceptional crisis situations

It has been acknowledged by the majority of Member States that in exceptional and very clearly defined crisis situations, time-limited derogations may be necessary to ease the burden on an affected Member State. To this end, the Presidency is proposing to extend the scope³ of possible derogations to be part of the Crisis Regulation also by including derogations from the mandatory border procedure as an exceptional and time-limited measure.

- As for any other derogation, it would need to be agreed and adopted by the Council in the Solidarity Response Plan (by a Council Implementing Decision).

e) Hierarchical application of the above criteria

It could be considered to apply the above-proposed criteria in a hierarchical order, in order to ensure that the above criteria defining the scope are being applied in a harmonised manner, as follows:

- Mandatory scope of the border procedure check (within the screening procedure)
- The nationality threshold
- Possible adjustment of the nationality threshold based on the capacity level
- Possible adjustment of the nationality threshold based on returnability
- Possible derogations from the mandatory border procedure

³ The scope of derogations to be included under the Crisis Regulation, and which would be applicable to all possible migration-related crisis situations, should be otherwise similar to the scope as proposed under the draft Instrumentalisation Regulation.

2) Rules on responsibility determination

i. Proper and timely registration of all irregular migrants

The necessity to register all migrants as soon as possible after crossing the external EU border is indisputable. Moreover, the new Eurodac Regulation stipulates that persons found to be illegally staying within the territory of a Member State must be registered. In both cases, such registration should happen primarily within the screening procedure. This does not only provide for orderly migration management and increases the EU internal security, it is also an important element in terms of establishing the Member State responsible and limiting secondary movements.

In this respect, a balanced compromise was reached by the French Presidency regarding the Eurodac Regulation that should contribute to an effective implementation of the asylum and migration acquis.

- The Presidency is in close contact with the European Parliament in order to start the inter-institutional negotiations as soon as possible.

ii. The Dublin system

Well-balanced Dublin rules that reflect the situation of both the Member States at external borders, and those Member States that suffer the most from secondary movements are another determinative part of the whole EU asylum system. It is widely acknowledged that the present rules for determining responsibility for asylum applicants across the EU are not working in a satisfactory manner, neither from the perspective of striking the appropriate balance nor from the perspective of effectiveness or reducing secondary movements.

Taking into consideration the above, as well as the input received from the delegations, the following key elements should be considered when negotiating the Dublin rules under the AMMR, to achieve a more balanced system:

(a) Responsibility criteria for a more balanced system

The AMMR proposal includes new criteria aiming at ensuring a more balanced distribution of responsibility across the EU. Some additional elements could be considered to ensure the overall balance of the system:

- **Family criteria:** the proposal to include families formed in transit, *as proposed in the current AMMR proposal*, should be maintained. Additionally, the possibility to also include siblings could be explored further.
- **Residence documents and visas:** assuming responsibility, if the application is registered within 1 year from the expiry of a visa or 3 years from the expiry of a residence permit (*3 years for both in the current AMMR proposal*).
- **Diplomas or other qualifications:** this criterion, *as proposed in the current AMMR proposal*, could be maintained. If so, it would need to be assured that such criterion cannot be easily abused by applicants⁴.
- **Irregular entry criterion:** the same responsibility criterion should be established for all irregular migrants arriving to the EU, to avoid pull factors. Member States are invited to consider the following time limits:
 - a) 18 months
 - b) 3 years (*as in the current AMMR proposal*)
- **Visa waived entry:** if the first application is lodged in a second Member State where the need for a visa is also waived, that Member State is responsible. *The current AMMR proposal establishes that the responsibility always falls on the Member State of first entry within 3 years from when the date of entry into the territory of the EU.*

⁴ E.g. by adding in the definition a condition that the studies must have taken place in the territory of MS (thus excluding online courses), lasted at least one year, and that the asylum application was registered within five years after the diploma/qualification was obtained, as discussed during previous negotiations on the AMMR. More detailed specifications regarding the types of diplomas and qualifications concerned could also be included to ensure a consistent interpretation.

- **Discretionary clause:** could be extended beyond family and humanitarian grounds (e.g. for relocation purposes, on cultural and social ties). The time limit for a reply to a request made by the second Member State should be maintained, while the reply by the first Member State could be considered as acceptance in case of no reply.
 - **The reasoning of Dublin requests and replies:** Member States should always provide solid reasoning for all criteria according to their hierarchical nature. A negative reply should be reasoned in relation to every relevant criterion. A standard form could be developed to facilitate this proposal and reduce the risk of an excessive administrative burden.
- (b) **Non-shift and cessation of responsibility rules that eliminate incentives for abuse and secondary movements**

The AMMR proposal enhances the system's capacity to fight abuses and incentives for secondary movements. Some additional elements could be considered to ensure the overall balance of the system:

- **Cessation of responsibility:** responsibility ceases if there is proof⁵ that the applicant stayed outside the territory of the EU for at least three months (*the current AMMR proposal does not foresee such a cessation of responsibility*).
- **Expiration of time limits:** as regards absconding, a suspension of the transfer deadline could be as follows (compared with the current AMMR proposal for an indefinite period):
 - a) 3 years
 - b) 5 years

⁵ Eurodac proposal in the version of the partial general approach from June 2022 contains an extension of the scope of the Entry/Exit System and allows the access of competent asylum as well as competent authorities for „Dublin issues“ to the Entry/Exit System, which should enable a sound implementation of the cessation clause in practice.

- **Take back notification:** take back should be triggered by a notification, the time limit for replying to this notification could, however, be extended to 2 weeks (*1 week is proposed in the AMMR proposal*).

(c) **New time-limits for an efficient system**

The AMMR proposal significantly shortens the time limits for sending requests and receiving replies, to ensure faster determination of the Member State responsible.

- The presidency does not propose, at this moment, to change the time-limits *as proposed in the AMMR proposal*.

3) **The fight against secondary movements**

The fight against secondary movements is undeniably another key element of the whole system. Without limiting this phenomenon to the extent possible, most of the other parts of the system will likely not work properly, including the solidarity part of the system.

Given this is a cross-cutting issue, the tools making the fight against secondary movements more effective must be considered across the acquis. The current legislative proposals already include a number of such tools. Examples of the most important tools, are provided below:

- The recast **Eurodac Regulation** will serve as one of the most important tools in terms of proper management and monitoring of the migration situation in the EU, contributing to the fight against secondary movements.
- The new **Screening Regulation** will significantly reduce the number of migrants who are not fingerprinted and checked, also with regard to security threats. Moreover, this regulation provides for the possibility of restrictive measures, including detention.

- The recast **Reception Conditions Directive** stipulates that applicants who apply in a Member State that is not responsible (especially after secondary movement) will not be eligible to receive standard reception benefits. This shall serve as one of the main tools in the fight against secondary movements.
- The new **Asylum and Migration Management Regulation** aims at simplifying the currently overregulated Dublin procedure to revive a functional Dublin system.
- The new **Asylum Procedure Regulation** contains several elements that enable applicants to be treated more effectively after secondary movements. CZ PRES builds on the work of previous Presidencies and is working, together with Member States, to make these rules even more effective, while maintaining necessary procedural guarantees. To highlight a few: new rules for implicit withdrawal that are also applicable in cases of absconding; a strong obligation on the part of the applicant to cooperate, with clear procedural consequences; special rules for those who are already beneficiaries of international protection; and the obligation to issue a return decision together with a negative asylum decision or non-automatic suspensive effect of appeal. Other areas such as the safe countries concept, withdrawals or appeals are about to be discussed at upcoming Asylum WP meetings.
- The fight against secondary movements is also one of the main objectives of the **Instrumentalisation Regulation** through the introduction of the extended scope of the border procedure.
- Further work at higher **convergence of decision on international protection** applications is necessary in order to eliminate abuse of the system (so-called asylum shopping) that is directly linked with secondary movements. The work of the French Presidency and the activities of the EUAA should be therefore further developed.