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From:	General Secretariat of the Council
To:	Asylum Working Party
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], Articles 6(4) and 46-49 - Comments from the delegations

Following the informal videoconferences of the members of Asylum Working Party on 20/21 January 2021, delegations will find attached a compilation of replies received from Member States on the abovementioned subject.

**Written comments submitted by the Member States
Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL
on asylum and migration management and amending Council Directive (EC)
2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration
Fund]
following informal videoconferences of the members of Asylum Working Party
on 20 and 21 January 2021**

Articles 6(4) and 46-49

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AUSTRIA

Article 6 para. 4 Governance and monitoring of the migratory situation

Explanatory comments:

Austria maintains a scrutiny reservation notably due to Austria's negative position on a separate and permanent solidarity mechanism for SAR.

If a Member State faces migratory burdens stemming from disembarkations following search and rescue operations, these burdens should not be addressed by a separate solidarity mechanism for SAR, but by the proposed solidarity mechanism for migratory pressure.

The proposed separate SAR solidarity mechanism would bypass the solidarity mechanism particularly designed for situations of migratory pressure. Fully acknowledging the international obligations including procedural particularities of certain Member States, Austria cannot deduce a coherent argument for the detachment of SAR cases from the concept of "migratory pressure" as an objective criterion and trigger mechanism for systematic and/or compulsory solidarity. In particular there should be no preferential treatment for those who try to reach the EU by boat.

Furthermore, it is questionable whether the Annual Migration Management Report in its current conceptualisation would have the foresight technology and capacity to anticipate migratory flows generated by search and rescue operation sufficiently and on short notice (e.g. current dynamics on the Atlantic Route); additional analytical and foresighting instruments should be examined. In this regard, Austria supports Germany's suggestion in the asylum working group that the Annual Migration Management report should also determine measures, which the benefiting Member State itself should implement.

Moreover, the terms "capacity challenges" and "vulnerable" are unclear and should be clearly defined for more legal clarity (see also comments to Art. 49 para. 4).

Text proposal: Art. 6 para. 4

4. The Commission shall adopt a Migration Management Report each year setting out the anticipated evolution of the migratory situation and the preparedness of the Union and the Member States. In the case of migratory flows generated by search and rescue operations, the Commission shall consult the concerned Member States and the Report shall set out the total number of projected disembarkations in the short term and the solidarity response that would be required to contribute to the needs of the Member States of disembarkation through relocation and through measures in the field of capacity building, operational support and measures in the field of the external dimension **in accordance with Articles 50 ff.** The Report shall also indicate whether particular Member States are faced with capacity challenges due to the presence of third-country nationals who are vulnerable and include the results of the reporting on monitoring listed in paragraph 3 including the information gathered within the framework of the Migration Preparedness and Crisis Blueprint and propose improvements where appropriate.

Article 46 Solidarity Forum

No comments.

Article 47 Solidarity for disembarkations following search and rescue operations

Explanatory comments:

As explained above, Austria maintains a very critical position towards a special and permanent solidarity mechanism after SAR disembarkations and a preferential treatment of those who are disembarked in the EU. Austria took note of the explanations given by COM during the AWP meeting. Nevertheless, Austria is concerned that this could create a pull factor.

Austria also strongly opposes a special solidarity mechanism for vulnerable persons, notably due to legal and practical uncertainties.

It is crucial to clarify in the enacting terms of the regulation (not only in the recitals) that only migrants arriving from countries of origin with a statistical high recognition rate would possibly be subject to voluntary relocation. This should be seen in the context that we know that on the Central and Western Mediterranean routes, in fact, almost all nationalities have a recognition rate lower than 20%. We should be very careful in not sending the wrong signals.

Furthermore, the proposed provisions do not sufficiently take into account the objective of focusing on the external dimension.

Moreover, SAR operations should not primarily be conducted by EU agencies or EU Member States but by third countries. Applicants disembarked after SAR operations, if disembarked in an EU Member State, should be mainly dealt with in a mandatory border procedure or otherwise be treated according to the same rules as all other applicants arriving to the EU. We propose to avoid a special solidarity mechanism after SAR.

Therefore, we propose to delete the respective provisions. Possible pressure situations related to a high number of disembarkations are already covered by the solidarity mechanism of Art. 50 ff.

Text proposal: Art. 47

- ~~1. This Article and Articles 48 and 49 shall apply to search and rescue operations that generate recurring arrivals of third-country nationals or stateless persons onto the territory of a Member State and to vulnerable persons as set out in Article 49(4).~~
- ~~2. Where the Migration Management Report referred to in Article 6(4) indicates that one or more Member States faced with the situations referred to in paragraph 1, it shall also set out the total number of applicants for international protection referred to in Article 45(1), point (a) that would need to be relocated in order to assist those Member States. The report shall also identify any capacity-building measures referred to in Article 45(1), point (d) which are necessary to assist the Member State concerned.~~
- ~~3. Within two weeks of the adoption of the Migration Management Report, the Commission shall invite all other Member States that are not expected to be faced with arrivals on their territory as referred to in paragraph 1 to provide the solidarity contributions referred to in~~

~~paragraph 2. In its request, the Commission shall indicate the total number of applicants to be relocated by each Member State in the form of solidarity contributions referred to in Article 45(1), point (a) by each Member State, calculated according to the distribution key set out in Article 54. The distribution key shall include the share of the benefitting Member States.~~

~~4. Within one month of the adoption of the Migration Management Report, Member States shall notify the Commission of the contributions they intend to make, by completing the SAR Solidarity Response Plan set out in Annex I. Member States shall indicate whether they intend to provide contributions in the form of:~~

~~(a) relocation in accordance with Article 45(1), point (a); or~~

~~(b) measures in accordance with Article 45(1), point (d) identified in the Migration Management Report; or~~

~~(c) relocation in accordance with Article 45(1), point (a) of vulnerable persons pursuant to Article 49(4).~~

~~5. Where the Commission considers that the solidarity contributions indicated by all the Member States pursuant to paragraph 4 fall significantly short of the total solidarity contributions set out in the Migration Management Report, the Commission shall convene the Solidarity Forum. The Commission shall invite Member States to adjust the number and, where relevant, the type of contributions. Member States that adjust their contributions shall submit revised SAR Solidarity Response Plans in the course of the Solidarity Forum.~~

Article 48 Commission implementing acts for search and rescue operations

Explanatory comments:

See comments to Art. 47.

Text proposal: Art. 48

~~1. Within two weeks from the submission of the SAR Solidarity Response Plans referred to in Article 47(4) or two weeks from the end of the Solidarity Forum referred to in Article 47(5), and where the total solidarity contributions indicated by all the Member States in their Plans corresponds to, or is considered by the Commission to be sufficiently close to the total solidarity contributions set out in the Migration Management Report, the Commission shall adopt an implementing act setting out the solidarity measures indicated by Member States pursuant to Article 47(4) or Article 47(5). Such measures shall constitute a solidarity pool for each Member State expected to be faced with disembarkations in the short term.~~

~~Where the Asylum Agency notifies the Commission and the Member States that 80% of the solidarity pool in the first subparagraph has been used for one or more of the EN 78 EN benefitting Member States, the Commission shall convene the Solidarity Forum to inform the Member States of the situation and request Member States to increase their contributions. Following the end of the Solidarity Forum, where Member States have indicated their readiness to make increased contributions the Commission shall amend the implementing act establishing a solidarity pool referred to in the first subparagraph in~~

~~relation to the benefitting Member State concerned to increase the contributions indicated by Member States.~~

~~2. Where the total number or type of solidarity contributions indicated by Member States pursuant to Article 47(5) still falls significantly short of the total solidarity contributions set out in the Migration Management Report leading to a situation where the solidarity pool is not able to provide a foreseeable basis of ongoing support to the Member States referred to in Article 47(2), the Commission shall, within two weeks after the end of the Solidarity Forum, adopt an implementing act establishing a solidarity pool for each Member State expected to be faced with disembarkations in the short term. That implementing act shall set out:~~

~~(a) the total number of third-country nationals to be covered by relocation to contribute to the needs of the Member States referred to in Article 47(2) as identified in the Migration Management Report;~~

~~(b) the number and share referred to in point (a) for each Member State, including the benefitting Member States calculated according to the distribution key set out in Article 54;~~

~~(c) the measures indicated by Member States as set out in Article 45(1), point (d).~~

~~Where Member States have indicated measures set out in Article 45(1), point (d), those measures shall be in proportion to the contributions that the Member States would have made by means of the relocations referred to in Article 45(1), point (a) as a result of the application of the distribution key set out in Article 54. They shall be set out in the implementing act except where the indications by Member States would lead to a shortfall of greater than 30% of the total number of relocations identified in the Migration Management Report. In those cases, the contributions set out in the implementing act shall be adjusted so that those Member States indicating such measures are required to cover 50% of their share calculated in accordance with the distribution key set out in Article 54 through relocation or return sponsorship as referred to in Article 45(1) point (b) or a combination of both. The Member States concerned shall immediately indicate to the Commission how they intend to cover their share in this regard. The Commission shall adjust the contributions set out in the implementing act regarding relocation, return sponsorship and the measures referred to in Article 45(1), point (d) for those Member States accordingly.~~

~~Where one or more Member States have not submitted an SAR Solidarity Response Plan within the time limits set out in Article 47(4) and Article 47(5), the Commission shall determine the amount and type of contributions to be made by those Member States.~~

~~Where the Asylum Agency notifies the Commission and the Member States that 80% of the solidarity pool in the first subparagraph has been used for one or more of the benefitting Member States, the Commission shall convene the Solidarity Forum to inform the Member States of the situation and the additional needs of the Member States. Following the Solidarity Forum the Commission shall adopt an amendment to the implementing act establishing a solidarity pool referred to in the first subparagraph in relation to the benefitting Member State concerned to increase the total number of third-country nationals covered by the solidarity measures referred to in point (a) of the first subparagraph by a maximum of 50%. The share of each Member State referred to in point (b) of the first subparagraph shall be amended accordingly. Where the provisions of the second subparagraph are applied and Member States have indicated that they shall contribute through return sponsorship, the share of these measures shall be increased by 50%. The measures referred to in Article 45(1), point (d) shall also be increased by a share that is in~~

~~proportion to a 50% increase of that Member States share calculated according to the distribution key set out in Article 54.~~

~~3. The implementing act referred to in paragraphs 1 and 2 shall be adopted in accordance with the examination procedure referred to in Article 67(2).~~

Article 49 Solidarity pool for search and rescue operations

Explanatory comments:

See comments to Art. 47.

As also brought forward by several other Member States during the AWP meeting, Austria considers Art. 49 – referring to Art. 49(4) – misleading since it seems to foresee not only provisions on SAR, but also a general preferential solidarity mechanism for persons with vulnerabilities.

The legal text as it currently stands does not establish that disembarkations following SAR operations are a precondition to apply a solidarity mechanism for vulnerable persons. A clarification is needed and should not leave any room for interpretation in this regard. Moreover, it is unclear what “capacity challenges” specifically refer to. Austria does not support a concept setting out that capacity challenges alone can trigger a solidarity mechanism, as this could be a signal in the wrong direction. In addition, it is not clear which authority would - on which criteria - determine whether applicants are vulnerable or not according to this provision.

Austria proposes to delete this Article.

Text proposal: Art. 49

~~1. Within two weeks of the adoption of the implementing act referred to in Article 48(1) or Article 48(2), the Member State referred to in Article 47(2) shall notify the Commission of its request for solidarity support. Following that request, the Commission shall draw on the solidarity pool and coordinate the implementation of the solidarity measures for each disembarkation or group of disembarkations taking place in a period of two weeks.~~

~~2. Under the coordination of the Commission, the Asylum Agency and the European Border and Coast Guard Agency shall draw up the list of eligible persons to be relocated and to be subject to return sponsorship. The list shall indicate the distribution of those persons among the contributing Member States taking into account the total number of persons to be relocated or to be subject to return sponsorship by each contributing Member State, the nationality of those persons and the existence of meaningful links between them and the Member State of relocation or of return sponsorship. Priority shall be given to the relocation of vulnerable persons. The Asylum Agency and the European Border and Coast Guard Agency shall assist the Commission in monitoring the use of the solidarity pool.~~

~~3. Where the Commission has adopted a report concluding that a Member State referred to in Article 47(2) is under migratory pressure as set out in Article 51(3), the remaining solidarity contributions from the solidarity pool established under Article 48(1) or Article 48(2) may be used for the purpose of immediately alleviating the migratory pressure on that Member State. In such cases, the provisions of paragraph 2 shall apply.~~

~~This paragraph shall not apply where an implementing act provided for in Article 53 is adopted. As from the adoption of that implementing act drawing on the list of eligible~~

~~persons to be relocated and to be subject to return sponsorship as provided for in paragraph 2 shall cease.~~

~~Where the solidarity pool referred to in the first subparagraph is insufficient for the purpose of immediately alleviating the challenges faced by the Member State referred to in Article 47(2), solidarity contributions from the solidarity pool of the other Member States established under Article 48(1) or Article 48(2) may be used N 80 EN~~

~~insofar as this does not jeopardize the functioning of the pool for those Member States.~~

~~4. Where the Migration Management Report identifies that a Member State referred to in Article 47(2) is faced with capacity challenges due to the presence of applicants who are vulnerable regardless of how they crossed the external borders, the solidarity pool established under Article 48(1) or Article 48(2) may also be used for the purpose of relocation of vulnerable persons. In such cases, the provisions of paragraph 2 shall apply.~~

~~5. The Commission shall support and facilitate the procedures leading to the relocation of applicants and the implementation of return sponsorship, paying particular attention to unaccompanied minors. It shall coordinate the operational aspects of relocation and return sponsorship, including with the assistance of experts or teams of experts to be deployed by the Asylum Agency or the European Border and Coast Guard Agency.~~

THE CZECH REPUBLIC

Articles 46-49 and Article 6. 4 - Solidarity after disembarkation following search and rescue operations – Proposal for a Regulation on asylum and migration management

General comments:

As has been mentioned several times the Czech Republic ("CZ") raises scrutiny reservation towards the whole proposal. Moreover, CZ has the substantial reservation regarding all parts of the proposal which enable direct or indirect mandatory redistribution of the foreigners among Member states.

Regarding solidarity mechanism following disembarkation after search and rescue operations CZ is not convinced about the necessity to have special solidarity mechanism when the Member State of disembarkation is not under migratory pressure.

The proposed automatic and mandatory mechanism CZ considers as a strong *pull factor* for irregular arrivals to the EU through this pathway.

Previous comments regarding the solidarity mechanism with the Member State under migratory pressure are also valid for this part of the proposal.

Article 47

Regarding paragraph 1 - We are not sure whether the proposal presumes the special mechanism for vulnerable groups regardless how they enter the territory of the respective Member State.

Paragraph 4 - This provision states that solidarity contribution should be provided only in the form of relocation or capacity building. On the contrary other provisions (for example Article 49) of the solidarity mechanism following disembarkation after search and rescue also admits return sponsorship. We kindly ask for clarification.

Article 49

Regarding a list of persons eligible for relocation or to be a subject of the return sponsorship, CZ is of the opinion that the role of the benefiting Member State should be extended in some way. Moreover, the mechanism of indication who may be eligible should be more mirrored directly in the text.

CZ is not sure whether a return sponsorship should be applied only to persons who have been disembarked following SAR operations or the other third country nationals may be included to the list.

Article 6 paragraph 4

CZ shares the views of some other delegations, where the delegations mentioned the objections regarding the vague formulations such as “short term”.

ESTONIA

Estonia's proposals following the 20-21.01.2021 AWP meeting.

1. Article 6 (Governance and monitoring of the migratory situation) paragraph 4

Proposal: to amend the 2nd sentence as follows

„In the case of migratory flows generated by disembarkations following search and rescue operations resulting a situation of migratory pressure, the Commission shall consult the concerned Member States and the Report shall set out the total number of projected disembarkations in the short term and the solidarity response that would be required to contribute to the needs of the Member States of disembarkation under migratory pressure through relocation and/or through measures in the field of capacity building, operational support and measures in the field of the external dimension.“

Reasoning: We cannot support SAR as a separate category in the context of AMMR. SAR should be seen as an important factor, when assessing situations of migratory pressure and needs in order to handle the situation. Therefore such clear indication to the situation of migratory pressure is needed in the paragraph 4.

2. Article 46 (Solidarity Forum)

General comment: It is important to us that relocation is not prioritized among all types of needed solidarity contributions. Contributing MS should be able to choose the type of contribution among those assessed as needed by the MS under pressure. All types of needed contributions in comparable proportion should be seen as of equal value, without prioritizing relocation or transfer of persons.

Mandatory relocation or transferral of illegally staying migrants should not be an option. Return sponsorship should not result in mandatory transferral of returnees. Such measure would not make returns more effective and would possibly create additional secondary movements and a strong pull factors. Creating pull factors should be avoided.

3. Article 47 (Assessment of migratory pressure), Article 47 (Solidarity for disembarkations following search and rescue operations), Article 48 (Commission implementing acts for search and rescue operations) and Article 49 (Solidarity pool for search and rescue operations)

Proposal: to delete articles 47 to 49 in their entirety

Reasoning: We cannot support SAR as a separate category in the context of AMMR. In our opinion by creating a separate management mechanism to one specific *modus operandi* of crossing borders illegally would possibly result creating an additional strong pull factor and would possibly consequently result of more migrants suffering. Creating pull factors should be avoided.

FRANCE

Article 6, paragraphe 4 (gouvernance et suivi de la situation migratoire)

- En soutien des commentaires de l'Allemagne lors du groupe asile du 20 janvier, la France souhaite amender la deuxième phrase de ce paragraphe afin de ne pas donner l'impression que les flux migratoires sont générés par les opérations SAR.
- Le rapport sur la gestion de la migration conditionne les contributions de solidarité qui seront mises en œuvre par les États membres, alors qu'il se base sur une approche théorique et prospective. Il semble donc nécessaire que les États membres concernés par des débarquements soient pleinement associés dans son élaboration, afin de leur offrir une meilleure prévisibilité sur ses conclusions.

La France propose les amendements suivants (2^e phrase) :

« In the case of ~~migratory flows~~ disembarkations generated by search and rescue operations, the Commission shall ~~consult~~ closely associate the concerned Member States and the Report shall set out the total number of projected disembarkations in the short term and the solidarity response that would be required to contribute to the needs of the Member States of disembarkation through relocation and through measures in the field of capacity building, operational support and measures in the field of the external dimension. »

Article 46 (forum de solidarité)

- Les modalités de fonctionnement du forum sur la solidarité doivent être précisées. A cet effet, l'article 46 pourrait être développé afin que les dispositions sur le champ d'intervention de ce forum d'États membres et sur son fonctionnement soient rassemblées et présentées en un seul article plutôt que dispersées comme actuellement. En l'état du texte, il est difficile d'évaluer la capacité de cette instance à trouver un consensus rapide au sujet des contributions proposées par les États membres, notamment en l'absence de délais prévus.

Article 47 (solidarité en matière de débarquement faisant suite à des opérations de recherche et de sauvetage)

Paragraphe 1 :

- Le mécanisme de solidarité établi par cet article doit être précisé afin de faire ressortir plus clairement que les personnes vulnérables visées au premier paragraphe sont des ressortissants de pays tiers issus de débarquements à la suite de sauvetages en mer.

La France propose l'amendement suivant :

« This Article and Articles 48 and 49 shall apply to search and rescue operations that generate recurring arrivals of third-country nationals or stateless persons, including vulnerable applicants referred to in Article 49(4) onto the territory of a Member State and to vulnerable persons as set out in Article 49(4) ».

Paragraphe 3 :

- Afin de gagner en efficacité dans la mise en œuvre de la solidarité, la Commission pourrait directement inviter les États membres à apporter leurs contributions de solidarité dès l'adoption du rapport, et ainsi épargner un éventuel délai de deux semaines.
- Par ailleurs, les États membres offrant des contributions de solidarité doivent prioriser les relocalisations de personnes en besoin de protection, afin de soulager les États membres sujets aux débarquements suivant des opérations de sauvetage en mer.
- Par cohérence avec le mécanisme de pression migratoire établi aux articles 52 et suivants du règlement, les États membres en situation de pression migratoire – telle que définie par l'article 50 dudit règlement – doivent être exclus du mécanisme de solidarité obligatoire dans le cadre de la solidarité en matière de débarquements.

La France propose les amendements suivants (1^e phrase) :

« ~~Within two weeks of the adoption of the Migration Management Report, the Commission shall invite~~ As soon as the report on asylum and migration management is adopted, the Commission shall invite all other Member States that are not expected to be faced with arrivals on their territory as referred to in paragraph 1, as well as those who are subject to migratory pressure as assessed by the Commission as defined in article 50, to provide the solidarity contributions referred to in paragraph 2, prioritizing relocations of persons in need of protection».

Article 48 (actes d'exécution de la Commission relatifs aux opérations de recherche et de sauvetage)

- Il conviendrait de préciser textuellement au paragraphe 2 que l'acte d'exécution mentionné correspond bien à une modification de l'acte d'exécution initial (tel que prévu au paragraphe 1), comme l'a confirmée la Commission lors du groupe asile du 20 janvier.
- De manière générale, le rôle du Conseil et des États membres doit être renforcé dans le mécanisme de correction envisagé au paragraphe 2.

Article 49 (réserve de solidarité pour les opérations de recherche et de sauvetage)

Paragraphe 4 :

- En miroir avec nos commentaires sur l'article 47, paragraphe 1, la France propose l'amendement suivant :

« Where the Migration Management Report identifies that a Member State referred to in Article 47(2) is faced with capacity challenges due to the presence of applicants who are vulnerable ~~regardless of how they crossed the external borders~~, the solidarity pool established under Article 48(1) or Article 48(2) may also be used for the purpose of relocation of vulnerable applicants disembarked after a search and rescue operation persons. In such cases, the provisions of paragraph 2 shall apply ».

GERMANY

Allgemeine Vorbemerkung zur Seenotrettung

Zahlreiche MS haben im JI-Rat vom Dezember letzten Jahres Unterstützung für die in Ziffer 10 des Fortschrittsberichts der DEU PRÄS formulierten Grundsätze signalisiert (dort heißt es: „Due to their geographical situation, the Member States at the EU external borders have a significant role in the functioning of the European migration and asylum management, and they must not be left without reliable and strong support of all Member States. Owing to the particularities of disembarking after rescue at sea, a solution in regard to an appropriate solidarity mechanism addressing such cases is crucial for the European Union as a whole as it may contribute to release migratory pressure on the Member States of first arrival. The Joint Declaration of Intent on a controlled emergency procedure signed by Malta, Italy, France and Germany on 23 September 2019 is a useful operational example of solidarity through action but a more coherent approach needs to be developed, taking into consideration swift asylum procedures, effective return procedures and the prevention of pull factors based on the proposals of the Pact on Migration and Asylum. In order to make progress in creating a common understanding in this regard, further structured and constructive study and discussion at technical and political level are needed. The Commission is invited to set up the contact group on search and rescue as soon as possible“). Wir unterstützen diese Leitsätze.

Zudem ist aus unserer Sicht neben zahlreichen Details, zu denen wir bei den einzelnen Artikeln kommen werden und die wir im Einzelnen noch prüfen müssen, aus grundsätzlicher Sicht Folgendes zu berücksichtigen:

Menschen in Seenot vor dem Ertrinken zu retten, entspricht nicht nur europäischen Werten. Es ist auch völkerrechtliche und humanitäre Verpflichtung. Faktisch obliegt es zunächst dem Schiffsführer, Menschen in Seenot Hilfe zu leisten. Als Küstenstaaten sind die (südlichen) EU-Mitgliedstaaten verpflichtet, einen Such- und Rettungsdienst in ihrer dortigen jeweiligen SAR-Zone zu errichten und Rettungen zu koordinieren. Auch aus humanitären Gründen muss es Ziel sein, lange Wartezeiten bis zur Hafenzuweisung und Ausschiffung zu verhindern.

Eine sachliche Debatte erfordert, den Zusammenhang zwischen Seenotrettung und Asyl(anträgen) offen zu diskutieren. Dabei gilt, dass die Pflicht zur Rettung auf See unabhängig davon besteht, welcher Staat für möglicherweise anschließend gestellte Asylanträge zuständig ist. Zugleich müssen wir anerkennen, dass die Durchführung der Seenotrettung faktisch zu einer erhöhten Belastung bei jenen MS führt, in deren Häfen die Ausschiffung der aus Seenot Geretteten erfolgt.

Denn diese MS sind nach den Zuständigkeitsregelungen als Ersteinreisestaat in der Regel für die Durchführung der Asylverfahren von Seenotgeretteten ebenso zuständig wie für deren Rückkehr, sofern kein Asylantrag gestellt wird (und auch sonst kein Aufenthaltsrecht besteht) oder dieser rechtskräftig abgelehnt wurde.

Diese mit der Ausschiffung von aus Seenot Geretteten einhergehende Mehrbelastung kann sich im Ausschiffungsstaat ganz unterschiedlich auswirken. Das zeigt die Praxis der letzten Jahre. Bei einigen MS führen Ausschiffungen von Seenotgeretteten und deren Asylantragsstellungen regelmäßig zu größeren Belastungen. Hier ist in unseren Augen die Solidarität aller MS in besonderem Maße erforderlich. Das führt letztlich zur Debatte des allgemeinen Solidaritätsmechanismus der Art. 50 ff.

In anderen Fällen mag die Stellung von Asylanträgen nach Ausschiffungen von Seenotgeretteten nicht dazu führen, dass der Migrationsdruck im Ausschiffungsstaat auch insgesamt erhöht ist. DEU hat sich als Unterzeichner der MLT-Erklärung in den letzten Jahren auch in solchen Fällen trotz erheblicher eigener Belastung mit Asylverfahren solidarisch gezeigt und freiwillig zur Übernahme der Zuständigkeit für die Durchführung der Asylverfahren von bisher bis zu 1.314 zuvor aus Seenot geretteten Asylsuchenden bereit erklärt. Dem lagen insbesondere humanitäre Erwägungen zugrunde.

Allgemein streben wir entsprechend unserem Konzeptpapier aus 2020 im Rahmen der GEAS-Reform ein fair-share-basiertes Zuständigkeitsregime an, das für alle Zugangswege gleichermaßen gelten sollte. Die Privilegierung eines Zugangsweges ist demgegenüber mit dem Solidaritätsgedanken nicht ohne weiteres begründbar. Zudem weicht eine migrationsdruckunabhängige Verteilung innerhalb der KOM-Vorschläge vom sonstigen Konzept ab (das Umverteilung ansonsten nur bei Druck vorsieht).

Um unsere Position zu dieser Frage zu verdeutlichen, bedarf es einer Einordnung in den Gesamtkontext der GEAS-Reform: Das nach unserer Überzeugung zielführende fair- share-basierte Zuständigkeitsregime ist sehr solidarisch, aber nur eines von drei aus DEU Sicht zentralen Kernelementen: Ebenso wichtig sind, wie sogleich näher ausgeführt, ein schnelles Grenzverfahren von offensichtlich aussichtslosen Asylanträgen an den EU-Außengrenzen und effektive Maßnahmen zur Verhinderung irregulärer Sekundärmigration (bei gleichzeitiger Einhaltung rechtsstaatlicher Standards). Wir fordern also ein hohes Maß an Solidarität UND Verantwortlichkeit.

Im Rahmen der KOM-Vorschläge könnten wir uns deshalb einen migrationsdruckunabhängigen seenotrettungsspezifischen Solidaritätsmechanismus (als Ausnahme der im KOM-Vorschlag grundsätzlich nur bei Migrationsdruck vorgesehenen Umverteilung) grundsätzlich nur dann vorstellen, wenn auch das Gesamtsystem im Übrigen stimmt. Das heißt insbesondere auch:

1. effektive Maßnahmen zur Verhinderung oder jedenfalls Verringerung von irregulärer Sekundärmigration, wie beispielsweise eine grundsätzlich dauerhafte Zuständigkeit und deutlich effizientere, unbürokratische Überstellungen durch Notifizierungsverfahren

2. schnelle Vorprüfung von Asylanträgen an den EU-Außengrenzen, um Anträge, die offensichtlich keinen Erfolg haben können, frühzeitig zu identifizieren und im Grenzverfahren einer Entscheidung zuzuführen
3. bei Einhaltung rechtsstaatlicher Grundsätze (Gewährleistung effektiven Rechtsschutzes und Berücksichtigung der besonderen Belange und Rechte von Familien mit Minderjährigen und weiterer vulnerabler Gruppen in allen Verfahrensschritten).
4. Im Rahmen der KOM-Vorschläge sollten sich MS, die eine seenotrettungsspezifische Solidarität erfahren, obwohl sie nicht unter Migrationsdruck stehen, ihrerseits an Solidaritätsleistungen zugunsten anderer, unter Migrationsdruck stehender MS beteiligen: Artikel 52 (1) geht diesbezüglich zu weit und privilegiert pauschal alle „benefitting MS“. Von der Solidaritätspflicht sollten aber nur jene „benefitting MS“ ausgeschlossen sein, die auch selbst unter Migrationsdruck stehen.

Zu den einzelnen Artikeln nehmen wir - unter dem Vorbehalt, dass unsere eben angeführten grundsätzlichen Voraussetzungen für eine migrationsdruckunabhängige Solidarität erfüllt werden - nach vorläufiger erster Prüfung wie folgt Stellung. Wir behalten uns dabei weitere Stellungnahme vor und erinnern an unseren Prüfvorbehalt gegen die gesamte VO und allen ihren Artikeln und Erwägungsgründen.

Artikel 2 (SAR-relevante Definitionen)

Wir prüfen die Legaldefinitionen noch im Kontext des jeweiligen Sachzusammenhangs. Zu den solidaritäts- und seenotrettungsspezifischen Definitionen äußern wir uns nach erster Prüfung wie folgt:

Gegen die Legaldefinition von lit. r, die auch Seenotrettungssolidarität umfasst, bestehen im Allgemeinen keine Bedenken. Klarzustellen ist aber, dass auch „MS of disembarkation“ sich gegenüber anderen MS solidarisch zeigen müssen, solange sie nicht selbst aufgrund von Migrationsdruck (!) Solidarität erfahren. Diese wichtige Klarstellung sollte aus unserer Sicht in Artikel 52 (1) erfolgen.

Die Definition des „contributing MS“ nach lit. s können wir grds. unterstützen.

Zu allen anderen Legaldefinitionen, u.a. zu der des „Migrationsdruckes“ in lit. w, legen wir Prüfvorbehalt ein.

Artikel 6, Absatz 4 (Bericht zum Migrationsmanagement)

Mit der Formulierung des Absatzes sind wir nach erster Prüfung grundsätzlich einverstanden, soweit der Solidaritätsmechanismus im Zusammenhang mit der Seenotrettung betroffen ist.

Im zweiten Satz sollte stärker betont werden, dass die „migratory flows“ nicht durch die Seenotrettung selbst, sondern die Ausschiffung nach der Rettung aus Seenot entsteht („In the case of migratory flows generated **in the context of disembarkations following** search and rescue operations...“).

Zudem sollten nach unserer Auffassung im Migration Management Report nicht nur die

Solidaritätsmaßnahmen der beitragenden MS festgelegt werden, sondern auch die Anforderungen und Maßnahmen, die sich an den begünstigten MS im Bereich von Asyl und Rückkehr richten - ebenso wie dies im Report on Migratory Pressure gemäß Artikel 51 (3) lit. b (i) der Fall ist.

Artikel 46

Der Artikel wird nach erster Prüfung begrüßt, da durch das Solidarity Forum eine wertvolle Gelegenheit für Verhandlungen zwischen den MS geschaffen wird, sofern das im Migrationsmanagementplan festgelegte Ziel noch nicht erreicht ist und bevor die KOM i.S.d. Art. 48 Abs. 2 zu verpflichtenden Maßnahmen greifen muss.

Artikel 47

Wir haben nach erster Sichtung grundsätzlich keine Einwände gegen die Absätze 1,2 und 4.

Absatz 3 wird nach erster Sichtung mit Blick auf die genannten, aus unserer Sicht gut gewählten Fristen begrüßt. Des Weiteren begrüßen wir ausdrücklich, dass (im letzten Satz) im Verteilungsschlüssel (distribution key) auch der Anteil der begünstigten Mitgliedstaaten einbezogen ist.

Absatz 5 wird nach erster Prüfung ebenfalls begrüßt.

Artikel 48

Gegen Absatz 1 bestehen grundsätzlich keine Einwände, insbesondere mit Blick auf die Bildung eines vorausschauenden Solidaritätspools, die enthaltene Frist sowie die Aufforderung zur Erhöhung des Solidaritätspools bei Ausschöpfung von 80%.

Absatz 2, 1. Unterabsatz und insbesondere zu Absatz 3: Prüfvorbehalt hinsichtlich der Frage, ob Implementierungsrechtsakt das richtige Element zur Herbeiführung der politischen Entscheidung ist (wie auch schon zum allgemeinen Solidaritätsmechanismus, siehe dort Artikel 53).

Absatz 2, 2. Unterabsatz: Bei aller noch erforderlichen Prüfung im Einzelnen, ist nach unserer Auffassung ein verpflichtender Beitrag zur Relocation von bzw. Return Sponsorship für Personen bei auch nach dem Solidaritätsforum unzureichenden freiwilligen Beiträgen in Höhe von 50% ihres Anteils grundsätzlich ein sinnvoller Anreiz, bereits zuvor freiwillig entsprechende Solidarität zu zeigen. Zugleich erhöht sich dadurch im positiven Sinne die Notwendigkeit, im vorangehenden Solidaritätsforum eine freiwillige Lösung zwischen den Mitgliedstaaten herbeizuführen. Das ist aber nur unsere vorläufige erste Einschätzung. Auch die in Absatz 2, 2. Unterabsatz konkret vorgesehenen Schwellenwerte gilt es noch zu prüfen. Sie scheinen jedoch nach erster Einschätzung in ihrer Höhe grundsätzlich angemessen gewählt.

Absatz 2, 3. Unterabsatz: Prüfvorbehalt

Absatz 2, 4. Unterabsatz: Prüfvorbehalt. Die pauschale Erhöhung der Beiträge bei Ausschöpfung von 80% des Solidarity Pools wird gegenwärtig noch geprüft. Wir gehen nach den Erläuterungen in der RAG vom 13.1.2021 davon aus, dass mit „adopt an amendment to the implementing act“ die Durchführung eines erneuten Komitologieverfahrens zur Ergänzung des ursprünglichen

implementing act gemeint ist. Eine „automatische“ Erhöhung der im ursprünglichen implementing act enthaltenen Solidaritätsbeiträge erschiene uns jedenfalls in Situationen problematisch, in welchen die ursprüngliche Prognose des Migrationsmanagementplan deutlich überschritten wird. Hier erscheint eine erneute politische Entscheidung sinnvoll. Zudem prüfen wir noch das Verhältnis zu der infolge von Migrationsdruck ausgeübten Solidarität, welche in den genannten Fällen ebenfalls relevant werden dürfte/könnte.

Absatz 3: Prüfvorbehalt aus den oben zu Absatz 2, 1. Unterabsatz genannten Gründen

Artikel 49

Absatz 1: Hiergegen bestehen grundsätzlich keine Einwände.

Absatz 2: Dieser Absatz wird gegenwärtig vor dem Hintergrund bereits vorhandener praktischer Erfahrung noch geprüft, insbesondere

- ob die Vermeidung von „Rosinenpickerei“ („cherry picking“) im Sinne der Auswahl bestimmter aus Seenot geretteter Personen zu Lasten der Verbleibenden hinreichend sichergestellt ist,
- ob die Möglichkeit einer Sicherheitsprüfung durch den beitragenden Mitgliedstaat (auch vor Ort) sinnvoll sichergestellt ist und potentielle Fälle, in denen Sicherheitsbedenken bestehen, nicht umverteilt werden, letzteres auch vor dem Hintergrund möglicher einschlägiger Regelungen in anderen Regelungen des New Pacts.

Absatz 3: Prüfvorbehalt, insbesondere vor dem Hintergrund operativer Fragestellungen der beschriebenen Umwidmung von Solidaritätsbeiträgen sowie aufgrund der von uns noch zu vertiefenden Frage, ob und wie eine solche Umwidmung des Solidaritätspools einer politischen Entscheidung bedarf. Eine Umwidmung hätte zudem wohl zur Folge, dass innerhalb des seenotrettungsspezifischen Solidarity Pools nachzusteuern wäre - auch diesen Aspekt wollen wir noch genauer prüfen (siehe bereits oben zu Artikel 48 Abs. 2, 4. Unterabsatz).

Absatz 4: Prüfvorbehalt aus denselben Gründen wie bei Absatz 3. Zudem werden durch den Verweis auf Artikel 47 Absatz 2 MS privilegiert, in welchen Ausschiffungen von Seenotrettungsfällen stattfinden. Wir bitten KOM, diese Privilegierung ggü. jenen MS, in die vulnerable Personen auf anderem Wege einreisen, zu erläutern.

Absatz 5: Wir haben nach erster Sichtung keine Einwände gegen diesen Absatz.

COURTESY TRANSLATION TO EN

General remarks on search and rescue at sea:

At the JHA Council last December, many member states signalled their support for the principles expressed in no. 10 of the German Presidency's progress report¹. Germany supports these guiding principles.

We also believe that, in addition to numerous details which we will address when discussing the individual articles and which we still need to examine further, the following must be noted:

Saving people in distress at sea from drowning is not only in line with European values, it is also a humanitarian obligation and an obligation under international law. In practice, it is first of all the responsibility of the ship's captain to assist those in distress at sea. As coastal states, the (southern) EU member states are obligated to establish search and rescue services in their respective SAR zones of responsibility and to coordinate rescue operations. For humanitarian reasons as well, the aim must be to avoid long waiting times before a port is assigned and the rescued persons can disembark.

To debate the issues reasonably, it is essential to explicitly discuss the connection between search and rescue at sea and asylum (applications). The obligation to rescue persons in distress at sea applies no matter which country may be responsible for any future applications for asylum. At the same time, we must acknowledge that search and rescue operations necessarily create additional burdens for those member states in whose ports the rescued persons disembark. That is because these member states are the countries of first entry and, according to the rules on responsibility, are generally responsible for conducting the asylum procedures of persons rescued at sea and for returning them to their countries of origin, if they do not apply for asylum (or otherwise have no right of residence) or if their application was rejected with no further possibility to appeal.

¹ **No. 10 of the German Presidency's progress report reads as follows: "Due to their geographical situation, the Member States at the EU external borders have a significant role in the functioning of the European migration and asylum management, and they must not be left without reliable and strong support of all Member States. Owing to the particularities of disembarking after rescue at sea, a solution in regard to an appropriate solidarity mechanism addressing such cases is crucial for the European Union as a whole as it may contribute to release migratory pressure on the Member States of first arrival. The Joint Declaration of Intent on a controlled emergency procedure signed by Malta, Italy, France and Germany on 23 September 2019 is a useful operational example of solidarity through action but a more coherent approach needs to be developed, taking into consideration swift asylum procedures, effective return procedures and the prevention of pull factors based on the proposals of the Pact on Migration and Asylum. In order to make progress in creating a common understanding in this regard, further structured and constructive study and discussion at technical and political level are needed. The Commission is invited to set up the contact group on search and rescue as soon as possible".**

These additional burdens associated with the disembarkation of persons rescued from distress at sea can have very different impacts on the member states of disembarkation, as the practice in recent years has shown. The disembarkation of persons rescued at sea and their applications for asylum regularly create an overall migratory pressure for some member states. We believe that this is where solidarity from all the member states is especially needed, which ultimately leads to debate over the general solidarity mechanism in Article 50 and following.

In other cases, applications for international protection submitted after disembarkation might not increase overall migratory pressure in the member state of disembarkation. As a signatory to the Malta Declaration, Germany has nonetheless demonstrated solidarity in such cases in recent years, despite being significantly burdened with asylum applications itself, and has to date voluntarily agreed to assume responsibility for processing asylum applications from up to 1,314 asylum seekers rescued at sea. Germany did so above all for humanitarian reasons.

In general, and in line with our concept paper of 2020 on CEAS reform, we seek a regime for determining responsibility which is based on the fair-share principle and applies equally no matter which route is used to enter the EU. Privileging one access route over others could not be justified by the principle of solidarity. Further, relocation under the Commission's proposals would depart from the overall concept, which provides for relocation only in case of migratory pressure.

To make our position on this issue clear, it is necessary to put it in the overall context of CEAS reform: a fair-share-based regime for assigning responsibility, which we believe is the most effective, provides a high level of solidarity but is only one of three elements which Germany considers key; equally important (as we will explain in more detail below) are rapid border procedures for obviously hopeless asylum applications at the EU's external borders and effective action to prevent irregular secondary movement (while upholding rule-of-law standards). We therefore want a high level of solidarity AND responsibility.

With regard to the Commission's proposals, we could therefore imagine a solidarity mechanism specifically for search and rescue and independent of migratory pressure (as an exception to relocation, which the Commission's proposal provides for only in the case of migratory pressure) only if the overall system is otherwise in order. That means in particular the following:

- 1. effective measures to prevent or at least reduce irregular secondary movement, for example permanent assignment of responsibility and significantly more efficient, unbureaucratic transfers using the notification procedure; rapid initial assessment of asylum applications at the EU's external borders in order to identify at an early stage applications which clearly cannot succeed and to decide on them using the border procedure;**

2. **rapid initial assessment of asylum applications at the EU's external borders in order to identify at an early stage applications which clearly cannot succeed and to decide on them using the border procedure;**
3. **ensuring that these measures comply with the principles of the rule of law (ensuring effective legal redress and taking into account the special needs and rights of families with minor children as well as other vulnerable groups at every stage of the procedure).**
4. **According to the Commission's proposals, member states which experience SAR-related solidarity even though they are not under migratory pressure would themselves not have to contribute to solidarity benefits for other member states under migratory pressure. Article 52 (1) goes too far in this regard and gives blanket priority to all "benefiting member states". However, only those "benefiting member states" that are themselves under migratory pressure should be excluded from the obligation of solidarity.**

Subject to the reservation that our general conditions for solidarity independent of migratory pressure, as explained above, are met, and following an initial preliminary examination, we comment on the individual articles as follows. We reserve the right to make further comments and confirm our scrutiny reservation on the entire Regulation and all its articles and recitals.

Article 2 (SAR-related definitions)

We are still examining the legal definitions in the context of the specific issue. Following an initial examination, we comment on the definitions specific to solidarity and search and rescue as follows:

In general, we have no concerns about the legal definition in (r), which includes solidarity measures following search and rescue operations. However, it is necessary to clarify that "member states of disembarkation" must also show solidarity with other member states as long as the former are themselves not under migratory pressure. In our view, this important clarification should be included in Article 52 (1).

In principle, we can support the definition of "contributing member state" in (s).

Regarding all other legal definitions, including that of "migratory pressure" in (w), we enter a scrutiny reservation.

Article 6 (4) (Migration Management Report)

Following an initial examination, we generally agree with the wording of the paragraph where it refers to the solidarity mechanism in connection with search and rescue operations.

The second sentence should put greater emphasis on the fact that migratory flows are not generated by search and rescue operations themselves, but by disembarkation after rescue from distress at sea ("In the case of migratory flows generated **in the context of disembarkations following** search and rescue operations").

Further, in our view the Migration Management Report should set out not only the solidarity response required from contributing member states, but also the measures that the benefiting

member state should take in the field of asylum and return - as does the Report on Migratory Pressure according to Article 51 (3) (b) (i).

Article 46

Following our initial examination, we welcome this article, because the Solidarity Forum would create a valuable opportunity for negotiating among the member states if the goal set in the Migration Management Report has not yet been reached and before the Commission must resort to mandatory measures as referred to in Article 48 (2).

Article 47

Following an initial review, we have in principle no objections to paragraphs 1,2 or 4.

Following an initial review, we welcome paragraph 3 and find the time limits mentioned to be well-chosen. Further, we explicitly welcome the fact that the distribution key in the final sentence includes the share of the benefiting member states.

Following an initial examination, we also welcome paragraph 5.

Article 48

In principle, we have no objections to paragraph 1, in particular with regard to creating a solidarity pool, to the time limit mentioned or to the call to increase the solidarity pool if 80% of the solidarity pool has been used.

Paragraph 2, sub-paragraph 1 and in particular paragraph 3: Scrutiny reservation on whether an implementing act is the right way to bring about a political decision (as in the case of the general solidarity mechanism; see Article 53).

Paragraph 2, sub-paragraph 2: Although a detailed examination is still needed, we believe that requiring all member states to cover 50% of their share through relocation and/or return sponsorship if voluntary contributions are insufficient following the Solidarity Forum is a useful incentive to encourage voluntary solidarity contributions. It would also increase the need to come up with a voluntary solution among member states in the preceding Solidarity Forum. However, this is only our preliminary assessment. It is also necessary to examine the specific thresholds provided for in paragraph 2, sub-paragraph 2. Following our initial assessment, the amounts appear in principle to be appropriate.

Paragraph 2, sub-paragraph 3: Scrutiny reservation

Paragraph 2, sub-paragraph 4: Scrutiny reservation. We are currently examining the blanket increase in contributions if 80% of the solidarity pool has been used. Based on the explanations in the Council Working Party of 13 January 2021, we assume that “adopt an amendment to the implementing act” means conducting another comitology procedure to add to the original implementing act. In our view, “automatically” increasing the solidarity contributions contained in the original implementing act would be problematic at least in situations in which the original forecast in the Migration Management Report is significantly exceeded. In this case, a new political

decision would appear to make sense. We are also still examining the relation to solidarity contributed as a result of migratory pressure, which could be equally relevant in the situations referred to.

Paragraph 3: Scrutiny reservation for the same reasons as for paragraph 2, subparagraph 1 above.

Article 49

Paragraph 1 : In principle, we have no objections.

Paragraph 2: We are currently examining this paragraph in light of practical experience, in particular

- whether measures to prevent “cherry picking”, i.e. selecting certain persons rescued at sea to the detriment of the others, are sufficient, and
- whether the possibility for the contributing member state to conduct security checks (including on site) is sufficiently ensured, and persons who might pose a security risk are not relocated (the latter also in the context of relevant provisions in other legislation in the New Pact).

Paragraph 3: Scrutiny reservation, in particular with regard to operational issues related to redirecting solidarity contributions as described and due to the question (which we plan to investigate further) whether and how such redirection of the solidarity pool requires a political decision. Redirection would also likely require readjusting the SAR- specific solidarity pool; we would also like to examine this aspect more carefully (see above regarding Article 48 (2) subparagraph 4).

Paragraph 4: Scrutiny reservation for the same reasons as for paragraph 3. The reference to Article 47 (2) would also privilege member states of disembarkation following search and rescue operations. We ask the Commission to explain this privileging of member states of disembarkation over member states which vulnerable persons enter via other routes.

Paragraph 5: Following an initial review, we have no objections to this paragraph.

GREECE

EL comments on Art. 46 -49 of the AMMR

Article 46

EL is of the opinion that the Solidarity Forum, as a flexibility component embedded in the solidarity mechanism may come at the expense of tangible support for MS facing migration pressure and/or recurring arrivals from SAR operation. As clarified by the Commission during the WG of 7/1/2021 it is not a decision –making body, however it should be clarified that adjustments of the solidarity contributions of each MS attending will be within the competence of the representatives of the MS in this Forum.

Article 47

Par 3

In respect with the distribution key and the share of the benefitting MS, same comment as in art 53 and 54

Par 4 (c)

We welcome the provision in case of arrivals of vulnerable persons, since respective reception capacity cannot be adjusted in short term in case of recurring arrivals.

Par 5

Commission should notify MS that did not respond, as foreseen in par. 4, and ask for their contributions and/or adjustments within a strict deadline.

Article 48

In the context of the correction mechanism it is not clear enough on what basis the Commission will compare the measures under 45. 1d and those of art.45. 1a. Detailed simulations and examples are needed to clarify how the mechanism would work in practice and how and to what extent the actual needs of the benefitting MS will be met, since as the text stands now, there is a possibility, that only 50% of the needs in measures referred to as “people solidarity” may be covered.

Article 49

In the context of the procedure for establishing the solidarity pool, the role of the MS receiving arrivals after SAR should be noted with clarity in all procedural steps. As it has been clarified in the WG of 21/1/2021 the list of the eligible persons to be relocated and/or subject to return sponsorship is being conducted by the EUAA and Frontex, after the Screening procedure. It is our position that the respective pool should be drafted in consultation with the MS. As the text stands in par. 2 the “meaningful links” may be established only after the “Dublin check” by the MS of arrival.

In par 3 of the same article, it is provided, that drawing on the list of eligible persons to be relocated and/or subject to return sponsorship shall cease after the adoption of the implementing act according to art 53.

Why drawing from the lists should cease, if the respective lists are not exhausted ?

HUNGARY

General comments

We make a scrutiny reservation on the whole proposal and refer to our substantive reservation along the lines of our concerns indicated at ministerial and SCIFA level. We also indicate that the Hungarian Parliament, in its Decision No 40/2020 (XII. 16.) OGY, laid down that the principle of subsidiarity had been infringed in relation to the five draft regulations of the new Pact on Migration and Asylum.

Article 6(4) and Articles 46-49

We cannot accept neither the creation of a special category for the disembarked persons after search and rescue operations, nor the proposed special solidarity mechanism created for it. In our view, this phenomenon is considered to be a form of illegal migration, in relation to which we need to focus solely on prevention. To this end, it must be ensured that the migrants concerned are rescued or readmitted by the countries of origin through disembarkation platforms.

The Commission's annual Migration Management Report pursuant to Article 6(4) should set out, inter alia, the total number of the short-term projections of disembarkations anticipated for search and rescue operations and the necessary solidarity response measures. Accordingly, according to Article 46, the Commission should set out the total number of relocations as a result of search and rescue operations in a given year and the relocation number for each Member State, on the basis of which voluntary contributions firstly, and then mandatory contributions should be made. However, such an annual relocation target will function as an explicit pull factor and excellent target for human smugglers, in particular that when the 80% of the relocation pool is exhausted, the Commission will request further contributions under Article 48. Furthermore, the operational provisions outlined in Article 49 raise several practical issues, in particular how the Commission could enable a sufficient number of return sponsorship beyond relocation with regard to disembarkations carried out within a two-week time period, keeping in mind that its implementation requires a return decision.

Accordingly, we cannot accept this special mechanism – regardless of the relevant procedures and possible future compromise proposals - under any circumstances.

ITALY

Article 6

Governance and monitoring of the migratory situation

...

4. The Commission shall adopt a Migration Management Report each year setting out the anticipated evolution of the migratory situation and the preparedness of the Union and the Member States. In the case of migratory flows connected to search and rescue operations, the Commission shall consult the concerned Member States and the Report shall set out the total number of projected disembarkations in the short term and the solidarity response that would be required to contribute to the needs of the Member States of disembarkation through relocation and through measures in the field of capacity building, operational support and measures in the field of the external dimension. The Report shall also indicate whether Member States of disembarkation are faced with capacity challenges due to the presence of third-country nationals who are vulnerable and include the results of the reporting on monitoring listed in paragraph 3 including the information gathered within the framework of the Migration Preparedness and Crisis Blueprint and propose improvements where appropriate.

Comment: it is not clear whether the word “particular” is referred to MS of disembarkation or contributing MS and whether in the latter case the presence of vulnerable TCN is taken into account in order to determine the pledges.

Comment: The sought-for flexibility is already guaranteed by article 47, para. 2 and 3, which read that MS are invited to provide the solidarity contributions and shall notify the contributions they intend to make.

Where contributions are not suitable to meet the Commission forecasts, MS whose contributions are insufficient should be invited bilaterally to adjust their pledges. In this regard, a Solidarity Forum has no added value. It may indefinitely (no deadline is foreseen for conclusion of negotiations) slow down the process by starting a bargain among the MS, with no additional certainty on a positive result.

Article 47

Solidarity for disembarkations following search and rescue operations

1. This Article and Articles 48 and 49 shall apply to arrivals, connected to search and rescue operations, of third-country nationals or stateless persons onto the territory of a Member State and to vulnerable persons as set out in Article 49(4).

Comment: the wording “apply to SAR operations” is not accurate. The referred provisions apply to the consequences of SAR operations.

2. Where the Migration Management Report referred to in Article 6(4) indicates that one or more Member States (are) faced with the situations referred to in paragraph 1, it shall also set out the total number of applicants for international protection referred to in Article 45(1), point (a) and 45(2), point (a) that would need to be relocated in order to assist those Member States. The report shall also identify any capacity-building measures referred to in Article 45(1), point (d) where they are necessary to assist the Member State concerned, in addition to relocation.
3. Within two weeks of the adoption of the Migration Management Report, the Commission shall invite all other Member States that are not expected to be faced with arrivals on their territory as referred to in paragraph 1 to provide the solidarity contributions referred to in paragraph 2. In its request, the Commission shall indicate the total number of applicants to be relocated by each Member State in the form of solidarity contributions referred to in Article 45(1), point (a) and 45(2), point (a) by each Member State, calculated according to the distribution key set out in Article 54. The distribution key shall include the share of the benefitting Member States.
4. Within one month of the adoption of the Migration Management Report, Member States shall notify the Commission of the contributions they intend to make, by completing the SAR Solidarity Response Plan set out in Annex I. Member States shall indicate whether they intend to provide contributions in the form of:
 - (a) relocation in accordance with Article 45(1), point (a) and 45(2), point (a), including relocation of vulnerable persons pursuant to Article 49(4) ;
 - ,
 - and
 - (b) where applicable, measures in accordance with Article 45(1), point (d) as identified in the Migration Management Report;
5. Where the Commission considers that the solidarity contributions indicated by all the Member States pursuant to paragraph 4 fall short by a 5% of the total solidarity contributions set out in the Migration Management Report, the Commission shall invite Member States to adjust the number. and submit revised SAR Solidarity Response Plans within one week.

Comment: the mandatory relocation is in Italy’s view the only possible measure in the case of SAR landings (100% of their share; unlike in situations of migratory pressure where the relocation should cover at least 50% of the share of the individual MS), due to the specific nature of international obligation.

In SAR cases, MS not subject to the pressure caused by landings should relocate the entire number of asylum seekers as calculated by applying their share, with no distinction between applicants in or out of the border procedure.

Other measures (capacity building, external dimension, etc.) could, however, be offered on a voluntary basis but in addition to relocation, taking into account the wide spectrum of burdens

related to SAR landings (coordination of landing operations, first assistance of disembarked persons, identification procedures, security and health checks, etc.).

The reference value indicated (5%) is aimed at avoiding interpretation of vague concepts.

Article 48

Commission implementing acts for search and rescue operations

1. Within two weeks from the submission of the SAR Solidarity Response Plans referred to in Article 47(4) or one week from the submission of revised SAR Solidarity Response Plans referred to in Article 47(5), and where the total solidarity contributions indicated by all the Member States in their Plans corresponds to, or falls short of no more than 5% of the total solidarity contributions set out in the Migration Management Report, the Commission shall adopt an implementing act setting out the solidarity measures pursuant to Article 47(4) or Article 47(5). Such measures shall constitute a solidarity pool for each Member State expected to be faced with disembarkations in the short term.

Where the Asylum Agency notifies the Commission and the Member States that 80% of the solidarity pool in the first subparagraph has been used for one or more of the benefitting Member States, the Commission shall inform the Member States of the situation and notify the single additional amounts needed according to the share as referred to in article 54. The Commission shall accordingly amend the implementing act establishing a solidarity pool referred to in the first subparagraph in relation to the benefitting Member State concerned to increase the contributions by other Member States.

Where, in the course of the year, the 80% of the solidarity pool, as redetermined in the second subparagraph, has again been used for one or more of the benefitting MS, the Commission, in consultation with the benefitting MS, shall revise the assessment of the migratory situation and the total number of projected disembarkations. Following the aforementioned revision, the first subparagraph apply.

2.

Where one or more Member States have not submitted an SAR Solidarity Response Plan within the time limits set out in Article 47(4) and Article 47(5), the Commission shall determine the amount and type of contributions to be made by those Member States.

3. The implementing act referred to in paragraphs 1 and 2 shall be adopted in accordance with the examination procedure referred to in Article 67(2).

Comment: The devised mechanism (including the correction phase) is overly cumbersome, not sustainable, hard to apply in practice and to manage. Solidarity needs to be clearly designed and effectively implemented, otherwise it may end up being a theoretical

statement of intent. The solidarity mechanism should be more automatic and not subject to an approach based on a series of incremental steps.

Where the solidarity pool gets exhausted during the time span covered by the MMR, this is a signal that forecasts were not accurate and a new assessment is needed.

Article 49

Solidarity pool for search and rescue operations

1. After the adoption of the implementing act referred to in Article 48(1), the Member State referred to in Article 47(2) shall notify the Commission of its request for solidarity support. Following that request, the Commission shall draw on the solidarity pool and coordinate the implementation of the solidarity measures for each disembarkation or group of disembarkations taking place in a period of two weeks.
2. Under the coordination of the Commission, the Asylum Agency and the European Border and Coast Guard Agency shall draw up the list of eligible persons to be relocated. The list shall indicate the distribution of those persons among the contributing Member States taking into account the total number of persons to be relocated by each contributing Member State, the nationality of those persons and the existence of meaningful links between them and the Member State of relocation. Priority shall be given to the relocation of vulnerable persons. The Asylum Agency and the European Border and Coast Guard Agency shall assist the Commission in monitoring the use of the solidarity pool.
3. Where the Commission has adopted a report concluding that a Member State referred to in Article 47(2) is under migratory pressure as set out in Article 51(3), the remaining solidarity contributions from the solidarity pool established under Article 48(1) may be used for the purpose of immediately alleviating the migratory pressure on that Member State. In such cases, the provisions of paragraph 2 shall apply.

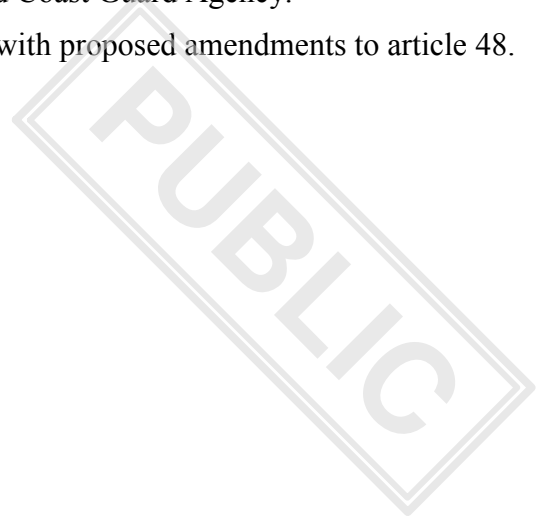
This paragraph shall not apply where an implementing act provided for in Article 53 is adopted. As from the adoption of that implementing act drawing on the list of eligible persons to be relocated and to be subject to return sponsorship as provided for in paragraph 2 shall cease.

Where the solidarity pool referred to in the first subparagraph is insufficient for the purpose of immediately alleviating the challenges faced by the Member State referred to in Article 47(2), solidarity contributions from the solidarity pool of the other Member States established under Article 48(1) or Article 48(2) may be used insofar as this does not jeopardize the functioning of the pool for those Member States.

4. Where the Migration Management Report identifies that a Member State referred to in Article 47(2) is faced with capacity challenges due to the presence of applicants who are vulnerable regardless of how they crossed the external borders, the solidarity pool established under Article 48(1) may also be used for the purpose of relocation of vulnerable persons. In such cases, the provisions of paragraph 2 shall apply.
5. The Commission shall support and facilitate the procedures leading to the relocation of applicants and the implementation of return sponsorship, paying particular attention to unaccompanied minors. It shall coordinate the operational aspects of relocation and return

sponsorship, including with the assistance of experts or teams of experts to be deployed by the Asylum Agency or the European Border and Coast Guard Agency.

Comment: the amendments to this article are consistent with proposed amendments to article 48.



MALTA

Article 6(4)

Member States are best placed to determine what type of measures are required to promptly and efficiently respond to migratory flows generated by search and rescue. Therefore, MT stresses the need to ensure that before the Migration Management report is adopted, the Member States that have been consulted in view of migratory flows generated by search and rescue operations should have the possibility to comment on the draft report within a stipulated timeframe (e.g. 1 week). Those comments should be duly taken into account by the Commission prior to adoption of the report.

Article 46

MT is concerned by the fact that once the solidary forum has been convened by the Commission in order to try and increase the pledges by the Member States, there is no set deadline within when this exercise is to be concluded. Thus, this could lead to prolonged discussions in a situation where front-line Member States are faced with migratory pressure.

Article 47

- Paragraph 2

MT has a substantive reservation on this paragraph due to its substantive reservation on the exclusion from relocation of persons subject to a border procedure. As already mentioned in previous meetings, MT recalls that all asylum seekers should be subject to relocation. Excluding applicants who are in a border procedure could lead to a situation where a substantial number of applicants are not eligible for relocation. The current proposal raises serious questions on the effectiveness and tangible impact that these measures will have on alleviating the burden on front line Member States.

- Paragraph 3

This paragraph should be amended as follows:

Within two weeks of the adoption of the Migration Management Report, the Commission shall invite all other Member States that are not expected to be faced with arrivals on their territory as referred to in paragraph 1 to provide the solidarity contributions referred to in paragraph 2. In its request, the Commission shall indicate the total number of applicants to be relocated by each Member State in the form of solidarity contributions referred to in Article 45(1), point (a) by each Member State, calculated according to the distribution key set out in Article 54. ~~The distribution key shall include the share of the benefitting Member States.~~

Justification: MT cannot accept a proposal where the share of the benefitting Member State(s) is still taken into account and subsequently deducted from the total number of persons subject to relocation, since this could lead to a significant shortfall in the number of persons who will actually be relocated.

- Paragraph 5

MT has reservations on the use of the words ‘*significantly short*’, since such vague wording leaves room for interpretation which ultimately could have an impact on the support to be provided to Member States.

Article 48

- **Paragraph 1**

MT has reservations on the use of the words ‘*sufficiently close*’, since such vague wording leaves room for interpretation which ultimately could have an impact on the support to be provided to Member States.

- **Paragraph 2**

MT has reservations on the use of the words ‘*significantly short*’, since such vague wording leaves room for interpretation which ultimately could have an impact on the support to be provided to Member States.

Point (b) should be amended as follows:

*the number and share referred to in point (a) for each Member State, **with the exception of including** the benefitting Member States calculated according to the distribution key set out in Article 54;*

Justification: MT cannot accept a proposal where the share of the benefitting Member State(s) is still taken into account and subsequently deducted from the total number of persons subject to relocation, since this could lead to a significant shortfall in the number of persons who will actually be relocated.

POLAND

PL submits reservation to the whole SAR part (Article 6(4) and Articles 47-49) and is against of introducing any permanent and obligatory mechanisms of solidarity dedicated solely for disembarked persons.

We do not oppose voluntary initiatives in this area coordinated by the European Commission and supported by EU Agencies, but such mechanism including and based mostly on redistribution in a situation of standard influx of migrants is not acceptable.

There is no reasoning for such approach and no legal basis. Both presentation of EASO and FRONTEX made us realize that there is no reliable data and analyzes on SAR so the proposed solution is not really evidence based.

Moreover, it could be a strong incentive, lying contrary to our efforts to reduce illegal migration taken at risk of life and to fight against migrants smuggling.

The solidarity mechanism should cover only the situation of migratory pressure and crisis in general, then disembarked persons, vulnerable groups could be included in it.

Thinking of systemic approach regarding SAR we should rather develop solutions in terms of external dimension as e.g. disembarkation platforms as well as jointly focus on the border procedure and rapid returns of those who do not have a right to stay in the EU.

Due to the above PL is in favor of removal previously mentioned articles from the regulation.

ROMANIA

General comments

In the case of the mechanism proposed for search and rescue (SAR) situations, our concerns about the automatic and mandatory relocation, the distribution key used and the effective implementation of return sponsorship remain valid.

We emphasize the importance of the voluntary nature of the solidarity expressed by the Member States mentioned in the COM report prepared in accordance with Article 6.4.

We are concerned about the powers given to the Commission to establish a solidarity reserve by means of implementing acts, to draw up to the Member States the action to be followed for carrying out the transfers according to the distribution key, also on the basis of an implementing act, as well as to adopt implementing acts to increase Member States' contributions by 50% if the number of disembarkations following search and rescue operations reached 80% of the solidarity reserves for one or more of the beneficiary Member States.

In this respect, we believe that the Council should have a stronger role in the decision-making process regarding the implementation of solidarity measures.

We have a **scrutiny reservation** on all articles addressed in this meeting and we make the following observations:

Article 6.4 – we ask for further clarifications regarding the phrase '*projected disembarkations in the short term*'.

Article 48, paragraph 1 – at the time being, the text reads that, should 80% of the solidarity pool has been used for one or more of the benefitting Member States, the Commission will convene the Solidarity Forum, which will in turn request Member States to increase their contributions. We consider that by implementing this procedure, the contributions the Member States were willing to make would be exceeded. It is safe to say that from now on we are talking about a migratory pressure and thus the procedure related to the migratory pressure should be applied instead of the Search and Rescue one.

Article 49, paragraph 1 – we suggest to introduce the possibility that, at the request of a Member State, the two-week period may be extended to 3 or even 4 weeks.

SLOVENIA

Republic of Slovenia states a general substantive reservation on solidarity mechanism provisions provided specifically for disembarkations following search and rescue operations.

We do not support the inclusion of a special category of disembarked persons and provisions regarding relocation of persons disembarked after SAR operations. In our opinion, this could generate a major pull factor and a further incentive for dangerous sea crossings and migrant smuggling.

In regular circumstances, we should address persons disembarked following search and rescue operations the same way as illegal crossers or as asylum seekers who applied for international protection. In the event of migratory pressure in the relevant Member States, further treatment of disembarked persons should be regulated according to the provisions of solidarity mechanism in case of migratory pressure.

Republic of Slovenia is also skeptical about including special category of vulnerable persons, as the current mechanism would provide for a “permanent” solidarity pool for relocation of vulnerable persons, regardless of the way they enter the EU and only for the Member States that are facing disembarkations. In our opinion, if the Member State concerned does not have sufficient capacities due to the presence of vulnerable persons, the European Commission should consider this in the preparation of report on migratory pressure.

Regardless of our general substantive reservation, we do have some technical remarks on the search and rescue solidarity provisions.

Comments on Article 6 / 4

In our opinion, it is rather difficult to predict the migration flows and the number of persons disembarked following search and rescue operations one year in advance. We also think that setting special pools for relocations one year in advance for persons disembark following search and rescue operations would create a strong pull factor.

According to AMMR, the report should also indicate whether particular Member States are faced with capacity challenges due to the presence of vulnerable persons. Reading this part of para 4 in connection with Art 47(1) and 49(4), we understand, that solidarity pool for relocation of vulnerable persons due to capacity shortage is only to be created for those Member States, that could potentially face disembarkations. Furthermore, it will include all vulnerable persons regardless of the way they enter EU, i.e. not only vulnerable persons disembarked after search and rescue operations. If our understanding is correct, we would like to know what was the reasoning behind the decision to include this category under search and rescue solidarity provisions and create a permanent pool for relocation of these persons? In addition, why only Member States of disembarkations can permanently benefit from this kind of solidarity, regardless of migratory pressure?

Comments on Article 46

Republic of Slovenia states a substantive reservation and concerns on the functioning of the solidarity forum and its possible benefit to the solidarity mechanism in general. The newly proposed mechanism is unclear and presents an added uncertainty in solidarity mechanism procedure, especially in relation to finding a solution to sufficient solidarity contributions, as there is no foreseen guarantee for the solution.

The Commission explained that Solidarity Forum is not a decisive body, but only a consultative body. Such nature of Solidarity Forum brings and opens additional questions concerning the role of Member States in this process.

Moreover, in our opinion, the Council should have a bigger role in Solidarity Forum, therefore binding decisions involving Member State's actions should be decided by the Council.

Comments on Article 47

As stated above, we do not support separate solidarity mechanism for persons disembarked following search and rescue operations, neither do we support the inclusion of vulnerable persons in this category.

We also think that the Member States benefiting from search and rescue solidarity should not be excluded from providing solidarity support to the Member States under migratory pressure solely on the base of predictions for the year ahead. The Commission should take into an account even the less likely scenario when there are no disembarkations to the Member State as it was previously predicted. Consequently, the Member States benefiting from search and rescue solidarity should be excluded only in the event they are also under migratory pressure. Moreover we would also like the text in para 3 to be more clear on the exclusion of Member States who are under migratory pressure to provide solidarity contributions.

We would like to raise a question regarding return sponsorship. By our understanding, the Commission sets out the total number of applicants that would need to be relocated and identifies necessary capacity-building measures in the Migration Management Report. The latter is then used as a base for the Member States to submit SAR Solidarity Response Plans according to which the Commission adopts an implementing act. The implementing act then serves as legal ground for solidarity contributions. According to this reasoning, we wonder what would serve as a ground for the use of return sponsorship after the application of correction mechanism. In this regard, we are of opinion that return sponsorship should be available from the start of search and rescue solidarity mechanism. Furthermore, to keep the maximum flexibility of the Member States, we are in favour of wider range of possible solidarity contributions.

Comments on Article 48

Republic of Slovenia is of opinion that solidarity mechanism should be mandatory only in crises. In all other situations, it should be based on voluntary contributions. Therefore, we do not support the proposed possibility of mandatory solidarity for disembarkations following search and rescue operations.

We also have reservations on possible amendments and increase of the solidarity contributions when 80% of the pool is used. In this event, there is no foreseen threshold when the additional needs of the benefiting Member State would be assessed as migratory pressure. In such event, it could also be possible to use the solidarity contributions from the pool of other benefiting Member States, which did not face predicted disembarkations or the actual disembarkations were much lower than predicted.

We are also not in favor of the proposed correction mechanism as it leaves very limited flexibility to the Member States. We find the concept of return sponsorship as one of the possible solidarity contributions; however, it should not be the only possible alternative to mandatory relocations of the applicants. Other possible alternatives could be concrete assistance with border procedure without overlapping with the Agencies and active cooperation in return activities and support to third countries.

Comments on Article 49

Republic of Slovenia states reservations on the inclusion of vulnerable persons to SAR solidarity mechanism regardless of their way of entry. We are of opinion that if the Member State concerned is facing capacity challenges due to the presence of vulnerable persons, the European Commission should consider this in the preparation of the report on migratory pressure.

We would also like to point out the inconsistency regarding para 2 and para 5. Para 2 puts special emphasis on vulnerable persons who have priority in drawing up the list of eligible persons for relocation. Contrary, para 5 emphasizes a particular attention to unaccompanied minors, who are also considered as vulnerable persons, but the term of vulnerable persons in the sense of para 2 is broader. We propose to unify this text.

Furthermore, not all contributing Member States would be able to provide appropriate care to a high number of relocated vulnerable persons, as there is a possibility that the contributing Member State has insufficient capacities or is facing capacity challenges due to the presence of vulnerable persons. For this reason, we are of opinion, that contributing Member States should have a possibility to amend and confirm the list of eligible persons for relocation.

In regards to connection with migratory pressure, there is no foreseen provision that the solidarity contributions given under SAR solidarity mechanism would be included in the fair share for migratory pressure. We are of opinion, that there should be a possibility to consider SAR solidarity contributions in migratory pressure solidarity and deduct them from the fair share.