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NOTE

From: Presidency
To: Delegations

Subject: Pact on Migration and Asylum – way forward
- Discussion paper

During the informal SCIFA meeting in Prague, the Czech Presidency outlined its plans for the work on the Pact on Migration and Asylum, mainly in terms of the gradual approach and relations with the European Parliament.

Based on the outcomes of the informal SCIFA debate as well as on further discussions organised on a technical level, the Czech Presidency developed a proposal for a ‘Way forward on EU migration solidarity and crisis response mechanism’, which was presented and discussed for the first time at a meeting of JHA Counsellors on 16 September. Based on the debate and written comments received, the Czech Presidency identified two major elements to be discussed at the strategic level. At the same time, based on the broad support received from the informal SCIFA, the Czech Presidency reached out to the respective rapporteurs in the European Parliament to discuss possible progress in negotiations on various proposals, in line with the roadmap agreed between the members of the European Parliament and the current and incoming rotating presidencies of the Council.

During the SCIFA debate on 4 October, the Czech Presidency would like to revisit these two issues (I. the key elements of the solidarity proposal and II. the strategy towards the European Parliament) and agree on the way forward.

The Presidency's proposal on solidarity will also be presented to the Ministers for the Interior during the upcoming JHA Council meeting on 14 October, with the aim of receiving general support for continuing the work on this proposal at technical/strategic level. The Presidency does not foresee a new version of the proposal between the SCIFA meeting and JHA Council meeting.

I. Way forward on EU migration solidarity and crisis response mechanism

During the JHA Counsellors' debate on solidarity on 16 September, the Czech Presidency concluded that there was an overall willingness by Member States to work on the proposal based on the mandatory flexible solidarity and responsibility.¹ Based on the debate and written comments received, the Presidency identified two key conceptual elements needing further substantial discussion – (1) the issue of predictability and guarantees of adequate solidarity during the pledging stage(s) and (2) a need for more details in terms of the possible scope of flexible responsibility.

As a follow-up to this meeting, the Presidency would like to elaborate further on these two elements and provide, for further discussion, a number of ideas as to how to approach these issues.

1) Guarantees of predictable and adequate solidarity

- i. Fair share as an obligatory distribution key:
 - On the basis of the Commission recommendation for solidarity (both relocations and financial support), when pledging to the Solidarity Pool, Member States would be obliged to follow a distribution key (fair share) based on the agreed formula. However, Member States would retain the right to choose which solidarity measure(s) they would like to use to contribute.

¹ See the latest version, reflecting Member States' feedback, annexed.

- This fair share could also serve as a basic quantitative threshold for the Commission when assessing Member States’ notifications/requests to use the pool, taking into account the significance of the migratory pressure or crisis (compared to the EU average in the last 12 (rolling) months).
- ii. Fair share as a guiding principle:
- On the basis of the Commission recommendation for solidarity (both relocations and financial support), when pledging to the Solidarity Pool, Member States would be invited to take into account a fair share (%) based on the agreed formula. The fair share would therefore be indicative. Moreover, Member States would retain the right to choose which solidarity measure they would like to use to contribute.
 - This fair share would also be taken into account by the Commission when assessing Member States’ requests to use the Pool, taking into account the significance of the migratory pressure or crisis (compared to the EU average in the last 12 (rolling) months).
- iii. Minimum threshold for relocations based on projected arrivals (*MED5 proposal*)
- Under this proposal, a fixed percentage (to be part of the Asylum and Migration Management Regulation – AMMR) of all projected irregular arrivals through Member States at the external borders would be used to calculate the overall needs in terms of relocations for the following year.
 - Based on this formula, Member States would be able to (or be obliged to) set the level of their relocation contributions in order to meet those needs.
 - A cap for relocations could be considered under this scenario to ensure predictability for contributing Member States and to reflect possible logistical limits in terms of implementation.

- iv. Mechanism based on thresholds and variable distribution key
- Under such a scenario, the Commission would recommend an annual nominal value for the overall solidarity mechanism with minimum numerical thresholds for relocations and (depending on the total number of Member States relocating) for financial contributions for each year. The total nominal value and/or the minimum threshold for relocation could also be part of AMMR with review clauses, with the annual exercise focusing on the pledging and adjustments needed (to top up or lower).
 - Member States would retain the right to choose which solidarity measure(s) they would like to use to contribute, either relocations or financial contributions based on distribution key(s) (fair share). The group of MSs opting for relocation would commit to fulfilling the minimum threshold recommended by the Commission. If only very few Member States contribute through relocation, the other Member States would have to meet the financial threshold (to ensure an equivalent level of solidarity commitment between those that relocate and those that contribute financially).
- v. Supplementary ‘people’s solidarity’ for situations where there are not enough relocation pledges – Dublin requests and/or transfer offsets:
- If the Commission’s recommendations in the Annual Report in terms of relocations are not fully followed by the Member States, a mechanism providing for supplementary ‘people’s solidarity’ could be proposed.
 - Such a mechanism would allow the remaining unfulfilled relocation pledges to be topped up, with a possibility for Member States under particular pressure/experiencing a crisis to apply for a corresponding reduction in the take back/take charge requests and/or transfers under the Dublin rules they would otherwise be responsible for and thus shifting the responsibility to Member States providing solidarity.

- Under such a scenario, all Member States providing solidarity would therefore be asked to suspend a proportional number of Dublin requests and/or transfers to Member States using the Solidarity Pool, additionally to relocations.

Questions for discussion:

1. *Which of the abovementioned proposals, or combination thereof, would you consider an acceptable solution to be further explored at the technical level?*
2. *Do you have an alternative proposal?*

2) Possible scope of flexible responsibility

i) Scope of derogations under the Crisis Regulation:

- The Presidency proposes that 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 similar to the scope as proposed under the draft Instrumentalisation Regulation, which is another significant tool in the area of flexibility.

ii) Scope of flexible responsibility in the respective legislative instruments across the asylum acquis:

The following areas already provide flexibility in the area of responsibility, while additional areas could, in the view of the Presidency, be considered²:

a) Asylum Procedures Regulation (APR):

- Flexibility on time limits for the registration and lodging of an application
- Flexibility in duration of the examination procedure (normal, accelerated and admissibility procedure)

² Existing flexibility in normal font; possible further elements for consideration in *italics*.

- Flexibility on the simplification of the procedural rules in the case of interviews (only one interview, the possibility of video conference)

- Flexibility on registration of subsequent application

- Flexibility on the information provision

b) AMMR/Dublin procedure

- *Flexibility in terms of time limits*

- *Simplification of procedural steps (e.g. simplified transfer decision, possibility to suspend an interview, etc.)*

- *Flexibility regarding information exchange among Member States as well as with persons concerned*

c) RCD:

- Flexibility on the information provision

- Flexibility on the modalities for material reception conditions to be provided to asylum seekers

- Flexibility on the obligation to appoint a representative for unaccompanied minors immediately and flexibility on respective timelines

d) Eurodac:

- Flexibility in transmitting biometric data of SAR persons to the central system

In addition, further flexibility regarding the border procedure and Dublin responsibility rules could be considered, subject to further discussion and analysis, at a later stage, following the result of the discussions on the solidarity mechanism.

Questions for discussion:

1. *In your view, what additional areas could be considered for providing specific flexibility in terms of responsibility?*

II. Relations with the European Parliament

During the informal SCIFA meeting, there was very broad support for the suggestion that the Czech Presidency organise outreach towards the European Parliament in order to verify the positions on particular dossiers that were almost concluded in the previous rounds of negotiations (namely the Qualification Regulation, the Resettlement Framework and the Reception Conditions Directive proposals), with the aim of incentivising the European Parliament to commence trilogues on proposals on which a general approach was adopted in the Council under the French Presidency (Eurodac and Screening Regulations).

The Presidency outreach towards the respective members of the European Parliament in September confirmed that the European Parliament is committed to the roadmap between the members of the European Parliament and the current and incoming rotating presidencies of the Council that was concluded during July and officially signed at the beginning of September. The European Parliament should therefore adopt its positions on all relevant legislative proposals by the end of the year. A possibility to advance on the three 2016 proposals in exchange for launching the trilogues for the Eurodac and Screening Regulations was also part of the discussion.

After thorough consideration, the Presidency believes a mini package could be agreed with the European Parliament, which could include the Qualification Regulation and the Resettlement Framework Regulation on the one hand and the Eurodac Regulation on the other, to be agreed and adopted together.

There is a willingness in the European Parliament to do so, under three conditions – (1) the European Parliament insists that these proposals should not be re-opened for further negotiations (i.e. the EP wants to stick to the 2018 provisional agreements); (2) the European Parliament has a strong preference for freezing the files so they can be adopted later as part of a package with the rest of the reform-related proposals and (3) the European Parliament needs to see progress on the solidarity aspects of the reform.

The Council would therefore need to accept the 2018 versions of those two Regulations, which might not, however, be finally adopted yet. This would give the Council the assurances and leverage needed in terms of the trilogues on Eurodac.

Given the more complex state of play of negotiations on the Reception Conditions Directive³, and to maintain balance, the Presidency would also propose not to include this proposal in the ‘mini package’.

After thoroughly examining the 2018 proposals⁴ on the Qualification Regulation and the Resettlement Framework, including the remaining objections of some Member States, the Presidency is of the opinion that this could be the best way forward.

As a meeting between the Asylum Contact Group of the European Parliament and the current and incoming Presidencies will take place on 10 October 2022, where the Presidency would like to further highlight the Council’s readiness to move ahead on the two 2016 proposals and Eurodac, while also underlining our current work on the solidarity aspects of the reform, the Presidency would like to verify the positions of Member States on the Qualification Regulation and Resettlement Framework Regulation proposals and agree on a way forward.

Questions for discussion:

1. *Do you agree with the idea of the proposed mini package consisting of the Qualification Regulation, the Resettlement Framework and Eurodac?*
2. *With regard to the Qualification Regulation, would you agree that the text of the 2018 provisional agreement could be accepted in the context of the proposed mini package, provided a provisional agreement can be found on Eurodac that is acceptable to the Council?*
3. *With regard to the Resettlement Regulation, would you agree that the text of the 2018 provisional agreement could be accepted in the context of the proposed mini package, provided a provisional agreement can be found on Eurodac that is acceptable to the Council?*

³ The Reception Conditions Directive – 10009/18 ADD 1

⁴ The Qualification Regulation - 10010/18 ADD 1; the Resettlement Framework – 10018/18 ADD 1.

Way forward on EU migration solidarity and crisis response mechanism*CZ PRES proposal*

The EU Pact on Migration and Asylum proposed by the European Commission includes the Asylum and Migration Management and the Crisis Situations and Force Majeure Regulations, which act as the two main components of the reform, together providing for a unified response in terms of solidarity and crisis. Since the reform was proposed, several major events have affected the EU and many lessons can be learnt from them to shape a common EU migration solidarity and crisis response mechanism.

The instrumentalisation of migrants at the EU's external borders, the arrival of large numbers of Ukrainian refugees, the growing uncertainty of the volume of mixed flows along various migratory routes and the large scale secondary movements of migrants across the EU call for a progress on the reform, including the solidarity mechanism that should take into account the articulated need for sustainability, predictability and simplicity as well as for flexibility, proportionality and fair-sharing of responsibility.

In view of the above, respecting the need for a balanced approach between the principles of responsibility and solidarity and building on the progress achieved under previous Council Presidencies, the Presidency invites the Council to consider the below proposal on how to amend the solidarity mechanism as proposed by the Commission in the Asylum and Migration Management Regulation (AMMR) and in the Crisis and Force Majeure Regulation, by amending the respective chapters in these draft regulations. The aim of the Presidency with this concept is to advance on the solidarity aspects of the reform, while acknowledging that AMMR covers both solidarity and responsibility. The discussion will continue also on the responsibility part of the proposed text, following the same balanced and flexible approach outlined for the solidarity mechanism.

The proposed mechanism⁵ would allow for a legally binding, but tailor-made and needs-based approach (mandatory, but flexible solidarity mechanism), reflecting the ever-evolving migratory challenges the EU and its Member States are facing, including the structural phenomenon of disembarkation after search and rescue operations or secondary movements. Moreover, acknowledging and building upon past and current experiences, including the solidarity declaration supported, under the French Presidency, by the largest number of Member States in recent years, a balanced and flexible approach, as key principles, should be applied within the solidarity mechanism, as well as in the area of responsibility.

KEY ELEMENTS OF THE PROPOSED MECHANISM:

I. Annual Migration Management Cycle and the Solidarity Mechanism

a. Annual Migration Management Report of the Commission

The whole mechanism would be based on an *Annual Migration Management Report* (Report) that would assess the situation along all migratory routes and in all Member States, serving as an early warning and awareness tool for the Union in the area of migration and asylum, while acknowledging the possible rapid nature of developments in terms of migratory flows towards the EU. The Report would be prepared, for each coming year, before the end of the third quarter of the previous year by the Commission, following close consultation with all Member States and relevant EU agencies. Existing reporting mechanisms, primarily the ISAA and Blueprint reports, would be used to their full potential to avoid duplication of efforts. Other relevant sources should be also taken into consideration while drafting the Report (e. g. EEAS, Eurostat, EMN, JRC, UNHCR, IOM, etc.).

⁵ This concept is drawn without prejudice to other existing mechanisms, such as the one provided for in the EU-Turkey statement of 18 March 2016.

The Report would focus on all relevant areas, notably on possible developments in the area of irregular arrivals through EU external borders, disembarkations after search and rescue operations, applications for international protection, secondary movements, cooperation with key third countries especially in the area of returns, as well as on push factors (including possible situations of instrumentalisation of migrants). The compilation and the analysis of all these qualitative and quantitative data would create a strategical situational picture, both at the level of the EU and at the level of individual Member States. Moreover, the report would provide forward-looking projections for the coming year.

Based on the overall experience of the previous year and on the current situation, a forecast for the following year will be developed. A list of selected permanent EU tools, suitable to react to these possible future developments, would also be highlighted in the report (based on the *Permanent EU Migration Support Toolbox* as described below in point b).

The Report would, furthermore, assess whether tailor-made solidarity is needed to support the Member States most likely-to-be affected in the coming year, taking fully into account all migratory routes , as well as the specificities of disembarkations after search and rescue operations or secondary movements. For the purpose of such assessment, Member States would have an opportunity to identify their likely support and solidarity needs for the coming year, to be taken into account by the Commission.

Based on such assessment, the Report could also include recommendations for concrete annual solidarity measures (and their numerical scale) required for the upcoming year, following a close consultation with Member States. These recommendations, together with the main outcomes of the Report, would then be assessed and addressed during the *annual High-Level Forum*, while the respective solidarity contributions would be collected in an *Annual Solidarity Pool*, as described below. The above-mentioned recommendations should not be made public.

The Report should also consider the level of Member States preparedness and may propose recommendations on relevant actions in the area of preparedness and resilience that could mitigate, on the level of Member States, the impacts of possible situations of migratory pressure or a crisis.

b. Permanent EU Migration Support Toolbox

A **Permanent EU Migration Support Toolbox** (Toolbox) for Member States (likely to be) under migratory pressure or in a crisis would be developed in order to provide for a wide range of responses consisting of the following tools (not exclusively) that are currently, or should soon be, at the disposal of the EU:

- *(enhanced) Support by the EU Agencies*
- *Enhanced support through the EU Funds*
- *Flexible responsibility, notably by way of targeted derogations from the respective acquis (such derogations could be tailor-made to specific migratory challenge and not limited to instrumentalisation. This would include flexibility set in the respective legal instruments of the asylum acquis, or in the amended Crisis regulation proposal - for more details see below)*
- *Activities in the external dimension of migration*
- *Cross-sectoral initiatives and actions applicable in the external dimension*
- *Enhanced return actions*
- *Tools and actions available in the area of visa policy*
- *Support provided through the Union Civil Protection Mechanism*
- *Diplomatic and political outreach*
- *Communication strategies*

c. Annual Solidarity Pool

This Pool should serve as the main stand-ready solidarity response tool. Annual contributions, being pledged each year during the annual High-Level Forum, will bring significant element of predictability for both the Member States in need and for the contributing Member States. While contributing to this Pool shall be mandatory, Member States will determine the nature and the volume of their contributions (taking into due account the overall needs and responsibilities identified in the Report). The Pool could consist (not exclusively and selectively) of the following measures:

- *Voluntary relocations*
- *Direct financial contributions by Member States* primarily aiming at projects related to the area of migration, border management and asylum or at projects in third countries that may have a direct impact on the flows at the external borders, thus reducing the migratory pressure on these borders.
- *Other alternative forms of solidarity to be provided directly by Member States*⁶ primarily focusing on capacity building, services, skilled personnel, facilities and technical equipment - in fields such as registration, reception, border management, screening, detention and return.

There should be a recognition that the various types of solidarity are of equal value.

d. High-Level EU Migration Forum

Following the publication of the Report, a **High-Level EU Migration Forum** (Forum) would be organised each year as part of the JHA Council meeting (possibly in the last quarter) in order to take stock of the overall situation and agree on a follow-up, including regarding possible urgent actions in terms of preparedness and contingency, as well as in the area of external dimension of migration, to be implemented by the relevant EU bodies at appropriate level and as necessary.

⁶ Such solidarity should always be complementary Member States' contributions to the activities of the respective EU Agencies.

At this Forum, Member States would be obliged to pledge a contribution to the Pool, taking into account the recommendations by the Commission included in the Report. For the sake of maximum level of preparedness and predictability, these recommendations should be understood as a base-line level of solidarity needed for the coming year. Member States would retain full flexibility to decide on the concrete type of their contributions. Each Member State should contribute adequately, based on the overall needs identified in the Report and on its capacities. Those Member States benefiting from solidarity in the time of pledging (or very likely to be) may be excluded from pledging for the following year.

As a result, a concrete Pool consisting of numerical contributions of each Member State would be established for the following year. The outcome of this exercise (the content of the annual Pool) shall be adopted by the JHA Council and would not be made public.

II. *Simplified procedure in case of a sudden and/or continuous and significant migratory pressure*⁷, on a notification of the affected Member State(s) - making use of the Permanent EU Migration Support Toolbox and the Annual Solidarity Pool

In case a Member State is confronted with a sudden increase and/or continuous *and* significant migratory pressure, including where it stems from disembarkations after search and rescue operations or secondary movements, it should notify the Commission and the Council on its intent to make use of the Toolbox and the Pool, highlighting which individual components the Member State would need to benefit from to address the situation.

Such notification to the Commission and the Council should always include a duly-substantiated reasoning describing clearly the requesting Member State's solidarity needs and the significance of the migratory pressure on the affected Member State and how the proposed Toolbox and/or the Pool components should stabilise the situation. The notification should also mention in what way the notifying Member State will address any possible identified vulnerabilities in the area of responsibility, preparedness or resilience.

⁷ As defined in the draft Regulation on asylum and migration management (art. 2).

Following this notification, the Commission should proceed with a fast-track, simplified and speedy assessment of the notification, taking into account (comparatively) the overall situation in the EU and the needs expressed by the notifying Member State. As soon as a positive assessment is presented to the Council, the Technical-Level EU Migration Forum (see in part IV) would be tasked to immediately operationalise the specific measures needed by the affected Member State (both from the Toolbox and the Pool), in close cooperation with the benefiting Member State. A definite timeframe for its implementation should also be set. Such simplified procedure should not take more than a few working days.

In cases where the Solidarity Pool is likely to be insufficient and/or the overall situation would call for further assistance and additional solidarity support, the Council (on its own initiative or on the initiative of the Commission) should further discuss the situation and agree on a way forward in order to meet the possible additional needs. If needed, the Council should agree on additional solidarity contributions, retaining full flexibility of the Member States to decide on the concrete type of their contributions, based on the additional needs identified.

The above-described procedure for the adoption of the Solidarity Pool, as well as the simplified procedure would be anchored in a modified version of the Commission's proposal for Asylum and Migration Management Regulation.

III. *Full-fledged procedure in case of a crisis*⁸, on a request of the affected Member State(s)

If a Member State finds itself in a situation that might require mobilising additional measures and contributions, it should request a formal, full-fledged, assessment of the situation. Following such request, the Commission, in close cooperation with the requesting Member State and relevant EU agencies, would make an assessment taking into account the particular situation in that Member State and on the basis of a number of criteria and the information available to avoid duplication of efforts. Where this joint assessment indicates that the Member State is in a crisis, it would identify appropriate specific measures needed both, in the area of solidarity and responsibility, to address the situation.

⁸ As defined in the draft Regulation addressing situations of crisis and force majeure in the field of migration and asylum (art. 2).

- Solidarity Response Plan(s) for crisis situations

The results of the assessment would be in a format of a draft ***Solidarity Response Plan*** (the Plan) indicating specific solidarity and responsibility measures needed, taking full advantage of the Toolbox and/or the Pool. The draft Plan would be prepared jointly by the Commission and the affected Member State.

Should the contributions to the solidarity Pool not be sufficient or appropriate for the given situation, the Plan should also identify additional solidarity measures or contributions needed and their scope.

The Plan should be, without undue delay, presented to the Council (the High-Level EU Migration Forum), which (on its own initiative or on the initiative of the Commission) could call, if necessary, for an extraordinary meeting so as to enable the Member States to agree speedily on the additional solidarity response and formally adopt the Plan. Member States would be obliged to contribute adequately, while retaining the flexibility to decide on the concrete type of their contributions and taking into account the overall needs identified in the draft Plan.

As a principle, the time needed to agree on the Plan should be as short as possible and the whole process should be treated with the upmost priority.

If needed, the Plan could be subsequently amended and adopted by the Council, reflecting the actual situation and adjusting the actions and measures as needed.

The above-described procedure for the adoption of a Solidarity Response Plan would be anchored in an amended version of the Commission's proposal for the Crisis and Force Majeure Regulation (see below).

IV. Operationalisation of the Permanent EU Support Toolbox and the Annual Solidarity Pool and the Solidarity Response Plans: Technical-Level EU Migration Forum

As soon as the notification of the affected Member State to use the Toolbox and/or the Pool is approved by the Council or the Plan is adopted by the Council, a meeting of the *Technical-Level EU Migration Forum* (Technical Forum) would be organised in order to promptly operationalise the agreed solidarity measures or operationalise the Plan. The operationalisation should be coordinated by the Commission.

The share of each Member State's solidarity contributions to be implemented in concrete situations should reflect the share of their overall annual pledge to the Pool for the given year or to the Plan.

A Member State may request a reduction of its contribution as committed to in the Pool or the Plan, should it be able to demonstrate clearly that a significant migratory situation on its own territory, leading to its reduced capacities in the area of asylum, reception and/or irregular migration, does not allow its (full) participation in providing solidarity to other Member States.

V. Other crisis-related elements to complement the proposed system:

This proposal also foresees modifications to the Commission's proposal for the Crisis and Force Majeure Regulation, reinforcing the elements related to derogations with a view to having a comprehensive legal tool to react to situations of crisis of any nature (including in cases of instrumentalisation of migration).

The objective would be to provide for maximum flexibility in the EU's ability to react to the ever-evolving migratory reality and cover various types of crises, notably in cases where the existing flexibility set in the respective legal instruments would be deemed inadequate. While such instrument must respect all necessary safeguards, it would bring the necessary flexibility specifically for the Member States in a crisis and would allow for temporarily easing their obligations in the area of responsibility.

Within the limits set in the Regulation, any derogations to be triggered for the specific crisis should be used selectively, should be tailor-made to each individual situation and should be closely monitored. The scope of such derogations should be set in a Solidarity Response Plan, based on the assessment made by the Commission and in close cooperation with the affected Member State. Any derogations should always be limited in time and respect all fundamental rights of migrants.

The concrete scope of the flexible responsibility anchored in respective legal instruments and the specific scope of the derogations to be set in the Crisis Regulation and Force Majeure, should be subject to further discussions and analysis.

Additionally, the part related to the immediate protection should be subject to further analysis, notably in relation to the recent activation of the Temporary Protection Directive and the respective lessons learned.

