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NOTE

From: Presidency
To: Delegations

Subject: Presidency concept '*Way forward on EU migration solidarity and crisis response mechanism*'
– discussion paper

Following the outcomes of the SCIFA meeting held on 4 October where the Presidency concept *Way forward on EU migration solidarity and crisis response mechanism* was discussed, the Presidency is presenting the discussion paper below. The paper further develops on the two key principle elements of the concept - (1) Guarantees of predictable and adequate solidarity and (2) Possible scope of flexible responsibility.

The main aim of the Presidency with this discussion paper is to advance on the solidarity aspects of the reform. It is clear that these aspects are in specific instances closely linked to some key responsibility elements of the reform (mentioned (not exclusively) under part 2. and 3.). In this respect, the Presidency will continue paying close attention to the responsibility elements of the reform, even if they are not explicitly elaborated in this discussion paper.

In order to facilitate swift progress on negotiating this concept, Member States are invited to prepare, in addition to their general positions, their specific preferences regarding the issues set out in this document.

1. GUARANTEES OF PREDICTABLE AND ADEQUATE SOLIDARITY

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

i) Minimum set threshold for predictable annual solidarity contributions

- A minimum annual threshold necessary for people's solidarity, as well as direct financial support, could be set in the Asylum and Migration Management Regulation to reflect the solidarity needs arising from structural challenges in the area of migration.
- This would allow for predictable planning for contributing Member States. It would also provide minimum guarantees in terms of people's solidarity for the benefiting Member States.
- Given the past and recent experiences with relocation exercises and limits in terms of logistical capacities, and thus feasibility in implementing relocation pledges, Member States are invited to consider what this *minimum* annual threshold could be:
 - a) 5000 relocations
 - b) 10000 relocations
- Irrespective of this minimum annual threshold, the Commission could propose, through the recommendations to be included in the Annual Migration Report, a higher annual relocation target, if necessary. These would be based on the established projections.
- In the same vein, should there be no projected need for solidarity for the coming year, the Commission could propose that the above-mentioned thresholds are not applied.

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

- On the basis of the Commission recommendation for solidarity (both relocations and financial support), when pledging to the Solidarity Pool, Member States should 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 wish to contribute with.
- Should there be a need for “other direct solidarity support”, its financial value should be assessed, allowing to apply the fair share principle.
- Member States are invited to consider whether the fair share principle should be established as a:
 - a) Guiding principle
 - b) Mandatory principle
- Such fair share could also serve as one of the basic quantitative indicators to be used by the Commission when assessing Member States’ notifications/requests for solidarity and when considering the significance of the migratory pressure or a crisis (compared to the EU average in last 12 (rolling) months of all irregular arrivals to the EU).

iii) Supplementary “people’s solidarity” for situations where there are not enough relocation pledges – Dublin transfer offsets:

- If the minimum annual threshold and/or the Commission recommendations in the Annual Report in terms of relocations are not fully followed by the Member States, the mechanism would allow for a topping-up of the remaining unfulfilled relocation pledges. This would include an option for Member States, under a particular pressure/crisis, to apply for a corresponding reduction of the Dublin cases under the Dublin rules that they would be otherwise responsible for. This would shift the responsibility to Member States providing solidarity.

- Such offsets would only be possible as a *second level* solidarity support, while relocations should always be considered as the preferred option. These offsets would therefore be possible only when the recommendations by the Commission regarding relocations are not followed by the Member States to a satisfactory level.
- A system of guarantees would need to be considered in order to avoid, to the extent possible, a negative effect on secondary movements in the EU and pull-factor.
- Under such scenario, all relevant Member States providing solidarity could therefore suspend a proportional number of Dublin requests and/or transfers to Member States under a particular pressure/crisis, in addition to relocations. The purpose would be to meet the respective annual threshold.
- Persons subject to a transfer (accepted requests) would fall under the scope of such mechanism.
- Unaccompanied minors and family unity related requests and transfers would be excluded from the scope.

2. POSSIBLE ADDITIONAL ELEMENTS OF FLEXIBLE RESPONSIBILITY

In order to create a functional and sustainable system, a balance must be maintained between Member States' commitments towards responsibility and solidarity. It is therefore a prerogative that any such system is based on a set of functional and sustainable rules, followed by all.

It has been, on the other hand, acknowledged by the majority of Member States that in exceptional and clearly defined crisis situations, time-limited derogations may be necessary to ease the burden on an affected Member State. To this end, the Presidency is proposing to extend the scope of possible derogations (as set in the draft Instrumentalisation Regulation) also to the mandatory border procedure, as proposed by the Commission in the draft Asylum Procedure Regulation.

- i) Suspension of the mandatory border procedure by including it in the scope of derogations under the Crisis Regulation:
- Building on the draft Asylum Procedure Regulation, and without prejudice to the ongoing negotiations, Member States are invited to consider a possibility to introduce a time-limited suspension of the *mandatory* border procedure in situations of crisis. As for any other derogation, it would need to be agreed and adopted by the Council in the Solidarity Response Plan.
 - Such derogation would be anchored in the Crisis Regulation and its concrete parameters should be negotiated and agreed, following an agreement on the Asylum Procedure Regulation by the Council.
- ii) Flexibility under the mandatory border procedure for situations of particular pressure
- Furthermore, it could be considered, as an additional flexibility element, that a Member State finding itself in a situation of particular pressure would have an option to lower the percentage threshold for nationalities subject to such procedure.

3. POSSIBLE AMENDMENTS TO THE DUBLIN RULES

The following elements related to the Dublin rules could be considered, in the spirit of a fair sharing of responsibility, in order to reflect the situation, particularly, of Member States at the external borders. Member states are invited to reflect on the following:

- **Entry criterion:** cessation of responsibility one year after entry in the case of persons disembarked following a SAR operation and 5 years for other categories.
- **Visa waiver criterion:** cessation of responsibility three years after entry.

- **The obligation to take back** international protection beneficiaries and resettled persons should cease after 3 years in accordance with the long-term residence status acquired after legal and continuous residence as per the AMMR proposed amendment to the Long Term Residence Directive¹.
- **Take back procedure:** take back should be triggered by a request, as it is provided for in the current acquis.
- **The reasoning of the decision** that the MS concerned is or is not responsible should be extended. The requesting MS should provide reasoning as to why the other criteria according to AMMR are not applied and why only one criterion is applied in an individual case. In the same vein, every negative reply should be reasoned in relation to every criterion. Thus, extended reasoning should aim to ensure a more proper examination of any individual case.
- **Time limits:** the expiration of time limits should entail a transfer of responsibility between MSs, when it is not a consequence of the applicant's behaviour. As regards absconding, a suspension of the transfer deadline should be 5 years.

¹ To note that the discussions on this matter have not fully started yet, whereas the recast of the Long-term Residence Directive is subject to ongoing negotiations in the Council, at working level.