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From:	Presidency
To:	Permanent Representatives Committee/Council
Subject:	Way forward on the reform of the EU asylum system based on balanced solidarity and responsibility – Czech Presidency concept

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The EU Pact on Migration and Asylum was proposed by the European Commission in September 2020. The majority of Member States agree that a structural reform, based on the proposals associated with the Pact are necessary to create a sustainable and resilient common legislative framework. Most notably, the key pillars encompassing the areas of responsibility and solidarity need to be developed in a balanced way, reflect the recent developments in migration and provide forward-looking solutions.

Since the reform was proposed, several major events have affected the EU and many lessons can be therefore learnt from them to better shape common EU migration solidarity and responsibility aspects of the reform.

The instrumentalisation of migrants at the EU's external borders, the arrival of large numbers of refugees from Ukraine, 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 and responsibility mechanisms 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, the Czech Presidency developed a proposal for a 'Way forward on EU migration solidarity and crisis response mechanism' that was, after first exchange of views on the technical level and in SCIFA, presented at the October JHA Council.

At the Council, Member states supported the continuation of work at the technical level. Follow-up debates on the technical level and in SCIFA were held and the concept was further elaborated both in the area of solidarity, as well as in the area of responsibility.

In view of the Presidency, a significant progress has been achieved on this concept since September, building further on the need for a balanced approach between the principles of solidarity and responsibility. The concept presents various ideas that received a sound support from majority of Member States and were welcomed throughout the negotiations as possible viable solutions to be considered during the necessary legislative work, notably on the Asylum and Migration Management Regulation (AMMR), the Crisis and Force Majeure Regulation and the border procedure in the Asylum Procedures Regulation (APR).

The proposed mechanism<sup>1</sup> would allow for a legally binding, but tailor-made and needs-based approach (mandatory, but flexible solidarity), 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. The same balanced approach outlined for the solidarity mechanism is followed for responsibility, notably regarding the border procedure and the rules on responsibility determination.

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<sup>1</sup> 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 work on this concept is now being concluded by the Czech Presidency. Following the commonly expressed interest to progress on the reform as speedily as possible, the Presidency is therefore proposing to renew the necessary work on the respective legislative proposals, building both on the concept outlined below and on the various concrete elements for flexible and adequate solidarity and responsibility, as detailed in an annex to this concept.

In this regard the Czech Presidency is committed to work closely with the incoming Swedish Presidency when drafting the amendments to the three legislative proposals mentioned above.

1) **AREA OF MANDATORY SOLIDARITY**

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.).

When assessing the overall situation in the EU and its Member States, the Commission should take into account the set of information still to be agreed under Article 50 of the AMMR proposal, taking into account the annual level of responsibility the EU as a whole shares to manage migration. This shared responsibility can be expressed notably by the number of annual arrivals, taking into account, among other quantitative and qualitative criteria, the overall number of annual arrivals, the average recognition rates as well as the average return rates.

Moreover, the Report would also 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 strategic 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. Such comprehensive picture should be also a useful tool for Member States when considering their own migratory challenges and deciding about their solidarity support.

Based on the overall assessment of situation, while also reflecting the previous pressure, and considering 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, could 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 and express their likely support and solidarity needs for the coming year, to be taken into account by the Commission.

Based on such assessment, the Report would include recommendations from the Commission for concrete annual solidarity measures (and their numerical scale) likely to be required for the upcoming year, following a close consultation with Member States. These recommendations could include a *minimum annual thresholds* (relocation and financial contributions) for predictable annual solidarity contributions (see also Annex, point I.1.).

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 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 the EU or Member States, the impacts of possible situations of migratory pressure or a crisis.

The above-mentioned recommendations should not be made public.

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*
- *Adaptable 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 would serve as the main stand-ready solidarity response tool. Annual contributions, being pledged each year during the annual High-Level Forum, would 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 would be able to determine the nature of their contributions. 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<sup>2</sup>* 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, above listed, types of solidarity are of equal value.

Furthermore, if the annual relocation target recommended by the Commission in the Annual Report would not be met in full by Member States in terms of relocation, the mechanism would allow for a topping-up of the remaining unfulfilled relocation pledges, when providing people's solidarity, through so-called *Dublin offsets*.

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<sup>2</sup> Such solidarity should always be complementary Member States' contributions to the activities of the respective EU Agencies and should be counted as financial solidarity.

Under such scenario, all relevant Member States could consider to resume responsibility and cancel a proportional number of Dublin transfers to Member States under a particular pressure/crisis, in addition to their relocation, financial or *other* forms of solidarity pledges. This would therefore shift the responsibility to Member States providing solidarity. Guarantees to avoid possible negative effect on pull-factors and secondary movements would be considered (see also Annex, point I. 3.).

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.

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. Member States would retain full flexibility to decide on the concrete type of their contributions. In doing so, Member States could follow a fair share distribution key based on a formula to be agreed. This fair share distribution key could be established as a guiding or a mandatory principle (see also Annex, point I. 2.).

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 (for people's solidarity, direct financial support and the other forms of direct solidarity). 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*<sup>3</sup>, on a notification of the affected Member State(s) - making use of the Annual Solidarity Pool and/or the toolbox**

In case a Member State would be confronted with a sudden increase and/or continuous *and* significant migratory pressure, including where it stems, for example, 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 Pool (and/or the Toolbox), 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 the Pool (and the Toolbox) components could stabilise the situation, including the possibility of using the Dublin offsets. 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.

Following this notification, the Commission would 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 would be presented to and acknowledged by 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 Pool, the Toolbox and possibly through the Dublin offsets), in close cooperation with the benefiting Member State. A definite timeframe for its implementation would also be set. Such simplified procedure should not take more than a few working days.

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<sup>3</sup> As to be defined in the Regulation on asylum and migration management (art. 2).

In cases where the Solidarity Pool would 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 invitation of the Commission) should further discuss the situation and agree on a way forward in order to meet the possible additional needs, including through the Dublin offsets. 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 the Asylum and Migration Management Regulation.

### **III. *Full-fledged procedure in case of a crisis*<sup>4</sup>, on a request of the affected Member State(s)**

If a Member State would find 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.

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<sup>4</sup> As to be 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 Pool, the Toolbox and possibly of the Dublin offsets. 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 invitation 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, possibly based on the fair share principle, 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 utmost 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 would be approved by the Council (see section II) or the Plan would be adopted by the Council (see section III), 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.

Should it be agreed that the fair share principle is applied mandatorily, Member States would still be able to request a partial or full reduction of their contribution as committed to in the Solidarity Pool or the Plan. In order to do so, such Member States should demonstrate clearly that a prevailing and/or past significant migratory situation on its own territory, leading to their reduced capacities in the area of asylum, reception and/or irregular migration, does not allow for (full) participation in providing solidarity to other Member States. The Commission should be able to confirm this, through a simplified and speedy assessment.

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

This proposal also suggests 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 adequate 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 adaptability specifically for the Member States in a crisis and would allow for temporarily adapting 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 and adopted by the Council. Any derogations should always be limited in time and respect all fundamental rights of migrants.

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.

## **2) AREA OF RESPONSIBILITY**

As with the solidarity part of the reform, responsibility should be based on a set of functional and sustainable rules and well adaptable to ever-evolving migratory circumstances and the various migratory challenges Member States are facing. The following pillars stand at the core of the responsibility area and its rules.

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

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

## **I. Fast and effective migration procedures at external borders**

An initial **screening procedure**, which is a necessary step to allow for proper identification, fingerprinting and channelling of the person to the adequate procedure, be it return or asylum, including, where applicable, to a border procedure is a key element of the responsibility part of the system.

In this respect, a balanced compromise was reached by the French Presidency regarding the **Screening Regulation**, which should contribute to an effective and controlled migration management at the external borders and the Czech Presidency is in close contact with the European Parliament in order to initiate the inter-institutional negotiations as soon as possible.

### a) Variability in the maximum nationality threshold establishing the scope of the mandatory border procedure

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

The purpose of the asylum border procedure is to quickly assess, at the external border, whether applications are unfounded or inadmissible and to swiftly return those with no right to stay, while ensuring that those with well-founded claims are channelled into the regular procedure and provided quick access to international protection. In this regard, **establishing a maximum nationality threshold** would allow for a simple and quick identification during the screening of those who should be channelled to the border procedure.

For that purpose, it could be considered that the **maximum threshold, for normal situations**, could be between **20%** (current proposal in the APR) and **30%** (see also Annex, point II. 1. a)).

Additionally, a Member State finding itself under migratory pressure with direct effect on its capacity to process eligible applications in the mandatory border procedure, including its reception capacity, could have the **possibility to request a reduction of the mandatory border procedure nationality threshold in clearly defined cases of exceeded adequate capacity in a Member State under migratory pressure**. Presidency proposes three possible ways how to reduce the to-be-agreed threshold for the mandatory border procedure: 1) by requesting to reduce the nationality threshold by half; 2) by requesting not to apply the mandatory procedure to nationalities with low return rates; or 3) by a combination of both previous options.

For a Member State to be able to benefit from reducing the threshold, it will need to notify the Commission and the Council, upon which the Commission will confirm such request through a simplified and speedy assessment, while the requesting Member State and the Commission would also agree on in what way should the threshold be lowered (see also Annex, point II. 1. b)).

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

In exceptional and very clearly defined crisis situations, time-limited derogations may be necessary to ease the burden on an affected Member State. It could therefore be considered to extend the scope<sup>5</sup> of possible derogations to be part of the Crisis Regulation also by including derogations from the mandatory border procedure as an exceptional and time-limited measure. As for any other derogation, it would need to be agreed and adopted by the Council in the Solidarity Response Plan by a Council Implementing Decision.

c) Hierarchical application of the above criteria

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

- Mandatory scope of the border procedure (within the screening procedure)
- The nationality threshold
- Possible reduction of the mandatory border procedure threshold in clearly defined cases of exceeded adequate capacity in a Member State under migratory pressure
- Possible derogations from the mandatory border procedure

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<sup>5</sup> The scope of derogations to be included under the Crisis Regulation, and which would be applicable to all possible migration-related crisis situations, should be otherwise similar to the scope as proposed under the draft Instrumentalisation Regulation.

## II. Rules on responsibility determination

The importance of **registering all migrants** as soon as possible after crossing the external EU border is indisputable. It is a prerequisite for correctly establishing the Member State responsible. This does not only provide for orderly migration management and increases the EU internal security, it is also an important element in terms of limiting secondary movements (see part III.). In this respect, a balanced compromise was reached by the French Presidency regarding the **Eurodac Regulation** that should contribute to an effective implementation of the asylum and migration acquis. The Czech Presidency is in close contact with the European Parliament in order to initiate the inter-institutional negotiations as soon as possible.

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

Taking into consideration the above, the Presidency is of the opinion that the following areas could be revisited when returning to the negotiations of the Dublin rules under the AMMR by the Council, to achieve a more balanced system (see also Annex, point II. 2. ii.):

- (a) Responsibility criteria for a more balanced system should aim at ensuring a more balanced distribution of responsibility across the EU.
- (b) Non-shift and cessation of responsibility rules that eliminate incentives for abuse and secondary movements should aim at the system's capacity to fight abuses and incentives for secondary movements.
- (c) New (shorter) time-limits for sending requests and receiving replies, to ensure faster determination of the Member State responsible and bringing sufficiency to the system.

### III. The fight against secondary movements

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

Given this is a cross-cutting issue, the tools making the fight against secondary movements more effective must be considered across the acquis. The current legislative proposals already include a number of such tools, some of which could be developed further (see also Annex, point II. 3.).

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The below proposals should be read together with the Presidency concept “**Way forward on the reform of EU asylum system based on balanced solidarity and responsibility**”.

They represent a result of extensive consultations and negotiations in the Council, both at technical level (JHA Counsellors held on 16 September, 24 October, 11 November and 23 November) and in SCIFA (held on 4. October and 29. November).

Furthermore, it is important to underline that the below proposals, as well as the Concept as such, should be considered as a commonly understood “springboard”, allowing the current and the incoming Presidency to restart, as soon as possible, the legislative work, making use of the elements presented in the concept as well as in this annex. It is however clear that each element proposed below will still need to be reviewed and ultimately considered within the legislative work itself.

## **I. AREA OF MANDATORY SOLIDARITY**

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

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

1) Minimum threshold for predictable annual solidarity contributions

- A minimum annual threshold necessary for people’s solidarity, as well as for direct financial support, could be agreed (in the Asylum and Migration Management Regulation) to reflect the solidarity needs arising from various structural challenges in the area of migration.
- This would allow predictable planning by contributing Member States. It would also provide minimum guarantees in terms of people’s solidarity and financial support for the benefiting Member States.
- Such minimum thresholds should be understood as a starting point on which the Commission should base its annual solidarity recommendation, not as a mandatory minimum for pledging.
- These thresholds could be set for both relocations and financial contributions and should reflect the structural and sustained nature of various migratory pressures on the EU.
- While relocations should primarily apply to persons in need of international protection, with priority for those most vulnerable, its application should be kept flexible. Given its voluntary nature, relocating and benefiting Member States should have the option to express their preferences in terms of persons to be considered for relocations. EUAA could support Member States with matching.

- Regarding the other forms of direct solidarity (focusing primarily on capacity building, services, skilled personnel, facilities and technical equipment - in fields such as registration, reception, border management, screening, detention and return), these would not be included in these thresholds, for practical reasons. However, during the pledging exercise itself, their financial value should be assessed and applied, recognising that the various types of solidarity are of equal importance.
- Irrespective of these minimum annual thresholds, the Commission will always have the possibility to propose, through the recommendations to be included in the Annual Migration Report, a higher annual relocation or financial target, as well as concrete proposals for the other forms of solidarity, if necessary and based on projected needs.
- Those needs would be based on the overall assessment of the past and current situation and pressures in all Member States. When assessing the overall situation in the EU and its Member States, the Commission should take into account the set of information to be agreed under Article 50 of the AMMR proposal, taking in to account the annual level of shared responsibility. Member States would also have an opportunity to express their solidarity needs for the coming year, to be taken into account by the Commission.
- In the same vein, in exceptional situations, where there would be no projected need for people's and/or financial solidarity for the coming year or a possibility to implement it (e.g. a health-related crisis with cross-border effect), the Commission could propose that the above-mentioned thresholds are not (fully) applied.

- A review clause could be included in the AMMR, allowing for an amendment of these minimal thresholds, should the overall migratory situation substantially change at EU level. Both the Commission and the Council could have the possibility to initiate such targeted amendment of AMMR.

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

- On the basis of the Commission recommendation for solidarity (people's solidarity, financial support and the *other* forms of solidarity), when pledging to the Solidarity Pool or the Solidarity Response Plan, Member States could follow a distribution key (fair share) based on a formula to be agreed. However, Member States would retain the right to choose which solidarity measure(s) they wish to contribute with.
- Should there be a need for the *other* forms of solidarity support, its financial (market) value would be assessed, allowing the fair share principle to be applied.
- The fair share principle could be established as a:
  - a) *Guiding principle*
  - b) *Mandatory principle*
- Should it be agreed that the fair share principle is applied mandatorily, Member States will still be able to request a partial or full reduction of their contribution as committed to in the Solidarity Pool or the Plan.

- In order to do so, such Member States should demonstrate clearly that a prevailing and/or past significant migratory situation on its own territory, leading to their reduced capacities in the area of asylum, reception and/or irregular migration, does not allow for (full) participation in providing solidarity to other Member States. The Commission should be able to confirm this, through a simplified and speedy assessment.
  - When a Member State is a recipient of solidarity measures, it is also excluded from providing solidarity to others.
  - Such a fair share should also serve as one of the guiding indicators to be used by the Commission when assessing Member States' notifications/requests for solidarity and when considering the significance of the migratory pressure or a crisis (compared with the EU average over the last 12 (rolling) months of all irregular arrivals to the EU) in an affected Member State.
- 3) Supplementary people's solidarity for situations where there are not enough relocation pledges – Dublin transfer offsets:
- If the annual relocation target recommended by the Commission in the Annual Report is not met in full by Member States, the mechanism would allow for a topping-up of the remaining unfulfilled relocation pledges, when providing people's solidarity. This would provide an option for the Member States that are under particular pressure/crisis, to also benefit from a corresponding reduction of the Dublin cases under the Dublin rules for which they would be otherwise responsible. This would shift the responsibility to Member States providing solidarity.

- Under such scenario, all relevant Member States could consider to assume responsibility and cancel a proportional number of Dublin transfers to Member States under a particular pressure/crisis, in addition to their relocation, financial or *other* forms of solidarity pledges.
- Such offsets would only be possible as a *second level* solidarity support, while relocations should always be considered as the preferred option, in terms of people's solidarity. The preferences of the benefiting Member States should be taken into account in this regard. These offsets would therefore be possible only when the recommendations by the Commission regarding relocations, financial or other solidarity support are not met by the Member States to a satisfactory level (therefore after the annual pledging exercise is concluded). Such level could be set (for example at 75 % of the Commission's recommendations on relocations).
- To motivate Member States to primarily pledge for relocations, financial support and the *other* alternative solidarity support, the Dublin offsets would not be considered when calculating the fair share/distribution key.
- The Dublin offsets could work as a supplementary solidarity tool on:
  - a) *Voluntary basis*
  - b) *Mandatory basis*
- For this proposal to work in practice, a system of guarantees is necessary, to avoid to the extent possible, a negative effect on pull-factors, secondary movements in the EU and the functioning of the Dublin system.

- Therefore, (some of) the following rules could be envisaged regarding the scope:
  - Persons subject to a transfer (accepted requests/notification), where the time limit from the acceptance of the request by the responsible Member States has not yet reached 6 months.
  - Persons who have absconded from the Dublin procedure in the second (requesting) Member States would not be included in the scope.
  - Cases in which the obligation to register a person in the Eurodac database is not fulfilled by a Member State would be excluded from the scope.
  - Persons that were resettled or relocated would not be included in the scope in order not to undermine these frameworks.
  - Unaccompanied minors and family unity related requests and transfers would be excluded from the scope.
  - Additionally, and on a voluntary basis, cases where the application has already been finally rejected in the first Member State could be included, so that the second Member State could consider the application as subsequent and carry out the return.
- The offsetting and benefiting Member States should be able to put forward their preferences in terms of persons to be considered for these offsets.
- It is also important to note that the tools making the fight against secondary movements more effective have to be considered comprehensively throughout the proposed reform (see part II. 3).

## II. AREA OF RESPONSIBILITY

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

The following pillars stand at the core of the responsibility area and its rules.

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

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

#### i. The mandatory border procedure

Besides well-functioning initial screening procedure, the border procedure is a crucial element supporting the Member States in managing their external borders. In order to reflect the operational reality and sustainability of the border procedure the Presidency is presenting the following ideas.

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

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

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

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

**b) A possibility to request a reduction of the mandatory border procedure nationality threshold in clearly defined cases of exceeded adequate capacity in a Member State under migratory pressure**

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

Three possible ways how to reduce the to-be-agreed threshold for the mandatory border procedure could be considered:

- 1) by requesting to reduce the nationality threshold by half;
  - 2) by requesting not to apply the mandatory procedure to nationalities with low return rates; or
  - 3) by a combination of both previous options.
- In order for a Member State to be able to benefit from reducing the threshold, the given Member State will need to notify the Commission and the Council and demonstrate clearly that given a significant migratory situation on its own territory, its annual *adequate capacity*<sup>6</sup> to process relevant cases in the border procedure is reaching its limits.

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<sup>6</sup> The Presidency acknowledges that such annual reasonable capacity would need to be clearly defined and agreed by the Council.

- The Commission will confirm such request through a simplified and speedy assessment, focusing notably on the overall *adequate* capacity of that Member State to process applicants subject to the border procedure, taking into account a last XX-year average number of persons subject to border procedure in a given Member State, the reception capacities and other relevant criteria<sup>7</sup>.
- The requesting Member State and the Commission would also agree on in what way should the threshold be lowered (e.g. by reducing the nationality threshold by half; by not applying the mandatory procedure to nationalities with low return rates; or by a combination of both previous options).
- Should that Member State and the Commission agree on a need to lower the threshold by not applying the mandatory procedure to nationalities with low return rates, they should agree on a list of nationalities that should be excluded. For that purpose, the Commission should carry an additional tailor-made assessment, also considering possible negative impact of this measure on a cooperation on returns with the given third countries.
- The possibility to lower the threshold could be accompanied by other measures, aiming at alleviating the pressure and improving the overall situation (e.g. the Support Toolbox) and have a clearly defined time-frame.

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<sup>7</sup> For example, by taking into account the set of information to be agreed under Article 50 of the AMMR proposal.

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

It has been acknowledged by the majority of Member States that in exceptional and very clearly defined crisis situations, time-limited derogations may be necessary to ease the burden on an affected Member State. To this end, the Presidency is proposing to extend the scope<sup>8</sup> of possible derogations to be part of the Crisis Regulation also by including derogations from the mandatory border procedure as an exceptional and time-limited measure.

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

**d) Hierarchical application of the above criteria**

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

- Mandatory scope of the border procedure (within the screening procedure)
- The nationality threshold
- Possible reduction of the mandatory border procedure threshold in clearly defined cases of exceeded adequate capacity in a Member State under migratory pressure
- Possible derogations from the mandatory border procedure

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<sup>8</sup> The scope of derogations to be included under the Crisis Regulation, and which would be applicable to all possible migration-related crisis situations, should be otherwise similar to the scope as proposed under the draft Instrumentalisation Regulation.

## 2) Rules on responsibility determination

### i. Proper and timely registration of all irregular migrants

The necessity to register all migrants as soon as possible after crossing the external EU border is indisputable. Moreover, the new Eurodac Regulation stipulates that persons found to be illegally staying within the territory of a Member State must be registered. In both cases, such registration should happen primarily within the screening procedure.

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

### ii. The Dublin system

Well-balanced Dublin rules that reflect the situation of both the Member States at external borders, and those Member States that suffer the most from secondary movements are another determinative part of the whole EU asylum system.

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

#### (a) Responsibility criteria for a more balanced system

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

- **Family criteria:** the proposal to include families formed in transit, *as proposed in the current AMMR proposal*, should be maintained. Additionally, the possibility to also include (minor) siblings could be explored further.

- **Residence documents and visas:** assuming responsibility, if the application is registered within 1 year from the expiry of a visa or 3 years from the expiry of a residence permit (*3 years for both in the current AMMR proposal*).
- **Diplomas or other qualifications:** this criterion, *as proposed in the current AMMR proposal*, could be maintained. If so, it would need to be assured that such criterion cannot be easily abused by applicants<sup>9</sup>.
- **Irregular entry criterion:** the same responsibility criterion should be established for all irregular migrants arriving to the EU, to avoid pull factors. Member States are invited to consider the following time limits:
  - a) *18 months*
  - b) *3 years (as in the current AMMR proposal)*
- **Visa waived entry:** if the first application is lodged in a second Member State where the need for a visa is also waived, that Member State is responsible. *The current AMMR proposal establishes that the responsibility always falls on the Member State of first entry within 3 years from when the date of entry into the territory of the EU.*
- **Discretionary clause:** could be extended beyond family and humanitarian grounds (e.g. for relocation purposes, on cultural and social ties). The time limit for a reply to a request made by the second Member State should be maintained, while the reply by the first Member State could be considered as acceptance in case of no reply.

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<sup>9</sup> E.g. by adding in the definition a condition that the studies must have taken place in the territory of MS (thus excluding online courses), lasted at least one year, and that the asylum application was registered within five years after the diploma/qualification was obtained, as discussed during previous negotiations on the AMMR. More detailed specifications regarding the types of diplomas and qualifications concerned could also be included to ensure a consistent interpretation.

- **The reasoning of Dublin requests and replies:** Member States should always provide solid reasoning for all criteria according to their hierarchical nature. A negative reply should be reasoned in relation to every relevant criterion. A standard form could be developed to facilitate this proposal and reduce the risk of an excessive administrative burden.
  
- (b) Non-shift and cessation of responsibility rules that eliminate incentives for abuse and secondary movements**

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

- **Cessation of responsibility:** responsibility ceases if there is proof<sup>10</sup> that the applicant stayed outside the territory of the EU for at least three months (*the current AMMR proposal does not foresee such a cessation of responsibility*).
  
- **Expiration of time limits:** as regards absconding, a suspension of the transfer deadline could be as follows (compared with the current AMMR proposal for an indefinite period):
  - a) 3 years
  - b) 5 years
  
- **Take back notification:** take back should be triggered by a notification, the time limit for replying to this notification could, however, be extended to 2 weeks (*1 week is proposed in the AMMR proposal*).

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<sup>10</sup> Eurodac proposal in the version of a partial general approach from June 2022 contains an extension of the scope of the Entry/Exit System and allows the access of competent asylum as well as competent authorities for „Dublin issues“ to the Entry/Exit System, which should enable a sound implementation the cessation clause in practice.

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

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

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

**3) The fight against secondary movements**

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

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

- The recast **Eurodac Regulation** will serve as one of the most important tools in terms of proper management and monitoring of the migration situation in the EU, contributing to the fight against secondary movements.
- The new **Screening Regulation** will significantly reduce the number of migrants who are not fingerprinted and checked, also with regard to security threats. Moreover, this regulation provides for the possibility of restrictive measures, including detention.
- The recast **Reception Conditions Directive** stipulates that applicants who apply in a Member State that is not responsible (especially after secondary movement) will not be eligible to receive standard reception benefits. This shall serve as one of the main tools in the fight against secondary movements.

- The new **Asylum and Migration Management Regulation** aims at simplifying the currently overregulated Dublin procedure to revive a functional Dublin system.
- The new **Asylum Procedure Regulation** contains several elements that enable applicants to be treated more effectively after secondary movements. CZ PRES builds on the work of previous Presidencies and is working, together with Member States, to make these rules even more effective, while maintaining necessary procedural guarantees. To highlight a few: new rules for implicit withdrawal that are also applicable in cases of absconding; a strong obligation on the part of the applicant to cooperate, with clear procedural consequences; special rules for those who are already beneficiaries of international protection; and the obligation to issue a return decision together with a negative asylum decision or non-automatic suspensive effect of appeal. Other areas such as the safe countries concept, withdrawals or appeals are about to be discussed at upcoming Asylum WP meetings.
- The fight against secondary movements is also one of the main objectives of the **Instrumentalisation Regulation** through the introduction of the extended scope of the border procedure.
- Further work at higher **convergence of decision on international protection** applications is necessary in order to eliminate abuse of the system (so-called asylum shopping) that is directly linked with secondary movements. The work of the French Presidency and the activities of the EUAA should be therefore further developed.

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