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NOTE

From: Presidency
To: Strategic Committee on Immigration, Frontiers and Asylum
Subject: New Pact on migration and asylum – Way forward on the border procedure
- Discussion paper

During the Czech Presidency, a concept for a way forward in the negotiations on the reform of the EU's common asylum system was developed, building further on the need to find common ground on the balance between the principles of solidarity and responsibility.¹ At the December 2022 Council, Ministers mandated the Swedish presidency to translate the concept into legislative texts on the Asylum and Migration Management Regulation (AMMR), the Crisis and Force Majeure Regulation and the border procedure in the Asylum Procedures Regulation (APR), and to continue the work at technical level based on that concept.

The Swedish presidency has already begun to translate the concept into a new compromise text for the AMMR, which is currently being discussed within the Asylum Working Party. The text has been positively received by the majority of the Member States as presenting viable solutions towards an overall compromise in the Council, and discussions continue to refine the text towards that end.

¹ The latest version of the document is 15265/22

While the Commission's proposal provided for mandatory people's solidarity in certain circumstances, the solidarity mechanism proposed in the concept establishes a system of **mandatory but flexible solidarity**: a legally binding, tailor-made and needs-based approach, reflecting the ever-evolving migratory challenges the EU and its Member States are facing. Under the mechanism, solidarity is mandatory, but contributing Member States have full discretion in choosing the type of solidarity contributions they wish to make. Given this approach, the revised AMMR text incorporates a system of three safeguards identified in the concept, in order to ensure sufficient predictability, assurances and flexibility in the solidarity mechanism, which is based on the premise that the EU as a whole shares responsibility for managing migration, governed by a set of common European rules (CEAS). The Presidency recalls that the safeguards are a minimum threshold that offers predictability as to the EU level of solidarity expected both in terms of people and financial contributions, a distribution key (based on a fair share) and thirdly, Dublin transfer offsets as a backstop to provide additional assurance on people's solidarity. The system also establishes a possibility for derogations from the obligation to contribute to the solidarity mechanism for Member States that are facing a significant migratory situation or are under migratory pressure.

The system also foresees an annual cycle, including an annual report by the Commission based on information provided by the Member States, and a Commission recommendation setting the concrete level of solidarity required for the year, taking into account, among other quantitative and qualitative criteria, the overall number of annual arrivals, the average recognition rates and also the average return rates which, based on the expected situation in a given year, can go beyond the minimum threshold set in the AMMR. For a Member State to be able to benefit from solidarity or derogations from the obligation to contribute under this system, it will need to notify the Commission, which will confirm the request through a simplified and speedy assessment.

The concept developed under the Czech Presidency foresees the same balanced approach for responsibility, outlining the various concrete elements for **mandatory but adaptable responsibility** built around three pillars 1) fast and effective migration procedures at the external borders, 2) rules on responsibility determination, 3) the fight against secondary movements. As with the solidarity component, the concept explains that the responsibility component should also be designed with **simplicity, practicability and predictability** in mind, 'taking into account the specificities of the migratory situation in all Member States, while maintaining the necessary and stable level of responsibility'.

The rules on responsibility determination, which are essential for the overall balance between responsibility and solidarity, are being discussed within the Asylum Working Party in the context of the AMMR negotiations.

In order to maintain balance and keeping in mind that it is also part of the responsibility rules, the Swedish Presidency wishes to focus the SCIFA discussion on the border procedure.

Border procedures – key elements for a sustainable and adaptable system

Border procedures are a central part of the reform of the common asylum system and an important element in the balance between solidarity and responsibility. The general objective is to provide for a quick assessment of asylum claims at the external border, and to swiftly return those without a right to stay in the Union.

In accordance with the APR Commission proposal, it is mandatory to apply border procedures to applicants from third countries with a low recognition rate (up to 20 %), or to those whose claim is fraudulent or abusive, or who pose a security risk. The Commission's proposal also foresees possibilities for not applying the border procedure linked to the issue of returnability established in accordance with Article 25a of the Visa Code.

The Czech Presidency concept paper also acknowledged the importance of the mandatory border procedure based on the establishment of a maximum nationality recognition rate threshold as an element allowing for a simple and quick identification of those who should be channelled to the border procedure.

However, as the numbers involved can vary, even dramatically from year to year, this has the consequence that the capacity required to process applications can be unpredictable to plan. As with the solidarity mechanism, the system thus requires adjustments that would allow the Member States to apply the border procedure in a practicable and predictable way.

Acknowledging this, as per the concept developed by the Czech Presidency and presented to Ministers, the design of the border procedure should 'take 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 Swedish Presidency would like to focus this SCIFA debate on finding a common ground to prepare for necessary legislative work on the APR, drawing on the ideas outlined in the concept. In this regard, the Presidency considers that the importance of balancing solidarity with responsibility is something all Member States acknowledge. The solutions found for the border procedure should accordingly ensure the right balance with those found for the solidarity mechanism.

Building on these aspects, the Presidency would propose the following key elements of the mandatory border procedure:

- 1. A rigorous system based on a maximum nationality recognition rate threshold,** in order to quickly identify during the screening those who should fall within the scope of the border procedure.

The Czech Presidency concept paper proposed two options, 20% as per the Commission's proposal, or up to 30%.

The objective of the threshold is to serve as a proxy for identifying applications that have low prospects of being granted international protection and can be rapidly processed within the time-limits of the border procedure. The higher the threshold, the greater the risk the examination would be complex, and would as a result clog up the available processing capacity. In addition, the higher the threshold, the higher the number of applications to be processed at the border, which would defeat the purpose of having a fast and sustainable system adapted to operational realities.

Which maximum nationality recognition rate threshold do you consider would best reflect the need to ensure a practicable and sustainable system of fast processing at the external border in a normal situation?

- 2. A predictable system based on an adequate capacity to process applications within the border procedure**

Similar to the approach developed for the solidarity mechanism, a system of further safeguards could be considered to secure sufficient predictability, assurances and adaptability in the border procedure. In particular, the notion of 'adequate capacity', which has already been identified in the concept as a safeguard, could be defined. This would serve to identify the capacity needed to carry out the border procedure on an annual basis.

Several options could be considered to determine the ‘adequate capacity’ of a Member State.

- (a) Setting up the adequate capacity for each Member State on an ad-hoc basis using the national strategies developed by Member States under the AMMR, followed by an assessment by the Commission and confirmed by the Council.

Under this option, the adequate capacity to process applications within the border procedure would be determined for each Member State on an annual or x year basis. The Commission would carry out an assessment with the Member State in question and then the final number, having been set, could be confirmed by the Council.

- (b) Identification of a minimum adequate capacity for the Union as a shared responsibility, which could be used as a reference to determine the adequate capacity for each Member State

Under this option, as with the solidarity mechanism, a number identifying the minimum annual adequate capacity for the Union would be set. Different options could be considered to share the set Union capacity among Member States. One possibility would be to do so based on the share of arrivals or the share of arrivals belonging to nationalities eligible for the border procedure. To ensure that such a system would be adaptable to changing circumstances, the share of arrivals could be identified on a rolling three-year basis. In addition, if one of the options based on the share of arrivals is chosen, it might still be considered opportune for each Member State to establish a residual basic level of capacity, to ensure that the Union as whole would be better prepared for different eventualities.

- (c) Other?

Which option for identifying more precisely the adequate capacity of a Member State do you consider to be best suited to ensuring predictability and practicality for border procedures as part of an overall balanced approach with that being taken for solidarity?

3. An adaptable system that allows Member States to react to the actual migratory situation when a Member State reaches its adequate capacity.

The Czech Presidency concept anchored the mechanism for ensuring solidarity and responsibility into the broader overall system of the annual cycle, including an annual report by the Commission, with the possibility for recommendations from the Commission to reflect changing circumstances, as well as the possibility to resort also to using the Permanent EU Migration Support Toolbox. It also included the possibility to request a reduction of the nationality threshold and to request that the border procedure not be applied to nationalities with low return rates or a combination of both.

Building on the possible derogations from the border procedure included in the concept so far, the Presidency considers that there is scope for their further development. Indeed, the Presidency considers that once a Member State is faced with a migratory situation that exceeds its adequate capacity, it would be reasonable to consider a range of other responses. In the first place, there is an interest to ensure that a Member State in such a situation uses its adequate capacity in place in the optimal manner. Secondly, in designing the appropriate response it is to be recalled that the concept's balanced approach to solidarity and responsibility is based on the premise that the EU as a whole shares the responsibility to manage migration, governed by a set of common European rules (CEAS).

A practicable and efficient system could then prioritise those cases with the highest likelihood of return, instead of cases where the probability of return is lower to avoid clogging up the capacity that is in place. It is also to be recalled that the Permanent EU Migration Support Toolbox, already foreseen by the concept, envisages a number of support measures, including the taking of EU-level actions to enhance returns, and can be called upon to address more difficult cases of returnability. It would also be possible to consider the response in terms of people's solidarity offered through relocation within the border procedure.

(a) Possible measures to apply when a Member State has reached its adequate capacity.

i. Relocation within the border procedure (relocation from border procedure to border procedure)

The Member State could request the relocation of applicants. The border procedure would then be applied by the contributing Member State to which the applicant is relocated.

ii. Temporarily lowering the nationality threshold.

The Member State could request a temporary lowered threshold based on the specific circumstances applicable to it. This could be accompanied by a possible limitation on how much the nationality threshold could be lowered (e.g. not below 5%).

iii. Temporarily not applying the border procedure to specific nationalities with low return rates.

The Member State could indicate to the Commission the nationalities to which it will not apply the border procedure. Such a measure would need to be accompanied by specific measures at EU level to increase return rates towards those third countries, which may be priority countries for EU action.

iv. Temporarily suspending the border procedure

The Member State could request a suspension. Such a suspension could be possible for a very limited period of time in a crisis situation, and its prolongation should be subject to reassessment.

(b) Procedure to request application of the measures

Mirroring the solidarity mechanism, for a Member State to be able to benefit from these measures under the concept developed so far, it would need to notify the Commission and the Council and demonstrate that its annual adequate capacity to process relevant cases in the border procedure is reaching its limits. The Commission would confirm such a request through a simplified and speedy assessment, and agree with the requesting Member State on the possible options regarding the application of the border procedure and any other measure aimed at alleviating the pressure and improving the overall situation (e.g. the Support Toolbox).

Which of the presented adaptability measures do you consider best suited to a Member State that is reaching its adequate capacity? Which other measures could you envisage? Which safeguards do you consider necessary?
