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#### NOTE

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From:	Presidency
To:	Permanent Representatives Committee
Subject:	Balance between solidarity and responsibility under the Pact on Migration and Asylum - Discussion paper

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The Czech Presidency developed a concept for a way forward in the negotiations on the Pact for Migration and Asylum, building on the need to find common ground on the balance between the principles of fair sharing of solidarity and responsibility<sup>1</sup>. At the December 2022 JHA Council, Ministers mandated the Swedish Presidency to translate that 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 Procedure Regulation (APR), as well as to continue work at the technical level. On 9 February 2023, the European Council called on the co-legislators to continue work on the Pact, in accordance with the Joint Roadmap.

The Swedish Presidency compromise text for the AMMR was discussed at the meetings of the Asylum Working Party on 18-19 January, 10 February, and 28 February to 1 March 2023, as well as at the meetings of the JHA Counsellors on 27-28 March and 18 April 2023.

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<sup>1</sup> The latest version of the document is 15265/22.

Drawing on the ideas outlined in the Czech Presidency concept and taking into consideration the importance of the mandatory border procedure in achieving a balance between solidarity and responsibility, the Swedish Presidency proposed key elements for a focused discussion at the SCIFA meeting on 16 February 2023 to prepare for the necessary legislative work on the APR. The Swedish Presidency translated the outcomes of the SCIFA meeting into legislative text for the APR, and a first discussion was held on 15 March at JHA Counsellors level. New compromise texts were discussed at the JHA Counsellors meetings on 5 and 27 April 2023.

For the informal SCIFA meeting of 20-21 April 2023, the Swedish Presidency presented a paper examining a number of possible compromises on certain key issues relating to the AMMR and the APR.

Overall, the compromise texts of the AMMR and the border procedure under the APR as well as the draft framework for the crisis and *force majeure* Regulation have been positively received by a majority of the Member States as steps towards viable solutions for an overall compromise on these proposals, even though further discussion is still needed to find a broader compromise on outstanding issues.

In its work, the Presidency has tried to take careful account of the need for sustainability, predictability and simplicity/practicality as well as for flexibility and a fair sharing of responsibility. Indeed, more broadly, close attention has been given to the need to ensure a balanced approach between the principles of solidarity and responsibility across the legislative framework. This should also guide the discussions towards reaching a common position on all three interlinked elements found in the AMMR and the APR: mandatory but flexible solidarity, mandatory but adaptable border procedures, and the rules on responsibility determination, balancing as much as possible the main elements in the solidarity part. At the informal SCIFA meeting, the Presidency presented a number of possible compromises on certain key issues. The Presidency recalls its objective, in line with the Roadmap, of reaching a general approach on both the AMMR and the APR at the 8-9 June JHA Council meeting.

Whilst focusing the current discussion on the balance needed in both the AMMR and the APR, the Presidency would encourage Member States to approach the discussion taking full account of the progress made and thus taking due account of the strengthened responsibility resulting from the recast Eurodac Regulation, the new Screening Regulation and the recast of the Reception Conditions Directive. Work on finding an appropriate way forward on the Crisis and *force majeure* Regulation, which is also part of the overall equation, also needs to be continued.

Considerable progress has been made on the solidarity component. This comprises a flexible mechanism in which the contributing Member State has full discretion about the type of solidarity contribution – relocation, financial or other measures where relevant – which are of equal value. The system therefore ensures that no Member State will ever be obliged to carry out relocations or contribute more than its fair share. The Presidency considers that the emerging compromise on the solidarity mechanism is broadly accepted, but it is appropriate to take account of the nature thereof in balancing out the remaining outstanding elements still to be discussed. In light of the above, the Presidency would encourage Member States to reflect on the following compromise proposals for key outstanding issues:

### **Mandatory but adaptable and practicable border procedure balanced with a fairer and more efficient system for determining responsibility**

There is an emerging compromise on mandatory but adaptable border procedures around the concept of ‘adequate capacity’. However, there is an ongoing discussion about which parameters should be used to calculate the ‘adequate capacity’ for each Member State on the basis of the reference number included in the Regulation, and about what this capacity means in practice.

Based on the ongoing discussions, the Presidency proposes the following as a compromise for the mandatory but adaptable responsibility in the APR:

- Adequate capacity to examine applications in the border procedure would be defined as ‘adequate capacity at any given moment’. This means that Member States are required to set up the necessary adequate capacity (infrastructure and personnel) required at national level to examine a specific number of applications at any given moment on an inflow-outflow basis.

- The adequate capacity at national level will be calculated on the basis of a formula that ensures the distribution of EU capacity across those Member States that will need to apply the border procedure. This formula would be based on aggregating irregular border crossings (as reported by Member States to Frontex, which also includes Search and Rescue) and refusals of entry (as per Eurostat data) calculated over a three-year period. The adequate capacity resulting from the formula would then be stable for the next three years.
- The extent of the obligation of the Member State to set up the adequate capacity, should take appropriate account of Member States' concerns regarding national security and public order.
- Furthermore, while the border procedure shall generally be carried out at the border, there should be a circumscribed possibility to designate facilities dedicated to the border procedure in other parts of the territory (i.e. not at or in the proximity of the border).
- When the adequate capacity is reached, through a single substantiated notification to the Commission, a Member State under migratory pressure (as determined in the Commission decision) will be able to temporarily not apply the border procedure beyond the adequate capacity on an inflow-outflow basis for the remainder of the calendar year. This means that as soon as places become available again, arriving applicants will be channelled to the border procedure. This compromise is a practicable solution that acknowledges the volatility of flows (as Member States may, in the course of a calendar year, be above or below their capacity at different moments in time) and avoids placing an excessive administrative burden on Member States already under pressure. If the Member State is not considered to be under migratory pressure, before applying this measure, it will require Commission authorisation, which, if granted, will be valid for the remainder of the calendar year. The Member State applying the adaptability measures will have to report to the Commission on a monthly basis and the Commission will monitor the situation.
- A Member State should always be able, within the border procedure, to prioritise cases with a high probability of prompt return.
- Families with children of 12 years of age or younger should not be automatically exempted from the border procedure. Applications by unaccompanied minors shall be dealt with in the border procedure only when the minor is considered a danger to national security or public order.

The Presidency considers that the increased responsibility deriving from screening and the mandatory border procedure should be duly taken into account in reflections on the overall balance. In particular, it should be balanced with a fairer distribution of responsibility for examining applications, particularly in the case of third-country nationals who are non-returnable. In this context, the Presidency presents the following elements as a possible compromise for some of the main outstanding issues in the responsibility part of the AMMR:

- Shorter responsibility for persons whose application has been rejected in the border procedure:
  - The current *acquis* of 18 months for the shift of responsibility for persons who absconded from the Dublin procedure (meaning that the person absconded from the second Member State that was applying the Dublin procedure in order to return the person to the Member State responsible) would apply to persons whose application had previously been rejected under the border procedure by the responsible Member State, while the time limit would be extended to five years in other cases of absconding. The Commission proposal provided that the responsible Member State would remain responsible for as long as the person was absconding.
  - There would be a new rule on the cessation, according to which the responsibility of the Member State that rejected the application in the border procedure will cease two years after the final rejection. An application registered after that time would then be considered as a new application for the purpose of determining responsibility. This type of cessation of responsibility is not provided for under the current *acquis* or under the Commission proposal.
- Cessation of responsibility when the applicant leaves the territory of the EU for at least six months during the examination of the application. The current *acquis* provides for such cessation after three months, while the Commission proposal had deleted this provision.
- Responsibility for applications registered within three years of the irregular entry or of the time when SAR disembarkation took place (in line with the Commission proposal). The current *acquis* is 12 months for irregular entry.

- Take-back notifications where responsibility has already been established, but the notified Member States would be able to object in a clearly defined and limited number of cases. However, there will be no shift of responsibility in the event that the notifying Member State does not comply with the time limit to send the take-back notification. The current *acquis* provides for a take-back request without clear grounds for rejections, and there is a shift of responsibility in the event that the requesting Member State does not comply with the time-limit.
- No extension of the definition of family members to cover siblings, and no new criterion on diplomas and other qualifications. The Commission proposal included these extensions. However, given the concerns and objections raised by a significant number of Member States about these criteria, the Presidency is not including them in its proposal for a compromise.
- The Commission proposal also included beneficiaries of international protection in the take-back procedure. However, given the strong objections by a significant number of Member States and in order to take due account of the overall balance, the Presidency proposal is to retain the current *acquis*, according to which beneficiaries of international protection are excluded from the take-back procedure. Resettled persons should be included, as in the Commission proposal.
- The discussions on how long beneficiaries of international protection must be legally resident in order to be able to opt for long-term residence will take place in IMEX under the Long-Term Residence Directive recast negotiations.

Finally, the Presidency considers that responsibility offsets are an essential element that would help to increase the predictability and robustness of the solidarity component and to balance out increased responsibilities resulting from the overall system. For this reason, the Presidency presents the following as a compromise:

- Responsibility offsets are provided only as a second-level form of solidarity after Member States have made their pledges on relocation and/or financial contributions (to avoid incentivising secondary movements). They also function as a backstop for the flexible solidarity system in order to increase the predictability of the mechanism: voluntary responsibility offsets can be made only when relocation pledges reach 60% of the relocation figure set out in the Commission Recommendation. At this point, both benefiting and contributing Member States may take the initiative to request and offer offsets. Mandatory responsibility offsets are activated following a new meeting of the High Level Forum, if the minimum threshold set in the Regulation is not achieved through relocation pledges.

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