



Council of the
European Union

Brussels, 12 May 2023
(OR. en)

9192/23

LIMITE

**ASILE 53
MIGR 164
JAI 606
FRONT 167
RELEX 586**

NOTE

From: Presidency
To: Permanent Representatives Committee

Subject: Balance between solidarity and responsibility under the Pact on Migration and Asylum
- Discussion paper

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, as well as at the meetings of the JHA Counsellors on 27-28 March, 18 April and 10 May 2023. Regarding the AMMR, the Presidency proposed key elements at the SCIFA meeting on 16 February 2023. The outcomes of that discussion were translated into a legislative text for the APR, which was discussed on 15 March at JHA Counsellors level. New compromise texts were discussed at the JHA Counsellors meetings on 5 and 27 April 2023.

Following the policy debate in COREPER on 3 May the essential building blocks of AMMR and APR, the Presidency is presenting the revised draft texts of AMMR and APR, set out in 9238/23 and 9242/23.

Following the COREPER debate on 3 May 2023, the Presidency has taken good note of the generally expressed need for a sustainable and practicable system of flexible responsibility and solidarity. Based on the reactions from delegations, the Presidency is confident that the proposed texts that it is putting forward form a good basis for a balance between solidarity and responsibility and should pave the way towards reaching a general approach on both the AMMR and the APR at the 8-9 June JHA Council meeting. The Presidency is also mindful of the need to make quick progress on the Crisis and *force majeure* Regulation, which is also part of the overall equation.

On the clear understanding that nothing is agreed until everything is agreed, the Presidency has noted that there is a **large support for the following compromises** it submitted to COREPER on 3 May.

For the border procedure in the APR:

- 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 will 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 will 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.
- 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 reminds delegations that the reception conditions applicable to applicants, including to minors, are entirely governed by the Reception Conditions Directive (RCD) on which the interinstitutional negotiations were ended under the Czech Presidency. The APR text is aligned with the RCD text in this regard.

For the AMMR:

- Take-back notifications will replace the current take back requests in cases where responsibility has already been established, with a possibility for the notified Member States to object in a clearly defined and limited number of cases. 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.
- There will be no extension of the definition of family members to cover siblings, and no new criterion on diplomas and other qualifications.
- Regarding beneficiaries of international protection, the current *acquis*, according to which beneficiaries of international protection are excluded from the take-back procedure, will be retained. Resettled persons will 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.

- The flexible solidarity 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.

At the same time, there is clearly still a need to further refine the balance between solidarity and responsibility. The particular geographical position of frontline Member States needs to be borne in mind. Also, taking due account of the increased responsibility resulting from the recast Eurodac Regulation, the new Screening Regulation and the recast of the Reception Conditions Directive, the Presidency submits the following **amended compromises** for some of the main outstanding issues. The Presidency wants to **limit the COREPER discussion to the issues set out below**.

For the border procedure in in the APR:

- The definition of adequate capacity to examine applications in the border procedure ‘at any given moment’ would be combined with **an annual cap**. Whilst Member States will be required to set up the necessary adequate capacity (infrastructure and personnel) necessary at national level to examine a specific number of applications at any given moment on an inflow-outflow basis, they will also have the reassurance that this requirement will not go beyond the annual cap. Nevertheless, Member States would still be obliged to continue the examination in the border procedure of applications from third country nationals with a high probability of prompt return or who are considered to be a security threat. The annual cap, taken together with the cessation of responsibility for applications rejected in the border procedure (see infra), is also an acknowledgment of the fact that some frontline Member States may be confronted with significant numbers of third-country nationals who are non-returnable.
- Furthermore, while the border procedure shall generally be carried out at the border, it is suggested to open up the possibility to **designate facilities** dedicated to the border procedure at **other locations of the territory** (i.e. not at or in the proximity of the border) in a similar way as in the negotiation mandate on the Screening Regulation.

- A single substantiated **notification** to the Commission should be sufficient to allow a Member State to temporarily not apply the border procedure beyond the adequate capacity on an inflow-outflow basis for the remainder of the calendar year, **regardless of whether the Member State concerned has been previously determined as being under migratory pressure** in a Commission decision. The use of the border procedure in a Member State that makes such notification will be monitored by the Commission and as soon as places become available again, arriving applicants will be again channelled to the border procedure. The Member State applying this measure will have to report to the Commission on a monthly basis and the Commission will closely monitor the situation.

For the AMMR:

- The Commission had proposed to significantly increase 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) to five years as it was one of the main incentives for secondary movements. The Presidency previously suggested to keep the 18 months time period for persons whose application had previously been rejected in the border procedure by the responsible Member State, while keeping five years in all other cases of absconding. In the light of the reactions from Member States against the latter time period, the Presidency proposes to provide a **shift of responsibility for all cases of absconding at three years**.
- There would be a **new rule on the cessation of responsibility of the Member State that rejected the application in the border procedure. Responsibility 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 nine 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.

- *Voluntary responsibility offsets* can be made only when relocation pledges reach **50% of the relocation figure set out in the Commission Recommendation**. In making its Recommendation the Commission will take due account of the number of benefitting Member States so as to compensate for the fact that these Member States obviously do not contribute. At this point, both benefitting and contributing Member States may take the initiative to request and offer offsets.
- *Mandatory responsibility offsets* can be triggered by reference to the minimum threshold set out in the Regulation which will remain as the ultimate backstop in any case, also where during the year, due to full or partial deductions, the implementable pledges for relocation fall below the minimum threshold. It is important to underscore that at any rate mandatory responsibility offsets can be triggered only in case a contributing Member State already has persons on its territory for whose application for international protection it would not be responsible. In order to increase the effective implementation of both the solidarity and the responsibility aspects of the AMMR/Dublin acquis, the Presidency proposes two new safeguards. On the one hand, **mandatory offsets should not be triggered to the benefit of a Member State with regard to which AMMR/Dublin transfers are effectively not possible**. On the other hand, **mandatory offsets should be available to a benefitting Member State in case a contributing Member State is not implementing its relocation pledges**.
- Member States can **pledge alternative solidarity measures** even if the Commission Recommendation, does not provide for it, provided of course that the benefitting Member State accepts such measures (otherwise the pledge will become financial contributions).

The Presidency invites COREPER to discuss the above package of amended compromise proposals with a view to finding an agreement that can be the basis for a general approach on both the AMMR and the APR.