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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL on asylum and migration management and amending
Council Directive (EC) 2003/109 and the proposed Regulation (EU)
XXX/XXX (Asylum and Migration Fund)
- Comments from the delegations

Following the Informal meetings of the Asylum Working Party on 10/11 November 2021,
delegations will find attached a compilation of replies received from Member States on the
abovementioned subject (Articles 3-7 and 61-75).

Written comments submitted by the Member States

Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]

and following informal videoconferences of the members of Asylum Working Party on 10/11 November 2021

Articles 3-7 and 61-75

Table of contents

DENMARK	3
GERMANY	4
HUNGARY	8
IRELAND	11
THE NETHERLANDS.....	12
PORTUGAL.....	14
SLOVAKIA	16
SWEDEN	18

DENMARK

Re.: Article 3:

- We think it is important that the chapeau of article 3 specifically mention the reduction of irregular migration to Europe as the overall aim of a comprehensive approach to asylum and migration management.

Litra a)

We propose to include “return” as part of capacity building of third country partners i.e. in the sentence ...” Building their capacities in search and rescue, border, asylum and migration management **including return**, preventing and combatting irregular migration.....”

Litra g) what is meant by : “effective access to procedures for granting and **withdrawing** international protection?

Litra ha) what is meant by “unauthorized movements” – is it between member states?

Re. Article 4:

- We agree to move article 4 to the recital due to its general nature

Re. Article 5

- We note that “the Union... and the relevant Union Agencies “ have been inserted in the chapeau of art 5. What are the reason for this insertion? We note that the last sentence in the chapeau states only what the Member States shall do in relation to litra a) to e) .

Re. Article 6:

We agree with the deletion of paragraphs 1 and 2.

GERMANY

We thank the presidency for considering our comments on Art. 61 – 75 of the AMMR Regulation.

As a purely precautionary measure, we would like to clarify that the DEU comments refer solely to the amendments in the text of 29 October 2021 and that we maintain our previous positions including a scrutiny reservation for the entire AMMR Regulation.

Art. 62 (Data security and data protection)

We think it is important that this Regulation is fully aligned with the relevant applicable Union data protection legislation. To that aim, we still see some need for amendments in Article 62. We are therefore sending you the following suggested wording and kindly ask that it is taken into further consideration by the Presidency:

<p>1aa. This Regulation is without prejudice to Union law on the protection of personal data, in particular Regulation (EU) 2016/679, Regulation (EU) 2018/1725 [and Directive (EU) 2016/680].</p>	<p>We suggest to add this paragraph in order to clarify the relationship between this Regulation and EU data protection law. This is fully aligned with wording in other recent EU legislation, such as the NIS2 Directive.</p> <p>If also Directive (EU) 2016/680 should be referenced is to be assessed after the articles referencing the exchange of security-relevant information have been finalised.</p>
<p>1. Member States shall implement provide that the controller implements, in accordance with applicable data protection legislation, appropriate technical and organisational measures to ensure the security of personal data processed under this Regulation and in particular to prevent unlawful or unauthorised access or disclosure,</p>	<p>In data protection law, the <u>controller</u> is obliged to take technical and organisational measures. As the Member State would not be the controller itself, but presumably the competent authorities, we suggest amend this paragraph accordingly (unless there is a specific reason why the wording has been</p>

<p>alteration or loss of personal data processed.</p>	<p>chosen here).</p>
<p>2. The competent supervisory authority or authorities of each Member State shall monitor independently, in accordance with its respective applicable national law, the lawfulness of the processing of personal data by the authorities referred to in Article 41 of the Member State in question.</p>	<p>This paragraph should be deleted: The GDPR, the EUDPR and the Directive 2016/680 each have adopted a regulation on the independence and also the competences and tasks of data protection supervisory authorities. The obligation to monitor data processing under this Regulation already arises from these legal acts, as does the independence of data protection supervision (which is based on EU primary law, see Article 16 (2) TEU and Article 8 (2) of the Charta).</p> <p>We do not see the added value of a specific regulation on supervision here. By contrary, we are concerned that this could give rise to misunderstandings, which should in any case be avoided.</p>
<p>2. The processing of personal data by the Asylum Agency shall be subject to Regulation (EU) XXX/XXX [<i>European Union Asylum Agency</i>], in particular as regards the monitoring by the European Data Protection Supervisor.</p>	<p>Amendment in order to avoid ambiguities (the EDPS should monitor, not be the one monitored).</p> <p>It could also be considered to move this paragraph to paragraph 1aa for reasons of context.</p>

Art. 64 (Penalties)

DEU maintains the scrutiny reservation.

As commented, DEU still believes that the choice of sanctions to be attached to a breach of provisions of the Regulation should be left to the discretion of the MS. It is already guided by the requirement that MS must provide for sanctions that are "effective, proportionate and dissuasive".

We appreciate the explanation of the COM that the wording "including administrative or criminal penalties" does not intend to create concrete specifications for the sanctions to be implemented and there is no obligation to introduce new sanctions, when there are already sanctions according to the Dublin III regulation.

Art. 67 (Committee)

DEU asks for clarification on how the procedure should look like with the inclusion of Art. 5 of Directive (EU) No. 182/20211.

Art. 68 (Exercise of delegation)

DEU expressly welcomes the extension of the deadline in Art. 68(6).

Art. 71 (Amendments to the Long-Term Residence Directive)

In principle, Germany considers it preferable to reserve possible amendments to the Long-Term Residence Directive and maintains a scrutiny reservation here.

Art. 72 (Amendments to Regulation (EU) AMIF)

DEU scrutiny reservation is maintained. We take a very cautious view of the proposed increase in the AMIF Regulation's flat rates for resettlement and relocation

Art. 73 (Repeal)

DEU welcomes the clarifying additions of the Presidency to Art. 73 AMM Regulation. We consider these to be useful, particularly in view of the transitional period to the implementing acts.

Art. 74 (Transitional measures) and Art. 75 (Entry into force and applicability)

DEU welcomes the shift from Art. 75 UA para. 2 to Art. 74 para. 2 AMM Regulation.

HUNGARY

General comments

Hungary maintains and reiterates its scrutiny reservation on the whole proposal on the entire Asylum and Migration Management Regulation and thus also on all the new amendments and proposals made. Hungary also refers to its substantive reservation along the lines of the concerns indicated at ministerial and SCIFA level. Hungary also indicates that the Hungarian Parliament, in its Decision No 40/2020 (XII. 16.) OGY, laid down that the principle of subsidiarity had been infringed in relation to the five draft regulations of the new Pact on Migration and Asylum.

Hungary maintains its position for a package approach and considers it important that the technical discussions of the proposals do not prejudice any decision to be taken at political level,

As certain content elements of the legislative proposals go beyond technical issues, Hungary recommends that decisions on issues that require political consensus should be taken at a higher level.

Article 3

Regarding the Presidency discussion paper presented on the AWP meeting on November 10, we do not support the first of the sentence (*with the overall aim of effectively managing asylum as well as managing migration flows to and between the territories of the Member State, actions taken by*) of the alternative drafting suggestions for the chapeau of Article 3, regarding our position on relocation. Therefore, we ask for its deletion. Given the deletion, we would prefer option A.

In the case of point a), maintaining our previous position, we cannot accept the reference to the provision of legal pathways (which practically refers to resettlement) unless the text states that this can only be done on a voluntary basis. In addition, in the case of legal migration, national competences should be referred to in the text. Furthermore this point shall mention the necessity for the access to international protection in third countries, especially in countries close to the region of origin.

Concerning point f) on persons rescued at sea, we note that the EBCG Regulation states that the European integrated border management concept includes requirements for the execution of search and rescue operations and since we consider this activity to be equal to illegal border crossing, it is sufficient to mention only point e), as it also covers SAR operations.

The Member States responsible to be determined on the basis of the rules and mechanism for solidarity is treated with reservations and we propose to delete the phrase „the principle of solidarity and fair sharing of’. However, Hungary could also consider the use of the following wording *fair balance between responsibility and solidarity*.

We request the deletion of point k) because, in accordance with the Treaties, integration is a matter for the Member States.

Article 4

Regarding the Presidency discussion paper presented on the AWP meeting on November 10, we would welcome the reference to the respective competences of Member States, as our position is that the measures taken by the Union and the Member States in the field of asylum and migration, based on the comprehensive approach, as well as relevant policies, must be implemented in full respect of national competences as set out in the Treaties. Making Article 4 a recital is still under consideration.

Article 5

Our position on this article remains unchanged. During the drafting of the Pact, we made it clear that the planned reform of EU migration policy must be based on a balance between responsibility and solidarity and in this regard we consider it as important to highlight this (balance) in the title, as well as in the text of the article. We also emphasize the need for a greater flexibility in solidarity. We propose to add in point b) a sentence referring to the prevention of the systematic abuses of asylum.

Article 6 – Governance and monitoring of the migratory situation

Maintaining our previous position, we are not convinced of the added value of the proposed strategic approach as, with regard to the different strategies, we see the risk of duplication and increased administrative burdens. However, if such a strategic approach is to be established, we would like to highlight the importance of involving the Member States in the drafting of the European Asylum and Migration Management Strategy, especially as it would be of utmost importance to ensure that all the prioritized elements of the national strategies are reflected properly

in the European Asylum and Migration Management Strategy. We therefore support option A of the alternative drafting suggestions in the Presidency discussion paper presented on the AWP meeting on November 10.

In paragraph 4, we consider it necessary to define the term "recurring disembarkation following search and rescue", and more specifically, when it can be considered recurring. In this regard, we stress that we do not support a special solidarity mechanism to be set up in connection with search and rescue operations, as we consider this phenomenon as a form of illegal migration. With regard to the Commission's annual Migration Management Report, maintaining our previous position, we believe that several external and internal factors influence the number of arrivals, be it a pandemic or the actions and decisions of governments. Furthermore, a one-year forecast pledge can be an explicit invitation up to the indicated number, especially if an automatic solidarity system is assigned to it.

Article 7 – Cooperation with third countries to facilitate return and readmission

Maintaining our previous position, we generally support the mechanism established by Article 25a of the Visa Code to improve cooperation with third countries in the field of return and readmission.

Article 61 and 72

As regards Article 61 and 72, we refer to our reservation on relocation, which we can only be accepted in a voluntary form.

Article 71

We maintain our previous position that the three-year deadline proposed in Article 71(1) is too short, and we support maintaining the current five-year deadline.

IRELAND

Article 3

It is important to ensure that no new direct or interpretive obligations are placed on Member States by this Article. This is of particular concern to Ireland as some of the matters listed such as (c) full implementation of the common visa policy (e) effective management of the Union's external borders and the reference to the EBCGA in (m) are Schengen related matters which Ireland is not part of.

With regards to the text suggestions circulated by the Presidency (WK 13019/21) our preference is for Option A.

“With the overall aim of effectively managing asylum as well as managing migration flows between the territories of the Member States, actions taken by the Union and the Member States in the field of asylum and migration management shall be guided by a comprehensive approach addressing the entirety of relevant migratory routes and consisting of the following components, within the framework of the applicable Union law”

Article 4

We can support the text of the proposed recital set out in document WK 13019/21 in place of Article 4.

Article 6

In order to ensure that Strategy referred to in paragraphs 1 and 2 of Article 6 could not be given some legal effect by the Courts we support Option A presented in the discussion paper - the deletion of these two paragraphs.

The last part of paragraph 3 lists a number of Schengen related matters that MS must take account of when developing their national strategies. These measures do not apply to Ireland and we would suggest adding ‘where applicable’ at the end of paragraph 3.

THE NETHERLANDS

In the following comments, the Netherlands reacts to the latest changes proposed by the Presidency. For some articles, we reiterate our previously written comments that were not taken over by the Presidency, but that we feel are particularly important. We uphold our previously written comments and reservations for the articles that are not listed below. We do not oppose the changes made in the amended text in the articles listed below, if we do not comment on them.

Article 3

We believe option B takes into account the obligations that the member states have in this regard and would prefer that option. However we are still reflecting on the legal objections other member states have put forward in this regard. This is still an ongoing analysis, also taking into account the context and explanation given by the council legal service.

Moreover, the Netherlands would like to point out that it has proposed to add a paragraph that includes the rules and mechanisms for solidarity. In the view of the Netherlands, solidarity is an essential part of the AMMR and should be included in this article.

Article 5

This article lists the responsibilities of member states to ensure the effective functioning of the Union's asylum and migration management policies. However, what happens if a member state does not establish or maintain a well-prepared and -functioning national asylum system or does not take all measures necessary to prevent secondary movements? Article 5 nor 6 address the current lack of a mechanism to bring deficiencies to the attention of the Council and nor do they foresee in a provision for sanctioning the member state involved. The fair balance between responsibility and solidarity needs to be reflected in the title as well as content of this article. In its current form the article gives the impression that solidarity is mandatory whereas member states responsibilities seem less so.

In paragraph 1 (a) we propose to clarify that these concern migration flows within the borders of the European union.

Article 6

This article is crucial to ensure effective implementation of the acquis. The Netherlands strongly supports the development of the European Asylum and Migration Strategy, the development of supporting national strategies as proposed in article 6.1.

Article 7

The Netherlands is in favour of a comprehensive approach on migration and the effective use of relevant EU instruments. The Netherlands wonders how the Commission views the relationship of article 7 of the AMMR with article 25a of the Visa Code and specifically the possibility therein for positive measures in case a country shows good cooperation on return. In addition, the Netherlands underlines the importance of a balanced approach and taking into account the notions of effectiveness and proportionality.

Article 64

We maintain our scrutiny reservation on this article.

Article 68

Paragraph 6: The Netherlands is still reviewing the proposed change in this paragraph and would like to maintain a scrutiny reservation on this paragraph.

Article 71

The Netherlands proposes to delete this article. An amendment to the Long Term Residence Directive should be made in that directive but has no place in the AMMR.

If deletion will not take place, the Netherlands wants to put forward its stance on the possible amendment in the LTR-directive. The amendment will not address the underlying problems that cause beneficiaries to leave the member state that gave them international protection. Often, beneficiaries will leave a member state that granted them international protection, sometimes only after a very short period of time, since they are not provided with facilities that they are entitled to according to EU-law. By changing the directive in the proposed way, the underlying cause for secondary migration of this group is not addressed. The proposed amendment does not address this root cause of migration flows of beneficiaries.

Article 72

It is noted that the reference to the AMIF-articles is not correct; changes must be made in article 19 and 20 (not article 16 and 17).

Article 74 en 75

The Netherlands wants to point out that it has put forward a proposal for a third paragraph. In the current text, a category of migrants is missing, that is people for whom responsibility was determined under the current Dublin-regulation, but have – since the implementation of the AMMR – left that member state and applied for asylum in another member state. We therefore again propose the following addition:

3. Where an application has been registered in accordance with Regulation (EU) No 603/2013 of 26 June 2013 and the responsibility for that application was determined in accordance with Regulation (EU) No 604/2013 of 26 June 2013, the responsibility shall remain with the Member State that was deemed responsible, unless the Member State concerned can demonstrate that its responsibility has ceased pursuant to Article 27.

PORTUGAL

Part II

Article 3

Portugal fully supports the implementation of a comprehensive approach to asylum and migration management. However, as pointed out by several delegations during the first examination of the proposal, and taking into account the explanations given by the Council Legal Service during the AWP on 23 February and 10 November, these provisions should not lead to unforeseen legal obligations to the MS.

Considering this, Portugal welcomes the sentence added to the Presidency's proposal "(...) *within the framework of the applicable Union law*", as we consider it clarifies that the Article does not constitute an independent legal basis and improves the legal framework for this provision.

On the whole, we prefer the alternative drafting provided by **Option A**, as it offers more flexibility to MS.

Article 4

Portugal can accept the proposed text as a recital in place of Article 4. The content of this article contemplates more general and political aspects which would fit in the context of a recital.

Article 6

Portugal shares the concerns raised by several delegations during the first reading, related with the legal nature of the Strategy to be adopted by the Commission and the role for the Council which was not envisaged.

It must be assured that a balanced relation between the added value of the Strategies and its administrative burden is established.

Considering this, we can support **Option A**, keeping in mind that some questions related to the Strategy require further clarification, namely its practical implications. We also support and appreciate the extension of the deadlines in paragraph 5.

Article 7a

Portugal welcomes the addition of this article.

SLOVAKIA

We would like to reiterate that we maintain all of our comments made during the previous meetings (first reading of the text). We still have general scrutiny reservation to the whole proposal.

Art. 3 – we fully support the implementation of comprehensive approach to asylum and migration management. As some of the delegations, and notably CLS, mentioned during the AWP, the responsibilities of Member States are too vague and can lead (through the CJEU’s interpretation of EU law) to unforeseen obligations. Taking into account that we are talking about general principles that should be guiding our work in the area of asylum and migration, we are of the opinion that it should be considered whether it would not be possible to place this text in the Preamble. Alternatively, we can support option A mentioned in PRES discussion paper.

Art. 3 point h) – a scrutiny reservation.

Art. 4 – we agree with the PRES proposal to move this article into the recitals with the wording proposed in the discussion paper.

Art. 5 - We would like to reiterate our general position that we do support solidarity, but it should be flexible and all forms of solidarity measures should be perceived as equal. In this regards we do not agree with the concept of mandatory relocations in any form.

We also do not agree with the correction mechanism throughout which the solidarity contributions of the Member State in the area of capacity building and other measures could be adjusted in a way that 50% of the contributions will be changed to relocation or return sponsorship. The choice of the form of solidarity contributions should be exclusively in the competence of the Members State concerned.

Art. 5 point d) – we prefer previous wording (“*take all reasonable and proportionate measures to prevent and correct unauthorised movements between Member States*”).

Art. 6 - We would like to reiterate, that it is essential to ensure balance between added value of the relevant provisions and the administrative burden they could create.

Regarding the two proposed options, due to similar concerns as were presented by several Member States and also by CLS related to the legal nature of the EU migration strategy and the fact that the role of the Council in adoption of the EU migration strategy is not sufficient, we agree with the opinion of CLS that deletion of the paragraphs 1 and 2 will be the best and the easiest way how these concerns can be addressed. Therefore we support the option A.

Art. 71 – we would like to reiterate our substantial reservation. We disagree with the reduction of the required 5 years period of legal and continuous residence, with regard to beneficiaries of international protection, to 3 years (detailed reasoning was sent in writing during the first reading of the proposal).

Art. 75 – we would like to joint to those Member State which would like to have the deadline for entering into force of the AMMR to be at least 24 months instead of 13 months.

SWEDEN

General Comments

On a general level, SE warmly welcomes the revised proposals prepared by the Presidency. SE would like to underline the importance of finding a way forward, while maintaining a balance between solidarity and responsibility and agreeing on a solution that contributes to a more equal distribution of asylum seekers among the EUMS.

SE retains its scrutiny reservation to the entirety of the proposals.

Specific Comments

Article 3: SE can accept both alternatives proposed by the Presidency in WK 13019/2021. In the case of alternative B, however, the consequences of making a reference to issues that are national competence should be clarified. This also applies to the original proposal by the Commission (point a) and the reference to legal pathways. Along the same lines, SE wonders if it is appropriate to include guidelines for co-operation with third countries in a regulation that is to be directly applicable. The term “enabling factors” in point (1) needs clarification. SE can accept the amendments to Article 3 proposed in ST 13360/21. Together these amendments constitute a balance between migration control and the right to seek asylum.

Article 4: SE can welcome the proposal to move the content of Article 4 to the recitals together with the amendments suggested by the Presidency.

Article 6: SE finds that there would be an added value in adopting a strategy on the EU-level. However, the relationship between the EU-strategy and that of the MS needs to be clarified. Clarification is also needed as concerns the situation where a MS adopts a faulty national strategy or a strategy that fails to secure sufficient national capacity. SE welcomes the deletion of the reference to legal consequences of the national strategies in paragraph 3 and the extension of the deadline from one year to 18 months in paragraph 5-

Article 7a: SE can support the proposal to regulate financial and organisational support in the new Article 7a.

Article 71: SE would like to have more information about the reasons behind the proposal to reduce the residence requirement for beneficiaries of international protection in Directive 2003/109/EC. The proposal might have far-reaching consequences for the balance between solidarity and responsibility. If it is decided to proceed with this proposal, it should be clarified whether the person concerned, in addition to residence, must have enjoyed international protection during the entire three-year period.

Article 75: The 13-month deadline should be extended to at least 24 months.