Council of the European Union

Brussels, 29 March 2023
(OR. en)

7625/23

Interinstitutional File: 2016/0224(COD)

LIMITE

ASILE 32
FRONT 91
CODEC 427

COVER NOTE

From:	General Secretariat of the Council
To:	JHA Counsellors (Asylum)
No. prev. doc.:	CM 2139/23 + COR 1; 7166/23
Subject:	Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU - compilation of replies by Member States

Following the request for written contribution on the above-mentioned proposal (CM 2139/23+COR 1), delegations will find in Annex a compilation of the replies as received by the General Secretariat.

ANNEX

Written replies submitted by the Member States

AUSTRIA 2

BULGARIA 7

CROATIA 11

THE CZECH REPUBLIC 15

DENMARK 18

FINLAND 20

FRANCE 22

GERMANY 30

GREECE 34

HUNGARY 40

IRELAND 41

ITALY 44

LUXEMBOURG 49

MALTA 51

NETHERLANDS 58

POLAND 62

ROMANIA 65

SLOVAKIA 68

SLOVENIA 70

SPAIN 73

AUSTRIA

Please find below our comments regarding the revised APR 7166/23.

General Remarks on the system of adequate capacity and border procedures

AT would like to highlight the **importance of mandatory border procedures** for the functioning of the future CEAS.

Mandatory border procedures should therefore be the **standard procedures** and implemented in all Member States. Functioning border protection in itself is also a **precondition for the functioning of the Schengen area.**

Exemptions to the mandatory border procedure should **only be foreseen** as a **last resort** ("ultima ratio").

We value the efforts of the Swedish presidency to find a compromise but the current proposals contradict the efforts for the establishment of effective border procedures:

- The far-reaching exceptions in Art 41e have not been changed in the current proposal despite problematic limitations for the border procedures.
- It is absolutely **unclear and unpredictable how the capacities in Art. 41ba and 41bb will be calculated** by the Commission. The text refers to a couple of indicators that should be taken into account but does not provide any guidance how this will be implemented in practice.
- The proposed approach will end up in the establishment of **different and constantly changing applications of border procedures** in the MS
- This will have a **detrimental impact on movements of migrants**. Migrants will choose the route where border procedures are temporarily not applied or the application is limited.
- This will have a **negative impact on the functioning of the whole system**

The **current proposal will lead to situations** where **different procedures** at the **borders** are **applied** in different Member States.

- For example, one Member State fully applies border procedures, another MS applies border procedures for nationalities with a recognition rate below X%, the next one with a recognition rate below Y% and the last one does not apply border procedure for nationalities with a low return rate.

Such a **flexible system** will not only **create confusion and fragmentation** within the union but also **hinder the functioning of the CEAS as a whole**.

The **CZ concept paper clearly stated** that under **normal situations the strict rules for border procedures should apply**. **Only if** a **Member State is under serious pressure exceptions may be applied.**

Finally, the **text changes** in a direction that **<u>responsibility elements are constantly softened</u>** in comparison to the solidarity elements.

Article 4 – Definitions

(x) – Adequate capacity

For AT it is **unclear how the adequate capacity will be calculated in practice**. Therefore, AT would like to **ask the EC to provide concrete calculations to show how the adequate capacity will be assessed**. The term "at any given moment" should remain in the text.

Art. 41 border procedure

AT still has a **reservation on the limited application of the mandatory border procedure in Art. 41 b** and the **far-reaching exceptions of Art. 41e**. In particular Art. 41 e (1) or (2) (c) should be deleted.

We also have a **scrutiny reservation for the definition of family members in Art. 41b.**

Article 41ba – The annual adequate capacity at Union level

It is **impossible to assess the implications of the proposal without** having any **guidance on how it will be implemented in practice**.

We have a scrutiny reservation against the current identification-mechanism of "adequate capacity" at Union level since there is a **non-exclusive list of criteria** and it is **unclear how these criteria will be taken into account** in practice by the Commission.

We therefore ask the EC to give us an example of a hypothetical "adequate capacity" for 2023, based on the figures of 2022.

We would also like to point out that during previous talks the target groups of the border procedures were still under consideration. In this regard, the suggested threshold for mandatory border procedures relating to recognition-rates was 20-30%.

Unfortunately, the requested 30% threshold is not reflected in the text.

Article 41bb – the annual adequate capacity of a Member State

AT has a scrutiny reservation against the current calculation-mechanism of "adequate capacity" since it is unclear how the Commission will apply this calculation and distribution in practice.

We would like to know if there will be a concrete quota for each MS such as the one mentioned in Art 44k AMR?

In this regard, we would also ask for clearance about the relation to Art. 7b AMR. Specifically, why is the period chosen by the presidency for the adequate capacity ("the last 3 years") not reflected in Art. 7b of the current AMMR proposal.

Article 41bc – Measures applicable in case the annual adequate capacity is reached

Regarding Art. 41bc we **refer to our general comments** and **reiterate that further flexibility will create situations of fragmentation within the Union and seriously impact the CEAS**.

We do not support a "pick and choose" approach by affected Member States.

Concerning (1) (d) we would like to ask for an overview of consequences in practice of the relocations, inter alia:

- Would the contributing Member state have to apply the border procedure?
- How will the "non-entry fiction" be applied in these cases?
- Is the relocation to continue a border procedure a solidarity contribution in line with the AMR?

Article 41bd – Notification of use of measures applicable in case the annual adequate capacity is reached

The last sentence of Art 41bd should be deleted.

If our assumption is correct, **MS who are identified as being under migratory pressure** under the AMR do **not need the approval of the EC when applying the measures in Art. 41 bc**.

Due to the fact that the current **definition of migratory pressure** includes the criterion of "**risk of such arrivals**" which in itself is an **unclear and unpredictable** criterion, a **MS which has reached its capacity limits** is obviously completely **free to choose the respective measures and does not need approval by the Commission.**

In practice, **under these criterions**, MS could be identified as being under migratory pressure and therefore, they could **unilaterally decide to stop carrying out border procedures as a whole when they deem it fit**.

Such an **approach cannot be supported by AT.**

Article 45 – safe third country

AT explicitly welcomes the new Par. 3

As a general remark, we **support any proposals for the strengthening of the safe third country concept**, since it is essential for migration management and thus for the functioning of the CEAS as a whole.

Article 60 – Monitoring and evaluation

Under **Art. 7c of the AMR**, the EC shall adopt a **recommendation each year** including annual numbers for relocation and financial contributions.

According to the newly added last paragraph of **Art. 60 APR**, the EC shall "**on a regular basis and as a minimum every three years**" review the relevance of the adequate capacity number of Art. 41ba.

In this regard, we **ask for clarification why different time periods were chosen**.

BULGARIA

General comment

Bulgaria maintains its position against the mandatory border procedures and against legal fiction. We put a reservation on the substance of the new texts because of the link with the border procedures, which are still disputable. We believe that the important elements, such as detention and effective return, should be addressed first before examining exceptions to the application of the border procedure.

On the proposal, we believe that it will create an additional burden for front line MSs because it complicates the system and makes the procedures difficult for practical implementation. Frontline countries bear the whole burden of primary arrivals and need solidarity rather than additional burden.

The introduction of the concept for adequate capacity does not provide for any added value to the border procedure. It makes it more complicate, inapplicable and creates additional burden to the front line MSs. That is why we cannot agree to increase the capacity for the purposes of the border procedure. We would like to discuss an alternative to the border procedure that is practicable, does not create an additional burden on the front line MSs and leads to the desired results.

Bulgaria underlines the importance of establishing the right balance between solidarity and responsibility as we all agreed on under the gradual approach of the French Presidency and the Roadmap with the EP. At the moment, solidarity is flexible, which to our understanding should apply also to the responsibility.

Article 4 Definition

(x) “adequate capacity” - Capacity is not flexible element to be adapted “at any given moment”. It requires time and resources. Capacity is also related to the organization of the national system and the country’s migration policy regarding the construction of refugee camps at the border. This is a very political issue and for Bulgaria it is a red line.

We would like to know if there is an obligation for the MSs to maintain capacity especially for the purposes of the border procedure.

We have doubts that APR is the proper act for setting a new obligation regarding the reception of persons. The notion of adequate capacity is over regulation.

We find that notion too vague. It is not clear what will be counted – persons in general, only applicants or free places for reception. Our understanding is that the number of applicants can vary, not the number of places for accommodation. This should be clarified, as well as the word "needed".

The link with the solidarity mechanism should be also clarified for the sake of finding the right balance.

Article 41ba

Paragraph 1 — We have doubts that it is a good approach to set a fixed number for capacity at Union level. In addition, we find it not balanced to fix a political number for capacity at Union level, but for the capacity of a MS to apply a formula. The number should be fact based.

Paragraph 2 — The phrase "higher number for adequate capacity" needs to be explained in the context of the solidarity mechanism. The link with Art. 41bb Para 1 should be clarified. How the identified higher number will affect the number of the capacity of a MS?

Paragraph 3 – Since the capacity includes reception and human resources also for return we would like to know why there is no criteria linked to the detention centres and return capacity. What will be the quantitative and qualitative criteria? The capacity is linked to the strategical planning and cannot vary every year. The prospects of return should also be taken into account.

Article 41 bb

Paragraph 1 - The formula for sharing adequate capacity is unclear. Regarding the annual adequate capacity, we are skeptical that the formula is objective. What exactly means “average share of irregular border crossings” and why exactly 3 years period will be taken into account? How the sudden influx will be calculated? How this concept for “adequate capacity” will be linked to the relocation mechanism? Regarding the share of each MS we think that it can’t be equal to all MSs.

Paragraph 2 – We have real doubts that setting the concreate number for “adequate capacity” is a good approach. Having in mind that the capacity includes reception and human resources what exactly will be fixed as number in brackets? We cannot agree to increase the capacity for the purposes of the border procedure.

Article 41bc

The provision implies many conditionalities that make the derogation inapplicable.

Paragraph 1 - Bulgaria agrees with the comment made by some MSs that the prospects of return should also be taken into account and some prioritisation could be provided. The idea for applying the derogation before reaching the capacity is interesting and we agree to work on it.

Paragraphs 2, 3 and 4 – the procedure should be simple, based only on notification and for longer period. More flexibility is needed.

Article 41bd

The procedure should be simple and more flexibility is needed. The MS concerned should decide when to apply the derogation because the border procedures are additional burden for the front line MSs. It is in the interest of all MS that the applications will be processed no matter what will be the procedure.

Paragraph 1, letter b) – we insist the phrase „if applicable“ to be kept because the derogation should apply separately of the solidarity mechanism and the Toolbox.

Articles 43a-50

Regarding Art. 45 and 47 we support the comments already notified to the Czech Residency as follows:

Art. 45 The concept of safe third country

On paragraph 1a we consider that exceptions should be made on the basis of individual assessment for each candidate after reviewing and considering all relevant proofs and circumstances on the case.

Art. 47 The concept of safe country of origin

On paragraph 1a we have the same comment as on Art.45, paragraph 1a.

Thus on both articles we maintain a scrutiny reservation.

We support **Art. 43 The Notion of Effective Protection** and **Art. 44 The Concept of Third** Country of Asylum.

We could also accept the current texts of Art. 46, 48, 49 and 50 regarding the designation of safe third countries and safe countries of origin at Union level and national level. We are in favour of establishing lists of safe third countries and safe countries of origin at Union level.

CROATIA

Article 4 (Definitions) point (x) adequate capacity: This is a provision that requires certain flexibility. However, adequate capacity here includes only reception and human resources in terms of processing an identified number of persons in the asylum and return border procedures. We assume that this does not include other aspects of adequate capacity in the context of border procedures: logistics, infrastructure, medical staff, including judicial capacities.

Moreover, we would like to know how the expression "identified number of persons" should be interpreted. In terms of international protection, are those persons who have expressed an intention to apply for asylum or persons who are in the procedure after lodging an application?

When it comes to the return procedure, are those persons for whom the decision on return has yet to be adopted or those for whom return needs to be organised (return logistics).

As regards the wording "at any given moment", SE PRES explained that this involves continuous work on the capacities, which we still find to be incomplete. We believe that MS capacity is a stable value which is why we find it necessary to simulate how MS would increase their capacities on the national level, continuously.

We would also like to know what is the correlation between "well-prepared asylum and reception systems" referred to in the definition of migratory pressure in AMMR and the definition of "adequate capacity". We believe that these terms should be adequately linked so that it is clear when an MS can be considered under migratory pressure.

Article 41ba (**The adequate capacity at Union level**) -

Paragraph 1 - It is not clear from the definition of the adequate capacity referred to in Article 4(x) how the adequate capacity will be quantified so we would like to know what exactly the number xxx refers to (the number of persons that will be processed within the framework of the asylum procedure and border procedure?).

It is stated in **paragraph 2** that the Commission may identify a higher number for the adequate capacity depending on the needs and the manner in which this higher number will be identified is explained in paragraph 3. More specifically, paragraph 3 refers exclusively and only to paragraph 2 when identifying a higher number, so we would like to know how you plan to identify or quantify the adequate capacity referred to in paragraph 1. We think that the criteria for determining the greater number for adequate capacity should be objective. Moreover, we do not see how and by means of which acts the Commission will change this number.

Pursuant to **paragraph 3,** when identifying the adequate capacity at Union level, the following is taken into account: the number of arrivals of third-country nationals or stateless persons for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide Eurostat data, 20% or lower, the reception and processing capacity of Member States, and the average return rates. However, we would like an explanation on how or according to which key the **adequate capacity** will be identified for each MS (**Article 41bb - The annual adequate capacity of a Member State** states that: "*by applying that Member State's average share of irregular border crossings and arrivals following disembarkations after search and rescue operations.*") We are aware that it is not the same for all MS and that MS on the external border have to ensure greater capacity. Since there is no specific formula for calculating capacities, and since different parametres are referred to in AMMR (Article 7c) and APR (Article 41ba), it is not clear how this will be compared and how the appropriate share in relation to MS will be calculated.

Article 41bb (The annual adequate capacity of a Member State)

Paragraph 1 - As regards determining the adequate capacity of an MS, we propose that the number of international protection applicants also be taken into account since this is the capacity for conducting asylum procedures on the border.

Paragraph 2 We think that it is not specific enough to refer only to the *adequate capacity for examining applications* since, as we indicated before, processing of asylum border procedures does not require only the capacity for examining applications but also the entire infrastructure, medical staff, etc.

Article 41bc (Measures applicable in case the annual adequate capacity is reached) - we welcome the possibility that an MS can use certain benefits once it reaches the annual level/quota of adequate capacity. However, the entire Article is a bit confusing and vague since it does not specify a trigger which would warrant the use of these measures so that it is clear when an MS should take action. Swift changes of circumstances require swift response and it is therefore essential to have simple notification procedures. We thus propose this part to be harmonised with AMMR.

We do not understand what "circumstances" in point (b) refer to.

Point c) – we are sceptical about the exclusion of nationals with a low probability of return. As regards the options proposed by SE PRES, we could consider only exclusion from the return procedure because we believe that the asylum procedure on the border has to be carried out in all cases. However, we are willing to propose that greater priority be given to the applications with higher probability of return in order to better manage the capacities on the border.

As regards point (d), we would like it to be more clear that relocation refers only to cases above certain capacity with a view to better distributing cases among all MS and better managing asylum and migration, or that an appropriate reference is made to AMMR.

Last subparagraph in paragraph 1 allows MS to use the prescribed measures for 3+3 months, which is a very short period and requires very quick action. We therefore wonder whether an MS can use these measures simultaneously with the notification.

Article 41bd- Notification of use of measures applicable in case the annual adequate capacity is reached

We propose that instead of the word "expeditiously" in **paragraph 2**, a specific deadline be prescribed within which the High-Level Forum would be convened and a deadline in which the implementing decision would be adopted.

There is a wrong reference to paragraph 3 in the last subparagraph of Article 41bd and we believe that it should refer to paragraph 1.

Article 16 (Access of the legal adviser) - paragraph 2 - we do not see any added value in introducing the expression **relevant** courts or tribunals, but we welcome the part that says "**in accordance with national law".**

Article 22 (Special guarantees for unaccompanied minors) - we would like to enter a scrutiny reserve to paragraph 1, point (b) since we are waiting for the opinion of the ministry that is competent for unaccompanied minors and guardians.

Article 24 (Age assessment of […] minors) - we welcome the change in paragraph 1, subparagraph 2 from *may also* to *shall.*

Article 28 (Lodging of an application for international protection) - paragraph 4 - we propose that the wording *Member State* in the last sentence be replaced with competent authorities, which are responsible for the interview and lodging, whereas the Member State prescribes the rules of procedure in national legislation.

Article 43a (The notion of effective protection) and Article 45 (The concept of safe third country), paragraph 1(e) – we believe that the interpretation of the "notion of effective protection" will be an additional challenge in practice, especially in administrative disputes.

Article 44 (The concept of first country of asylum), paragraph 6 - we would like to point out that the concept of safe third countries and the first country of asylum cannot be successfully applied without successful readmission in practice. We would therefore like to know whether the expression "readmit the applicant" is part of readmission agreements and whether this Article will affect readmission agreements.

Article 45 (The concept of safe third country) - we would like an explanation for the wording "where EU and a third country have jointly come to a statement, arrangement or agreement that migrants admitted under this statement, arrangement or agreement will be protected" in paragraph 3, i.e. whether such arrangement derogates from the previous paragraphs in this Article, what the scope of such arrangements is, and whether the EU has an example of such practice.

Article 50 (Designation of third countries as safe third countries or safe country of origin at national level)

We maintain our earlier position that Member States can have national lists of safe third countries in addition to the EU list, which do not have to be harmonised with EU lists, and that this is exclusively a matter of national competence which is why we support the proposal to delete the Commission's authority (*The Commission's right of objection*….) which interferes with national competences in paragraph 3.

THE CZECH REPUBLIC

General comments

In general, we support the text being consistent with Asylum and Migration Management Regulation.

Article 4/1(x)

We agree with the definition including *"at any given moment"*.

Article 41ba/1

We do not agree with the inclusion of a fixed EU number in the regulation. The migration situation is unpredictable and therefore, from our point of view, it is not wise to have a fixed number in a regulation, as the future situation may require different capacities. The non-legal mechanism in paragraph 2 would thus completely replace the potentially non-functional number in paragraph 1. We believe that enshrining the mere existence of a Union number is fully sufficient, as the other provisions then regulate how it is arrived at. Furthermore, the Commission's recommendation is not enforceable which is problematic for us.

CZ also does not agree with linking these measures with solidarity measures (relocations) in AMMR. CZ also supports those delegations requesting a presentation of COM on practical examples with relation to estimated numbers.

Article 41bb

The text completely lacks a focus on asylum applications - applications made at the external border - which, in our opinion, is missing, while all types of illegal arrivals, where the person does not have to apply for asylum at all, are counted. Thus, it seems that we are dealing with adequate capacity for screening and not for the asylum procedure - we have a substantive reservation on this. Moreover, we do not support having a fixed minimum number for an adequate capacity.

Article 41bc/1(c)

low probability of return/the enforcement of a return decision... We understand that it is not appropriate to define the term in a rigid way, but the MS should indicate in the notification how it came to this conclusion.

Out of the two options presented by the Presidency we are in favour of the following:

[By way of derogation from Article 41g, a Member State whose annual adequate capacity is reached shall have the possibility to temporarily exclude from the border procedure for carrying out return those third country nationals or stateless persons who are habitual residents of third countries with a low probability of return from that Member State. This may be applied for a duration of three months starting from the notification or from the

authorisation as applicable. That duration may be automatically extended for an additional 3 months.]

Article 41bc/1(d)

3 + 3 months seems like an unnecessary burden to us. We think that the 6 months period should be in the text, especially, when there is a *may be* and automatic extension. Furthermore, the whole process is in the hands of the Commission – reservation.

Safe third countries

Increasing the effectiveness of the use of safe country concepts is important for the Czech Republic. To this end, we consider it crucial to allow territorial and personnel limitations as proposed in the latest version of the text. At the same time, we support the latest version of the text, which includes the removal of the condition of the relationship between the foreigner and the safe third country. The Czech Republic currently considers the safe third country concept to be dead according to its practice and we would like to return to the application. We are flexible on other issues, but we do not support an increase in the administrative burden. We are also interested in what plans PRES or the EC has with Annexes for possible candidates for inclusion on the various lists.

CZ border procedure proposal

CZ is of the opinion that the proposed system for applying various measures after the adequate capacity threshold is met, deserves further considerations. We believe that a respective MS should have the possibility to start applying some of the measures proposes in art. 41bc earlier then when reaching the adequate capacity threshold, in order to avoid a situation of fast saturation of national capacities, leading to abrupt stop of the application of the BP, which will undeniably have some negative effects on the overall migration management of the EU as a whole. The following could be therefore considered:

Step 1:

When reaching, for example, 70% of its adequate capacity the given MS could have the possibility to:

- Lower the nationality threshold to 10%
- Exclude nationalities with low return prospects from the return part of the border procedure

In the same time, such MS should consider making use of the Support Toolbox. To start applying the above, the respective MS would only need to notify the Commission and the Council.

Step 2:

If, nevertheless, this MS would reach 100% of its adequate capacity, it could request to use the following measures:

- Lower the nationality threshold to 5%

- Exclude nationalities with low return prospects from both the asylum and the return part of the border procedure.

- Not to apply (dynamically) border procedure for those above the adequate capacity.

To start applying the above, the respective MS would only an authorisation from the Commission.

DENMARK

Article 4, para 2, (x)

DK support the current version of article 4, para 2, (x).

Article 41bc (a)

DK support the current point a, but as a secondary solution.

We suggest to add a new point (a) stating that a member state should be eligible for assistance from the EU and especially from the EUAA. The EUAA asylum reserve pool could be used in a situation like this and ensure that the border procedure stays fast and effective. A member state should be eligible for assistance even before that member state reach its adequate capacity.

This must be the first solution to be applied before lowering the threshold (current (a)).

Article 41bc (c)

We understand the second option on page 97 to mean that third country nationals or stateless persons who are habitual residents of third countries with a low probability of return, will be temporarily excluded from the border procedure for carrying out return, however they will not be excluded from the border procedure itself and will still have their asylum claim processed in the border procedure.

If that is correctly understood, DK prefers option 2 on page 97. However this should be reflected a bit clearer in the proposal on page 97, preferably by adding that third country nationals or stateless persons who are habitual residents of third countries with a low probability of return will still have to go through the border asylum procedure, but will be excluded from the border return procedure.

Article 45

Denmark supports the continued removal of the requirement for a connection between the applicant and the safe third country in article 45, and thereby a broader possibility for the application of the safe third country concept and a wider application of the inadmissibility provisions in accordance with international law.

To be able to pursue cooperation with safe third countries along the migratory routes inspired by the EU-Türkiye statement, it would be useful to have a safe third country notion allowing for such cooperation. By insisting on a requirement for a connection between the applicant and the safe third country (and as transit would not be sufficient in order to establish such a connection) it narrows down significantly the safe third countries with whom the EU can pursue cooperation.

Furthermore, the safe third country concept cannot efficiently be applied in relation to the countries in the Western Balkans (the EU candidate countries) through which the vast majority of irregular transit to the EU takes place.

By extension, Denmark would like to point out that though UNHCR consistently has been advocating for a meaningful link or connection to exist that would make it reasonable and sustainable for a person to seek asylum in another state, it is acknowledged that such a requirement is not mandatory under international law, cf. UN High Commissioner for Refugees (UNHCR), Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018, available at: https://www.refworld.org/docid/5acb33ad4.html.

FINLAND

We still have a general scrutiny reservation to the whole proposed text.

Border Procedure

Article 4 (x)

- FI supports and considers it appropriate that adequate capacity means capacity needed at any moment.

Article 41bb

- **para 4:** The criteria affecting the calculation of an adequate capacity for each MS should be reconsidered. MS's average share of irregular border crossings does not seem the best criteria if in some countries there are none of these. An option could the same as in Article 41ba para 3: For this purpose, the Commission shall calculate for the calendar year the annual adequate capacity of a Member State by applying that Member State's average share of ***~~irregular border crossings~~ third country nationals or stateless persons former residents of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide Eurostat data, 20% or lower*** and arrivals following disembarkations after search and rescue operations in the EU during the last three years to the adequate capacity at Union level.
- **para 5:** Delete this para. Minimum capacity is not needed as adequate capacity is calculated for every MS each year. This capacity should be seen as a minimum capacity that can be exceeded.

Article 41bc

- **It should be made clear that all other possible measures and tools have been adopted by the MS in question before the derogations in this Article can be used. This principle should also be made clear in this Article.**
- **Para 1:** From derogations FI can support a), c) in form it is in the third subparagraph (=derogation from return border procedure) and d).

Article 41bd

- **Para 1 (d):** To stress the need to use all other measures and tools (icl. the Toolbox) before using the derogations in Article 41bc the MS should also give a reasoning why the use of the Toolbox has not been sufficient.
- A possible wording could be: **(d) ~~if applicable~~, other measures that the Member State has adopted or envisages to adopt at national level to alleviate the situation, including those in the Toolbox AND SUBSTANTIATED REASONING WHY THESE MEASURES HAVE NOT BEEN SUFFICIENT**

Safe Country Concepts

- FI supports the safe country concepts and does not have any significant reservations concerning these.

FI also supports the EU common lists on both the safe countries of origin and safe third countries.

FRANCE

Partie 1 : discussions sur les nouveaux articles relatifs aux procédures frontalières

Article 4, point x) : définition de la capacité adéquate (nouvelle disposition)

La France remercie la Présidence pour ses explications sur le fonctionnement de la capacité adéquate et rejoint la position présentée : la capacité adéquate doit être comprise comme la capacité pour un État de traiter en procédure à la frontière un certain de nombre de demandes à un moment donné. Il ne s'agit pas d'un quota annuel de demandes à instruire en procédure à la frontière qui pourrait conduire à des différences de traitement entre les demandeurs arrivés en début d'année et ceux arrivés en fin d'année. Le maintien d'une procédure à la frontière tout au long de l'année permet d'envoyer un signal fort : les frontières des États membres sont robustes et ce tout au long de l'année.

Article 41ba (nouveau) : la capacité adéquate au niveau de l'Union et Article 60 (ajout d'un paragraphe): le suivi et l'évaluation

Paragraphe 1 :

La France soutient l'inscription d'un seuil de capacité adéquate au niveau de l'Union.

La France souligne que ce seuil doit être réévalué régulièrement. Par esprit de compromis, la durée de trois ans proposée par la Présidence à l'article 60 pourrait être acceptée. Une durée supérieure ne pourrait pas être soutenue en raison de l'évolution rapide des flux : il est nécessaire que les capacités de l'Union s'adaptent rapidement aux nouvelles réalités migratoires. La possibilité pour la Commission de prévoir un seuil supérieur offre une marge de manœuvre bienvenue.

Paragraphe 2 :

Les termes « *the specific challenges in the area of migration* » devraient être supprimés afin de ne pas complexifier le mécanisme. Il pourrait être fait référence à des notions existantes, comme la pression migratoire ou la situation migratoire significative.

Proposition rédactionnelle :

2. **In the [Recommendation] referred to in Article 7c of AMMR the Commission may identify a higher number for the adequate capacity at Union level than that provided in paragraph 1 depending on the needs arising ~~from the specific challenges in the area of migration~~ for the relevant year, particularly in relation to a situation of migratory pressure or a significant migratory situation, as identified by the Commission in the Report referred in Article 7a.**

Paragraphe 3 :

La France s'interroge sur la possibilité de lier ce paragraphe, d'une part, à l'article 7b d'AMMR relatif aux informations permettant d'évaluer la situation migratoire au niveau de l'Union, et, d'autre part, aux « capacités suffisantes pour la mise en œuvre d'un système de gestion effective de l'asile et de la migration » prévues dans les stratégies nationales des États membres par l'article 6, paragraphe 3, d'AMMR. Il convient en effet de ne pas multiplier les sollicitations qui seront adressées aux États membres par la Commission pour définir la capacité adéquate au niveau de l'Union.

Proposition rédactionnelle :

3. When identifying the adequate capacity at Union level as provided in paragraph 2, the Commission shall take into account relevant qualitative and quantitative criteria **foreseen in article 7b of AMMR**, including, for the relevant year, the number of arrivals of third country nationals or stateless persons former residents of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide Eurostat data, 20% or lower, the reception and processing capacity of Member States **described in theirs national strategies foreseen in article 6(3) of AMMR**, the preparedness measures and the average return rates.

Article 41bb : capacité adéquate annuelle d'un État membre (nouvel article)

Paragraphe 2 (incorrectement indiqué paragraphe 5) :

La France indique que le seuil prévu au second paragraphe doit présenter une certaine flexibilité afin qu'un État membre ne soit pas contraint de se doter d'une capacité adéquate qui ne corresponde pas à la réalité des flux constatés à ses frontières. Ainsi, il pourrait être proposé que la capacité adéquate lui permette de traiter les flux des personnes qui relèvent de la procédure d'asile à la frontière obligatoire. En effet, l'article 41b d'APR correspond au champ d'application minimal de demandes que les États sont supposés devoir traiter à la frontière et constitue donc une base objective pour calculer les capacités adéquates d'un État.

Proposition rédactionnelle :

~~5~~**2. [Notwithstanding paragraph 1/Irrespective of paragraph 1], each Member State shall have an adequate capacity for examining applications in the border procedure of at least** [**80%] of the average number, calculated over the last three years, of third country nationals and stateless persons whose applications fall under article 41b in that Member State**~~[XXX]~~.

Article 41bc (nouveau) : mesures applicables quand la capacité adéquate annuelle est atteinte

La France remercie la Présidence pour cette proposition, mais craint que l'ensemble du mécanisme ne soit trop complexe à manier, notamment en raison du paragraphe 1, point c. La France s'oppose à ce que des considérations liées au retour soient prises en compte dans des procédures d'asile. La France est favorable à la possibilité d'introduire une hiérarchie entre les mesures, mais s'interroge sur les modalités pratiques en lien avec la procédure de notification : cela conduirait-il à multiplier les notifications ?

Paragraphe 1 :

Sur le b), la possibilité de ne plus appliquer la procédure d'asile à la frontière obligatoire pour les demandeurs originaires de pays avec de faibles taux de protection au niveau de l'Union européenne n'est pas acceptable. La suspension de l'application de la procédure à la frontière pourrait envoyer un contre-signal et accroître la pression sur l'État qui prendrait cette mesure.

Sur le c), la France rappelle sa ferme opposition à ce que les perspectives de retour soient prises en compte dans le champ d'application des procédures d'asile à la frontière. Là encore, cela constituerait un contre-signal sur le plan de notre politique migratoire en facilitant l'arrivée des ressortissants des États les moins coopératifs, ce qui conduirait à alimenter les filières d'immigration irrégulière et à rendre le territoire européen encore plus attractif pour ces personnes. En outre, leur appliquer la procédure d'asile à la frontière permettra d'instruire rapidement ces demandes principalement non fondées et de traiter ensuite les intéressés en procédure retour à la frontière. Et, le cas échéant en cas d'autorisation d'entrée sur le territoire, ils seront traités comme des demandeurs d'asile déboutés. Leurs demandes seront alors considérées comme des réexamens sans octroi des conditions matérielles d'accueil, ce qui permettra de soulager les systèmes d'asile et d'accueil déjà sous pression. Ainsi, même en cas de difficulté à éloigner, l'application de la procédure frontalière conserve un intérêt dissuasif pour ces arrivées.

Sur le d), la France souligne le caractère peu adapté de la relocalisation des personnes placées en procédure à la frontière, compte tenu du poids opérationnel qu'elle représente pour l'État membre concerné. Les moyens opérationnels de cet État devraient se concentrer sur la gestion des arrivées à ses frontières, ce que permet la réduction temporaire du taux de reconnaissance. Cette procédure de relocalisation est peu compatible avec l'exigence d'urgence pour le traitement des demandes d'asile à la frontière.

Sur le sous-paragraphe 2, la France demande la suppression de ce sous-paragraphe par cohérence avec sa position dans le point c) sur le contre signal envoyé sur le plan de notre politique migratoire en facilitant l'arrivée des ressortissants des États les moins coopératifs.

Paragraphe 2 :

La France demande que la prorogation des mesures dérogatoires au-delà de six mois soit autorisée par le Conseil. La rédaction devrait ainsi préciser explicitement que le Conseil autorise cette prorogation.

La France précise que le renvoi au paragraphe 2 est incorrect et devrait être remplacé par le second sous-paragraphe du paragraphe 1 (dont la suppression est demandée).

Proposition rédactionnelle :

1. By way of derogation from Article 41b(1), a Member State whose annual adequate capacity is reached shall, subject to the procedure in Article 41bd, have the possibility to:

(a) temporarily reduce the threshold of the proportion of decisions by the determining authority granting international protection according to the latest available yearly Union-wide Eurostat data foreseen in Article 40(1)(i). In any event, the reduced threshold shall not go below 5%;

~~**(b) temporarily not apply the border procedure beyond that adequate capacity where the circumstances referred to in Article 40(1)(i) apply;**~~

~~**(c) [temporarily exclude from the border procedure third country nationals or stateless persons who are habitual residents of third countries with a low probability of the enforcement of a return decision or a refusal of entry from that Member State within the deadlines set in Articles 41c and 41g;] or to**~~

~~**(d) carry out relocation with a view to applying the border procedure in the contributing Member State, where applicable.**~~

The measures foreseen in points (a) ~~**or (b)**~~ **may be applied for a duration of three months that may be automatically extended for an additional 3 months.**

~~**[By way of derogation from Article 41g, a Member State whose annual adequate capacity is reached shall have the possibility to temporarily exclude from the border procedure for carrying out return those third country nationals or stateless persons who are habitual residents of third countries with a low probability of return from that Member State. This may be applied for a duration of three months starting from the notification or from the authorisation as applicable. That duration may be automatically extended for an additional 3 months.]**~~

2. Where the measures foreseen in points (a) ~~or (b)~~ of paragraph 1 ~~or in paragraph 2~~ need to be extended beyond six months the Council shall authorise this extension.

3. The measures foreseen in paragraph 1 ~~or in paragraph 2~~ shall not apply where there are reasonable grounds to consider the applicant as a danger to the national security or public order of the Member States.

Article 41bd : notification de l'utilisation des mesures applicables quand la capacité adéquate annuelle est atteinte (nouvel article)

Paragraphe 1 :

Un État membre devrait justifier les raisons pour lesquelles l'utilisation de la boite à outils de la solidarité et les mesures nationales adoptées ou envisagées sont insuffisantes pour répondre à la situation à laquelle il est confronté.

Proposition rédactionnelle :

The notification shall include:

[…]
(d) if applicable, other measures that the Member State has adopted or envisages to adopt at national level to alleviate the situation, including those in the Toolbox, and the reason why the use of these other measures is not sufficient to alleviate the situation.

Paragraphe 2 :

Le terme "*expeditiously*" n'est pas suffisamment précis. Il pourrait être prévu un délai de 10 jours pour que la Commission évalue la notification de l'État membre.

Proposition rédactionnelle :

3. **The Commission shall within ten days ~~expeditiously~~ assess the notification and adopt a decision authorising or not the application of the measures. The Commission shall transmit to the Council the results of its assessment for information purposes.**

Sous paragraphe 2 du paragraphe 2 :

La France estime que l'évaluation de la Commission est, dans tous les cas, nécessaire pour l'application des mesures. Un État identifié en situation de pression migratoire peut déjà bénéficier des mesures de solidarité prévues par le règlement AMMR, les mesures prévues à l'article 41bc, paragraphe 1, ne doivent pas être automatiques comme le prévoit ce sous-paragraphe : ces mesures ne doivent être autorisées par la Commission que si elles sont pertinentes pour soulager la pression d'un EM.

Proposition rédactionnelle :

~~**Paragraph 3 shall not apply where the notifying Member State is identified in the [Report] referred in Article 7a of Regulation (EU) XXX/XXX [AMMR] as being under migratory pressure.**~~

Partie 2 : discussions informelles sur les concepts de pays tiers sûrs et pays d'origine sûrs

Sur les réserves de la France dans la section V :

La France rappelle, en premier lieu, ne pas pouvoir transposer le concept de pays tiers sûr qui est contraire à sa Constitution. En effet, le droit d'asile revêt en France une portée constitutionnelle. De ce fait, tout demandeur d'asile se réclamant de la Constitution doit voir sa demande examinée au fond par les autorités françaises.

La France souligne, en deuxième lieu, son opposition très forte à la suppression du lien de connexion qui constitue une garantie fondamentale pour éviter une utilisation immodérée de la notion de pays tiers sûr. La France rappellera qu'il n'est ni dans l'esprit ni dans la lettre de la convention de Genève d'externaliser la demande d'asile.

Le lien de connexion avec le pays tiers est une condition essentielle pour assurer le respect des droits fondamentaux, et pour assurer l'effectivité et la durabilité des retours en facilitant l'identification et la réadmission des personnes concernées vers le pays de transit dans lequel elles ont séjourné. En outre, ce lien permettrait de mieux endiguer la poursuite des mouvements irréguliers vers l'UE. Si un simple transit ne peut, à lui seul, constituer un lien de connexion suffisant, le fait d'être au moins passé par ce pays, lors du parcours migratoire de l'intéressé, est toutefois nécessaire.

Par ailleurs, la suppression du critère du « lien de connexion » conduirait à des utilisations multiples du concept de pays tiers sûr par les États membres, ce qui apparaît en contradiction avec l'esprit du règlement visant à harmoniser les procédures nationales et à lutter contre les mouvements secondaires.

La France indique, en troisième lieu, que les concepts de pays tiers sûr et d'origine sûr ne peuvent s'appliquer que si un pays est sûr dans son intégralité territoriale et pour toute sa population. Il peut exister des exceptions individuelles, d'où l'examen au cas par cas, mais en aucun cas ces exceptions ne sauraient concerner des groupes entiers de personnes ou des parties entières du territoire.

Sur les autres modifications demandées par la France dans la Section V à la fin de la Présidence tchèque :

La France rappelle sa demande concernant l'article 47, paragraphe 4, sous b) : il incombe au demandeur d'établir que le caractère sûr de son pays d'origine ne s'applique pas à sa situation individuelle.

Propositoin rédactionnelle :

(b) **the applicant ~~cannot demonstrate the existence of elements justifying why the concept of safe country of origin is not applicable to him or her, in the framework of an individual assessment~~ has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances.**

La France demande la suppression de la dernière phrase du cinquième alinéa du paragraphe 3 de l'article 50. Après la période de deux ans durant laquelle la Commission peut s'opposer (« *object* ») à l'introduction d'un pays tiers dans une liste nationale après qu'il a été retiré de la liste européenne, les États membres devraient être en mesure de modifier librement leur liste de pays sûrs.

GERMANY

Thanks to the Presidency for further work on the Asylum Procedure Regulation. We must now also make progress on the difficult issues.

We have a general scrutiny reservation on the new provisions and maintain our previous scrutiny reservations, e.g. on the border procedure, and comments.

Border procedures

Article 4 (x)

We find the addition of the definition of “adequate capacity” understandable. We are in favour of “at any given moment”, but this must also correspond to the following articles.

Article 41ba – The adequate capacity at Union level

Para. 1:

Scrutiny reservation. We wonder whether it makes sense to set a certain number of adequate capacity for the Union in advance in this regulation. We understand that this would be a political number, also with a view to the minimum number in the AMMR, but are skeptical whether this is the right approach. The number will inevitably be subject to fluctuations due to the migration situation. We assumed that the figure refers to the annual capacity, but this also needs to correspond to Art. 4 (x).

Para. 2:

Scrutiny reservation, especially with a view to para. 1. In any case, we think it is right that the Commission can set a higher figure for the adequate capacity for the relevant year depending on the needs.

Para. 3:

We think it makes sense that quantitative and qualitative criteria should be used as a basis. In this respect, it is right that, among other things, the number of arrivals that would fall under the mandatory border procedure because of the recognition rate should be used. We continue to have a scrutiny reservation regarding the level of the recognition rate.

Overall, we would find it helpful if the Commission could once again explain how the EU-wide recognition rate is calculated, as the recognition rates in the MS differ considerably in some cases, and present a new overview, if possible for the previous year (the last time this was done in 2021 with the data for 2019).

We understand that the reception and processing capacity of the MS should also be taken into account. However, we are of the opinion that a basic reception capacity must be maintained in each MS. The inclusion of the return quota is understandable, but should also be made dependent on the design of the procedures (see position on Art. 41 bc para. 1 (c)).

Article 41bb – The annual adequate capacity of a Member State

Para. 1:

Scrutiny reservation; We wonder whether it makes sense that the adequate capacity be shared by all MS, as the border procedure according to the Commission's proposal is to be carried out primarily (except for the air border) in the external border states. We can understand the calculation on the basis of irregular border crossings and arrivals after SAR disembarkations for the external border states. However, we find the reference value "adequate capacity at Union level" difficult, insofar as this refers to Art. 41ba para. 1.

Para. 2:

Scrutiny reservation, as this relates to all MS. We do not think it makes sense to set the adequate capacity at the same figure for each MS (external border state or not).

Article 41bc – Measures applicable in case the annual adequate capacity is reached

Paragraph 1

Scrutiny reservation. In addition to the options mentioned here, first the option should be considered that other MS or the EU agencies (if covered by their mandate) could provide support in expanding capacities.

Furthermore, a hierarchy of the measures should be foreseen.

(a): We support the lowering of the recognition rate with a fixed lower limit.

(b): We are still examining this. The applicability of the border procedure should in principle be based on clear criteria. A temporary suspension of the border procedure can only be considered at a last stage.

(c): We find this proposal difficult because of the signal effect towards countries of origin. We are in favour of applying this only to the return border procedure, in this respect we support sentence 3 or paragraph 2 (in square brackets).

(d): Since the underlying idea of the border procedure is to provide a quick procedure to persons who are in principle obviously not in need of protection, we wonder whether relocations from the border procedure are expedient. In this context, it should also be considered that relocation procedures are laborious and should primarily be applied to groups of persons in particular need of protection, who are not likely to be affected here as a rule.

We support the limitation of the measures in sentence 2 to three or six months. We welcome the referral to the High-Level Migration Forum in case of a further extension (**paragraph 2**).

We welcome **paragraphs 3 to 4** (or 4 to 5; probably formatting errors) in principle.

Article 41bd – Notification of use of measures applicable in case the annual adequate capacity is reached

Para. 1:

The relationship to the AMM Regulation is not entirely clear to us; we ask for clarification.

Para. 2:

We find it right and important that the application of the measures must be notified and (at least) authorized by the Commission. An appropriate involvement of the Council should also be discussed.

Para. 3 (or last sentence):

We understood that the reference here is to para. 1 and that no notification is required in case of migratory pressure. This is in principle acceptable for us, as para. 2 continues to apply.

Article 60

We find the addition correct in principle, but refer to our position on Art. 41ba. How can the figure be adjusted if it is in a regulation?

Safe country concepts

With regard to the safe country concepts, we can only reiterate our general scrutiny reservation at the moment. We will comment on the criteria for the concepts at a later stage.

GREECE

The delegation of Greece would like to submit the following written comments to the revised text of the draft APR Regulation (Ref no 7166/23) on the articles examined during the in the JHA Counselors Meeting on 15/3/2023, on the border procedure (Article 4(x), Articles 41ba-41bd and Article 60).

EL reiterates its general scrutiny reservation, taking into account the interdependence of this Regulation with the other legislative proposals of the Pact under negotiation, particularly the AMMR proposal and the Crisis and Force Majeure Regulation.

Furthermore, EL upholds its reservations on the other relevant articles of the border procedure, particularly, the ones defining the scope, the locations and the timeframe of such procedure.

As a general comment we reiterate our position that flexibility is required on the application of border procedures, which should be adapted to the circumstances of the Member States, including to situations of mass influx at land and maritime borders. The aim is to ensure that the procedures are effective and that they have added value, without causing vulnerabilities at the external borders.

Reaching the right balance between solidarity and responsibility implies that the level of flexibility of the solidarity mechanism should also be reflected in the application of border procedures.

The following drafting suggestions are proposed:

Article 4 Definitions (x)

'adequate capacity' means the capacity ~~needed at any given moment~~ in terms of reception and human resources to process an identified number of persons in the asylum and return border procedures on an annual basis.

Justification

In line with the temporary scope of the solidarity contributions/obligations under AMMR and in order to ensure predictability, the adequate capacity should have an annual timeframe and relate to a number of cases/persons to be processed in a given year under the asylum and return border procedures

Article 41 ba The adequate capacity at Union level

1. For the purposes of applying Article 41b(1), the number referred to in article 4 (x) ~~adequate capacity at Union level~~ shall be set at ~~[XXX]~~.

2. In the [Recommendation] referred to in Article 7c of Regulation (EU) XXX/XXX [AMMR] and in line with the Solidarity Contributions established therein the Commission may identify a higher number for the adequate capacity at Union level than that provided in paragraph 1 depending on the needs arising from the specific challenges in the area of migration for the relevant year.

3. When identifying the annual number of the adequate capacity at Union level as provided in paragraph 2, the Commission shall take into account relevant qualitative and quantitative criteria, including, for the relevant year, the number of arrivals of third country nationals or stateless persons former residents of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide Eurostat data, 20% or lower, the reception and processing capacity of Member States, the geopolitical particularites of the Member States at the external borders, the preparedness measures and the average return rates.

Justification

On para. 1 and 2. As repeatedly argued in the discussion of Solidarity in AMMR, the EU shared responsibility should be calculated on the basis of objective criteria. The same principle should also apply for the calculation of the adequate capacity at EU level, taking into account returnability. The correlation between the number regarding the solidarity contributions and the number of cases under the border procedure should be established in this provision

On. para. 3 Experience has shown that MS at the external borders need flexibility in order to be able to face the challenges arising due to changing geopolitical environment.

Article 41bb The annual adequate capacity of a Member State

1. The number of the adequate capacity at Union level referred to in Article 41ba(1) shall be shared among the Member States. For this purpose, the Commission shall ~~calculate~~ identify for the calendar year the annual adequate capacity of a Member State, which is calculated by applying that Member State's average share of applications made at an external border crossing point or in a transit zone, ~~irregular~~ unauthorised border crossings and arrivals following disembarkations after search and rescue operations in the EU, during the ~~last three years~~ previous year, to the number of the adequate capacity at Union level.

(New paragraph). The Commission shall identify a lower number of the annual adequate capacity of a Member State than that calculated in accordance with paragraph 1 following consultation with that Member State with regard to specific vulnerability/security concerns at its external borders, as well as its geographical and geopolitical particularities.

(New recital) The identification of the adequate capacity is without prejudice to the national competences of the Member States as regards defence and to preserve national security and should take into account that the Member States retain primary responsibility for the management of their sections of the external borders, as provided for in Art. 7 of the Regulation (EU) 2019/1896.

2. Notwithstanding paragraph 1, each Member State shall have an adequate capacity for examining applications in the border procedure of at least [XXX].

Justification

Applications made at the external border crossing points should also be counted in order to capture all possible cases of asylum applications at the external borders.

*Language alignment with Screening Regulation "**unauthorised**" border crossings instead of "irregular".*

The new paragraph should be accompanied by a recital, as presented above.

Article 41bc Measures applicable in case the annual adequate capacity is about to be reached

1. By way of derogation from Article 41b(1), a Member State ~~whose~~ which has ~~is~~ reached at least 75% of its annual adequate capacity, shall, subject to the procedure in Article 41bd, have the possibility to:

(a) temporarily reduce the threshold of the proportion of decisions by the determining authority granting international protection according to the latest available yearly Union-wide Eurostat data foreseen in Article 40(1)(i). ~~In any event, the reduced threshold shall not go below 5%;~~

(b) temporarily not apply the border procedure ~~beyond that adequate capacity~~ where the circumstances referred to in Article 40(1)(i) apply;

(c) ~~[~~temporarily exclude from the border procedure third country nationals or stateless persons who are habitual residents of third countries with a low probability of the enforcement of a return decision or a refusal of entry from that Member State within the deadlines set in Articles 41c and 41g;~~]~~ or to

(d) carry out relocation with a view to applying the border procedure in the contributing Member State, where applicable.

The measures foreseen in points (a) to (c) may be applied for a duration of three months starting from the notification ~~or from the authorisation as applicable~~. That duration may be automatically extended for an additional three months.

2. Where the measures foreseen in points (a) or (b) of paragraph 1 or in paragraph 2 need to be extended beyond six months the Council shall convene the High-Level Migration Forum.

3. The measures foreseen in paragraph 1 or in paragraph 2 shall not apply where there are reasonable grounds to consider the applicant as a danger to the national security or public order of the Member States.

4. The Member State that has notified the Commission of the need to use the measures foreseen in this article ~~or the Member State that has been authorised to use these measures~~ shall inform the Commission on a monthly basis about the evolution of the situation and of any extension of the measures in accordance with paragraph 1.

Justification

On Para 1: a percentage is necessary to guarantee that the system will not be overwhelmed.

On Para 1 (a) and (b): in such circumstances flexibility is necessary.

On Para 1 (d): A notification should suffice

On Para 4: A notification should suffice

Article 41bd Notification of use of measures applicable in case the annual adequate capacity is about to be reached

1. When 75% of a Member State's ~~whose~~ annual adequate capacity has been ~~is~~ reached, that Member State shall notify the Commission and inform the Council and the European Parliament of its intention to apply any of the measures foreseen in Article 41bc. That Member State may submit the information provided in paragraph 2 as part of the notification foreseen in Articles 44c and 44d AMMR [if applicable].The notification shall include:

(a) information about the extent to which its adequate capacity is about to be exceeded,

(b) the type of measures referred to in Article 41bc that it wishes to apply,

(c) a substantiated reasoning in support, describing how the measures could help address the situation, and

(d) if applicable, other measures that the Member State has adopted or envisages to adopt at national level to alleviate the situation, including those in the Toolbox.

2. The Commission shall expeditiously assess the notification and may adopt a Commission Recommendation ~~implementing decision authorising or not~~ regarding the application of the measures.

~~3. Paragraph 3 shall not apply where the notifying Member State is identified in the [Report] referred in Article 7a of Regulation (EU) XXX/XXX [AMMR] as being under migratory pressure.~~

Justification

On Para 1 and 1(a): a percentage is necessary to guarantee that the system will not be overwhelmed.

On Para 2 and 3: A notification should suffice

Safe country concepts

EL supports the current drafting of Section V Safe Country Concepts as in doc 7166/23 with the following drafting suggestions / remarks

Art 45 par 1b

[…]The assessment of whether a third country […] is a safe third country in accordance with this Regulation ~~shall be based on~~ should take into account […]a range of relevant and available sources of information, including […] from Member States, the European Union Agency for Asylum, the European External Action Service, the United Nations High Commissioner for Refugees […] and other relevant international organisations.

Art. 45 par 3 We support the addition on the EU and third country joined statements

Article 47(2)

[…]The assessment of whether a third country […] is a safe country of origin in accordance with this Regulation ~~shall be based on~~ should take into account […] a range of relevant and available sources of information, including […] information from Member States, the European Union Agency for Asylum, the European External Action Service, the United Nations High Commissioner for Refugees, […] and other relevant international organisations, and shall take into account where available the common analysis of the country of origin information referred to in Article ~~10~~ 11 of Regulation (EU) No ~~XXX/XXX~~ 2021/2303 (EU Asylum Agency).

HUNGARY

As we mentioned during the counsellors meeting of 15 March and during the last SCIFA Hungary does not support the concept for making the use of border procedures more flexible as proposed by the Presidency. We are still convinced that taking into account the continuous migratory pressure on the EU, the implementation of the proposed concept would only create further opportunities for abuse of the system. As far as we see if the national capacities are exhausted and the proposed derogations are used with regards to the border procedure, this will act as an incentive, as smugglers and illegal migrants will do their utmost to take advantage of these derogations and choose a border sections where the abuse of asylum rules could lead to the entry into the territory of the Member State concerned. Consequently, applying this concept will lead to the exponential increase in migratory pressure and by this the national capacities will be constantly overburdened making the use of derogations a permanent tool. This would not only serve as a pull factor and increase the number of lives lost at sea, but would also explicitly encourage illegal migration, significantly increasing both primary and secondary movements and this would therefore not help to ensure the balance between responsibility and solidarity, but would lead to an exponential increase in solidarity needs. Furthermore, Hungary does not agree with setting out the level of adequate EU or national capacities centrally as this will serve also as a pull factor as well. Based on the aforementioned reasoning Hungary continues to highlight the need for a new approach which is based on the principle of “extraterritoriality” in the examination of asylum applications.

With regards to the safe third country concept, we support the deletion of the connection criteria between the applicant and the third country concerned. As a general comment we still think that EU candidate countries should automatically be considered as safe countries. We agree that Member States should be able to designate safe third countries at national level in addition to the EU list, but we do not support the Commission's broad competences in this regard as set out in the proposed text.

IRELAND

Article 4(x):

We have concerns about the reference to "at any given moment" in the definition of adequate capacity which could suggest a constantly changing adequate capacity while the related articles refer to an annual capacity. We welcome the Presidency's explanation that the intention is to reflect infow and outflow and not to suggest a changing figure. We can accept its inclusion on this basis and so long as it is a stable figure.

The definition also refers to the capacity needed in terms of reception and human resources however, article 41ba provides for one figure to be set for the Unions adequate capacity – how is it intended that both reception and human resources will be provided for in one figure. In addition, it is not clear how the criteria for determining adequate capacity at EU and Member States in Articles 41ba and 41bb relate to this definition.

Article 41ba:

Para 1: It is not clear how one figure would reflect both reception and human resources as per the definition in Article 4(x) and join other Member States who called for a concrete example of how adequate capacity would be assessed.

Para 2: We can support the link here to the AMMR Regulation and the intention that where the Commission identifies a higher number for the adequate capacity than is set out In para 1 then this will be included in the Recommendation regarding the establishment of the solidarity pool in the AMMR, however, this may require an amendment to the AMMR.

Para 3: Sets out a non-exhaustive list of criteria to be taken into account when identifying a higher number for the adequate capacity. However, as the definition of "adequate capacity" is the capacity needed in terms of reception and human resources to process an identified number of persons in the asylum and return border procedure then we don't see how some of these criteria are relevant.

As the border procedure will only apply to those who make an application for protection: at an external border crossing point; following apprehension in connection with an unauthorised crossing of the external border; following disembarkation after a SAR operation; or following relocation under the AMMR then “adequate capacity” should be based on those persons who apply for international protection and not on the overall number of arrivals or irregular arrivals.

We understand that the new Eurodac Regulation will allow for the counting of applicants rather than applications and the identification of applicants who made their applications following apprehension in connection with an illegal border crossing, following disembarkation after SAR operations etc.

We can agree to the 20% rate.

Article 41bb

Para 4(1) We note that there is a difference in the criteria for determining the adequate at union level under Article 41ba(3) and Member States adequate capacity under Article 41bb, Is there a particular reason for this difference?

As we have stated above in relation to Article 41ba(3) we think the calculation should be based on persons who have applied for international protection at the external border crossing, following apprehension in connection with an unauthorised crossing of the external border and following disembarkation following SAR operations and not the overall number of irregular border crossings and disembarkations as only those who apply for international protection will be subject to the asylum and return border procedure.

Para 5(2) We have concerns about setting one figure for adequate capacity for all Member States, which could either be too small for bigger Member States making it ineffective or too large for smaller Member States and therefore unrealistic.

Article 41bc

We can agree to the temporary lowering of the threshold to 5% (para 1a) and prefer para 1(c) to the last subparagraph of paragraph 1. We thank the Commission for the clarification that relocation under para 1(d) does not necessarily only apply to MS who are considered to be under migratory pressure and have been authorised to use the solidarity pool.

It is not clear from the second last sub paragraph of paragraph (1) at what stage a Member State may apply the derogations. Is it once they notify the Commission or do they have to wait for the Commission to authorise the derogations. We note the explanation from the Commission that if a Member State has been authorised to use the solidarity pool under the AMMR then the derogations can be applied from notification and where a MS is not a beneficiary under the AMMR they may be applied once the derogations have been authorised. This will need to be clarified in the text.

Para 2: It is not clear what the purpose of convening the High Level Forum meeting will be. We note the explanation of the Pres and the Commission that this will be to approve the extension of the derogations however, this could be made clearer in the text.

Article 41bd

The term expeditiously in para 2 is not clear enough and we would prefer a time-frame to be specified here.

Safe Country Concepts

We do not have any substantial reservations outstanding on the Safe Country Concepts other than to say that the assessment carried out in relation to the countries listed in the annexes were carried out a number of years ago and could be updated.

ITALY

APR – 7166/23 – IT contribution

21.03.2023

ASYLUM PROCEDURE REGULATION - ITALIAN CONTRIBUTION

The Italian delegation has the pleasure to submit the following amendment proposal concerning the provisions on border procedures examined during the meeting of JHA Counsellors on April 15 (doc. No. 7166/23).

On a general note, Italy reiterates its general scrutiny reservation due to the linkages of this Regulation with the other legislative proposals of the Pact under negotiations, particularly the AMMR proposal and the Crisis and Force Majeure Regulation.

A reservation is also maintained on the other relevant provisions concerning border procedure, namely those on the scope, the locations and the timeframe of such procedure.

As already stressed during the meeting, flexibility is necessary in order to adapt border procedures to the concrete circumstances which frontline Member States may face, including the situations of mass influx through land and maritime borders.

The aim should be devising and putting in place workable procedures, providing genuine added value. Member States implementing the border procedures should be given the possibility to consider the prospect of return, depending on cooperation of the third countries concerned, and identify the nationalities which may be meaningfully prioritised in the context of such procedures.

The capacity of Member States carrying out the border procedures should be established on the basis of objective criteria, taking into account their specificities. Finally, border procedures should be suspended with a simple notification when the capacity threshold is reached and the Member States concerned should be given the choice to continue processing cases in the framework of a border procedure or to apply ordinary procedures.

By contrast, where the threshold is about to be reached (e.g. when reaching at least 75% of the adequate capacity), derogations should be foreseen, upon request by the MS concerned and assessment by the Commission.

Article 4

(x) **'adequate capacity' means the capacity needed ~~at any given moment~~ on an annual basis in terms of reception and human resources to process an identified number of persons in the asylum and return border procedures for the relevant year.**

Article 41ba

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APR – 7166/23 – IT contribution

21.03.2023

The adequate capacity at Union level

1. For the purposes of applying Article 41b (1), the adequate capacity at Union level shall be set at XXX cases per year.

2. In the [Recommendation] referred to in Article 7c of Regulation (EU) XXX/XXX [AMMR] the Commission may identify a higher number for the adequate capacity at Union level than that provided in paragraph 1, reflecting the higher number for relocations or direct financial contributions pursuant to article 7c.3 of Regulation (EU)XXX/XXX (AMMR) ~~depending on the needs arising from the specific challenges in the area of migration for the relevant year~~.

3. When identifying the adequate capacity at Union level as provided in paragraph 2, the Commission shall take into account relevant qualitative and quantitative criteria, including, for the relevant year, the number of arrivals of third country nationals or stateless persons former residents of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide Eurostat data, 20% or lower, the reception and processing capacity of Member States, the preparedness measures and the average return rates.

Article 41bb

The annual adequate capacity of a Member State

1. The adequate capacity at Union level referred to in Article 41ba(1) shall be shared among the Member States. For this purpose, the Commission shall calculate for the calendar year the annual adequate capacity of a Member State by applying that Member State's average share of irregular border crossings and arrivals following disembarkations after search and rescue operations in the EU, taking into account the processing and reception capacity of the Member State and the Member State's specificity, during the last three years to the adequate capacity at Union level.

2. ~~Notwithstanding paragraph 1, each Member State shall have an adequate capacity for examining applications in the border procedure of at least [XXX].~~

3. In order to use efficiently its adequate capacity, each Member State may prioritise third country nationals or stateless persons who are habitual residents of third

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countries with a high probability of return from that Member State.

4. To the same purpose, ~~E~~each Member State may exclude from the border procedure third country nationals or stateless persons who are habitual residents of third countries with a low probability of the enforcement of a return decision or a refusal of entry from that Member State within the deadlines set in Articles 41c and 41g.~~;~~

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Comment: para. 2 should be deleted since it is in conflict with and supersedes para. 1.

Article 41bc

Measures applicable in case the annual adequate capacity is almost reached

1. By way of derogation from Article 41b(1), a Member State which has reached at least 75% of its ~~whose~~ annual adequate capacity ~~is reached~~ shall, subject to the procedure in Article 41bd, have the possibility to implement one or more of the following measures:

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(a) temporarily reduce the threshold of the proportion of decisions by the determining authority granting international protection according to the latest available yearly Union-wide Eurostat data foreseen in Article 40(1)(i). In any event, the reduced threshold shall not go below 5%;

(b) temporarily not apply the border procedure beyond that adequate capacity where the circumstances referred to in Article 40(1)(i) apply;

(c) ~~temporarily exclude from the border procedure third country nationals or stateless persons who are habitual residents of third countries with a low probability of the enforcement of a return decision or a refusal of entry from that Member State within the deadlines set in Articles 41c and 41g;~~ ~~] or to~~ *(moved to Article 41 bb)*

(d) carry out relocation with a view to applying the border procedure in the contributing Member State, where applicable.

The measures foreseen in points (a) to (c) may be applied for ~~a~~ the necessary duration up to six ~~of three~~ months starting from the notification ~~or from the authorisation as applicable~~. ~~That duration may be automatically extended for an additional three months.~~

~~[By way of derogation from Article 41g, a Member State whose annual adequate capacity is reached shall have the possibility to temporarily exclude from the border procedure for carrying out return those third country nationals or stateless persons who are habitual residents of third countries with a low probability of return from that Member State. This may be applied for a duration of three months starting from the notification or from the authorisation as applicable. That duration may be automatically extended for an additional 3 months.]~~ *(option deleted due to the preference for the option in point c), moved to Article 41bb)*

2. **Where the measures foreseen in points (a) or (b) of paragraph 1 or in paragraph 2 need to be extended beyond six months the Council shall convene the High-Level Migration Forum to discuss the specific challenges and preparedness needs in the area of migration over the relevant year.**

3. **The measures foreseen in paragraph 1 ~~or in paragraph 2~~ shall not apply where there are reasonable grounds to consider the applicant as a danger to the national security or public order of the Member States.**

4. ~~**The Member State that has notified the Commission of the need to use the measures foreseen in this article or the Member State that has been authorised to use these measures shall inform the Commission on a monthly basis about the evolution of the situation and of any extension of the measures in accordance with paragraph 1.**~~ *(moved to Article 41bd(3))*

Article 41bd

Notification of use of measures applicable in case the annual adequate capacity is almost reached

1. **A Member State whose annual adequate capacity ~~is~~ has reached at least 75%, shall notify the Commission and inform the Council ~~and the European Parliament~~ of its intention to apply ~~any~~ one or more of the measures foreseen in Article 41bc. The measures may be applied by that Member State since the day after the notification. That Member State may submit the information provided in paragraph 2 as part of the notification foreseen in Articles 44c and 44d AMMR [if applicable].**

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The notification shall include:

(a) **information about the extent to which its adequate capacity is exceeded.**

(b) the type of measures referred to in Article 41bc that it wishes to apply,

(c) a substantiated reasoning in support, describing how the measures could help address the situation, and

(d) if applicable, other measures that the Member State has adopted or envisages to adopt at national level to alleviate the situation, including those in the Toolbox.

2. The Commission shall expeditiously assess the notification. Where the measures foreseen in points (a) and (b) of Article 41bc(1) need to be extended beyond six months, the ~~and adopt a~~ Commission shall inform the Council and adopt an implementing decision authorising or not the application of the measures.

3. The Member State that has notified the Commission of the need to use the measures foreseen in Article 41bc(1) shall inform the Commission on a monthly basis about the evolution of the situation.

4. Paragraph ~~3~~ 2 shall not apply where the notifying Member State is identified in the [Report] referred in Article 7a of Regulation (EU) XXX/XXX [AMMR] as being under migratory pressure.

5. Where the adequate capacity of a Member State, set on an annual basis, is exceeded, that Member State shall notify it and continue processing cases according to the general rules, including the accelerated examination procedure.

LUXEMBOURG

Art. 4 (2)(x) : Luxembourg welcomes the inclusion of this definition of “adequate capacity” and suggests adding further clarifications to its interpretation, possibly in the recitals. These would concern the link with reception conditions, beyond mere capacities.

Luxembourg can accept a timeframe of one year with a view to simplifying the mechanism. Furthermore, the concept itself should include a reference to the overall objective that adequate capacities are meant to ensure that procedures can be dealt with within regular deadline, thereby avoiding the need for derogations.

Article 41ba : Luxembourg can be flexible when it to fixing a capacity at Union level, similar to the solidarity mechanism provisions. It will however be crucial that this the number identified by the Commission truly reflects the reality on the ground and that such a number will not be interpreted as a self-fulfilling prophecy. Sufficient reception capacities and conditions need to remain at the heart of the border procedure. Luxembourg can agree with the 20% recognition rate. The criteria for determining the adequate capacity at Union level and those used for the Member States level should be aligned. Luxembourg supports the role attributed to the Commission and remains skeptical concerning a more prominent role of the Council.

Article 41bb: Luxembourg maintains a reserve on §5 as we cannot accept a unique number for adequate capacity per Member State.

Article 41bc: Luxembourg understands the need for a balanced approach between solidarity and responsibility, notably when it comes to level of commitment and the possibility to derogate from certain commitments when the situation so requires. The level of rigid application of responsibility rules would need to be matched with automatic and binding commitments under the solidarity mechanism. Luxembourg therefore engages in a constructive manner on the issue of binding procedures.

Luxembourg believes that §1 of this article should include a reference to the point several Member states had made during the SCIFA discussion: before applying derogations, the measures at hand under the Toolbox should have been exhausted.

Furthermore, we note that there is no hierarchy among the options a) to d). Luxembourg could imagine introducing a certain order among the derogations, thus avoiding that the option of not applying the border procedure is immediately activated, but represents rather a measure of last resort. Luxembourg is not convinced that relocation with border procedures is a practical option and would remain hesitant to its inclusion. We would rather suggest introducing derogations for certain vulnerable categories, such as families with children or women.

A system of simple notifications could only be acceptable if it was mirrored by notifications system in the framework of Dublin.

Article 41bd : Luxembourg would like to delete the wording “if applicable” in 1d). Every Member State should do its utmost to avoid a repetition of such a situation and show a clear way ahead on how the reaching of adequate capacities can be avoided in the future.

Safe country concepts

Luxembourg maintains its positions regarding the safe country concepts, in particular in relation to the connection criterion concerning safe third countries, which must be maintained.

MALTA

Following the meeting of the JHA Counsellors (Asylum) held on 15 March 2023, below please find Malta's comments, as follows:

- **Border procedure**

Article 4 (x)

> 'adequate capacity' means the capacity **needed at any given moment** in terms of reception and human resources to process an identified number of persons in the asylum and return border procedure **on an annual basis.**

Justification: the definition needs to reflect the relevant Articles that clearly refer to the annual adequate capacity.

Article 41b

MT maintains its substantive reservation on the obligation to have a border procedure, especially concerning the mandatory application of the border procedure when Article 40(1)(i) applies, as this will create significant burden on the national authorities and resources of front-line Member States.

Without prejudice to the above, MT is of the opinion that when it comes to Article 40(1)(i) a mandatory border procedure, including a mandatory return border procedure, could only be considered if there are tangible prospects of return, which should be determined by the individual Member States depending on the level of cooperation with third countries.

Malta calls on the following addition in Article 41b:

> **2. For the purpose of paragraph 1a, Member States may following an assessment made by the Member State implementing the mandatory border procedure, exclude persons with a low prospect of return.**

Articles 41ba-bd

As a general comment, MT calls for a presentation by the Presidency on how the concept of adequate capacity as presented in this document would work in practice. Furthermore, the

presentation should also include actual figures so that Member States have a clear idea of what is being proposed in practical terms.

Article 41ba

MT is not in favour of having a minimum number, in terms of adequate capacity, stipulated in the APR. Instead, MT favours a system wherein the adequate capacity is established yearly on the basis of objective criteria, like the ones listed in paragraph 3, which reflect the reality on the ground.

1.For the purposes of applying Article 41b(1), the number referred to in article 4 (x) shall be set up **on the basis of the number of irregular arrivals of third country nationals or stateless persons former residents of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide Eurostat data, 20% or lower, the reception capacity, human resources of the Union to carry out border procedures and the average return rate.** at [XXX].

~~**2. In the [Recommendation] referred to in Article 7c of Regulation (EU) XXX/XXX [AMMR] the Commission may identify a higher number for the adequate capacity at Union level than that provided in paragraph 1 depending on the needs arising from the specific challenges in the area of migration for the relevant year.**~~

~~**3. When identifying the adequate capacity at Union level as provided in paragraph 2, the Commission shall take into account relevant qualitative and quantitative criteria, including, for the relevant year, the number of arrivals of third country nationals or stateless persons former residents of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union wide Eurostat data, 20% or lower, the reception and processing capacity of Member States, the preparedness measures and the average return rates.**~~

Article 41bb

MT is concerned with the provision in paragraph 1 which only takes into account the Member State's share of irregular border crossings and disembarkations following SAR and excludes other objective and relevant criteria in terms of the adequate capacity of a Member State like: (1) the processing and reception capacity of the Member State; and (2) Member States' specificities.

1) The adequate capacity at Union level referred to in Article 41ba(1) shall be shared among the Member States. For this purpose, the Commission shall calculate for the calendar year the annual adequate capacity**, in close consultation with** the Member State **concerned**, by applying that Member State's average share of irregular border crossings and arrivals following disembarkations after search and rescue operations in the EU **of third country nationals coming from third countries with a recognition rate of 20% or lower, taking into account the processing and reception capacity of the Member States and Member States' specificities** during the last three years to the adequate capacity at Union level.

Furthermore, when it comes to paragraph 2, while Malta agrees on the need for all Member States to ensure a level of adequate capacity to carry out border procedures, it is unclear to us on what basis this fixed minimum number will be established. Moreover, the size of the country needs to be taken into account. What might be considered to be sufficient for large Member States will certainly be too much for small Member States and vice versa.

Article 41bc

MT is of the opinion that once the annual adequate capacity has been reached, the obligation to process any further applications under a border procedure should immediately cease. It would then become optional on the particular Member State concerned on whether to continue applying the border procedure or not, with the only exception being cases where an applicant presents a danger to the national security or public order of the Member State (in such a scenario the application of the border procedure should remain mandatory).

Therefore, provisions in Article 41bc could be made use of when 75% of the adequate capacity is reached to limit the risks that a Member State reaches full capacity, as follows:

1. By way of derogation from Article 41b(1), a Member State which has reached at least 75% of its whose annual adequate capacity is reached shall, subject to the procedure in Article 41bd, have the possibility to:

(a) temporarily reduce the threshold of the proportion of decisions by the determining authority granting international protection according to the latest available yearly Union-wide Eurostat data foreseen in Article 40(1)(i). In any event, the reduced threshold shall not go below 5%;

~~**(b) temporarily not apply the border procedure beyond that adequate capacity where the circumstances referred to in Article 40(1)(i) apply;**~~

~~**(c) [temporarily exclude from the border procedure third country nationals or stateless persons who are habitual residents of third countries with a low probability of the enforcement of a return decision or a refusal of entry from that Member State within the deadlines set in Articles 41c and 41g;] or and to**~~

(b) carry out relocation with a view to applying the border procedure in the contributing Member State, where applicable.

Article 41bd

In line with our comment on Article 41bc, MT is of the opinion that once the annual adequate capacity has been reached, the obligation to process any further applications under a border procedure should immediately cease. In such a situation, the Member State concerned should only be obliged to notify the Commission and inform the Council and the European Parliament that its annual capacity has been reached, with no further action being required by either the Member State concerned or the Commission.

Article 41c

MT maintains its reservation on this paragraph since in our opinion, the proposed time limits (for both lodging and the conclusion of the border procedure), even when extended to 16 weeks, will place significant pressure on the national authorities, especially in case of mass arrivals who fall under the mandatory border procedure due to Article 40(1)(i). Furthermore, MT stresses that this short time limit for lodging an application and completing the border procedure does not take into account a number of factors, including medical clearances by the health authorities and the availability of interpretation at the border.

Article 41d

- Paragraph 1

In view of the explanation given by the CION in previous meetings, wherein it was indicated that a Member State can effectively decide to determine the Member State responsible outside of the border procedure (i.e. the applicant would be allowed entry into the territory of the Member State), MT would like that the wording of this paragraph is amended as follows so as to clearly highlight this possibility:

> *Where the conditions for the border procedure apply, Member States may decide to carry out the procedure for determining the Member State responsible for examining the application as laid down in Regulation (EU) No XXX/XXX [Regulation on Asylum and Migration Management] at the locations where the border procedure will be carried out, without prejudice to the deadlines established in Article 41c(2).*
>
> ***Without prejudice to the above, Member States may also decide to stop applying the border procedure and allow entry into their territory in order to carry out the procedure for determining the Member State responsible in accordance with Regulation (EU) No XXX/XXX [Regulation on Asylum and Migration Management].***

Article 41e

MT is of the opinion that when it comes to Article 40(1)(i) a mandatory border procedure, including a mandatory return border procedure, could only be considered if there are tangible prospects of return, which should be determined by the individual Member States depending on the level of cooperation with the said third country. Hence, MT is of the opinion that persons coming from a country with a low probability of the enforcement of a return decision or a refusal of entry should be excluded from a border procedure.

Article 41g

MT maintains its position that matters related to return should be included in the Return Directive and not in the Asylum Procedures Regulation.

With regards to paragraph 2, while MT welcomes the flexibility vis-à-vis the possibility to resort to other locations within the territory where persons subject to a return border procedure can be kept, MT insists that this flexibility should apply regardless of whether this need arises due to a difficulty in accommodating individuals at the designated locations found at, or in proximity to, the external border or transit zones.

Article 60

In line with our comments on Articles 41ba and 41bb, MT is of the opinion that the new paragraph 3 can be deleted.

- **Safe country concepts**

Article 45

Malta welcomes the addition in Article 45(3). Furthermore, the same could be applied when the statement, arrangement or agreement is between a Member State and a third country.

- Paragraph 1b

MT is of the opinion that the assessment of whether a third country is a safe third country should take into account, and not be based on, the various sources of information listed here. Therefore, we would like to revert to the previous version of the text.

Article 47(2)

MT is of the opinion that the assessment of whether a third country is a safe country of origin should take into account, and not be based on, the various sources of information listed in this article. Therefore, we would like to revert to the previous version of the text.

Article 49(4) and (4a)

MT is of the opinion that the total validity period of the delegated act should not exceed 12 months. This could either be done through one single extension of 9 months or through a maximum of two extensions for periods of 3 and 6 months, respectively.

Article 50(3)

Considering the fact that the Commission's right of objection is limited to a period of 2 years, MT is of the opinion that following the lapse of the 2 years the notifying Member State does not need to consult the Commission on the designation of that third country as a safe third country or safe country of origin at national level. In this regard, Malta calls for the following change in Article 50(3):

> The Commission's right of objection shall be limited to a period of two years after the date of removal of that third country from the EU common lists of safe countries of origin or of safe third countries. Any objection by the Commission shall be issued within a period of three months after the date of notification by the Member State and after due review of the situation in that third country,
>
> having regard to the conditions set out in Articles 45(1) and 47 of this Regulation. ~~**After the period of two years, the Member State shall consult the Commission on the designation of that third country as a safe third country or as a safe country of origin at the national level.**~~

NETHERLANDS

The Government of the Netherlands thanks the Swedish Presidency for the opportunity to send in written comments. In addition to the remarks put forward in the JHA Counsellors meeting on the 15th of March, we would like to make the following remarks.

Comments regarding the border procedure

The focus of the meeting and the new articles was on the adequate capacity for a border procedure. However, in the event that applications cannot be dealt with within the border procedure because the person evades the border procedure or because the border procedure facilities lack the capacity to deal with these cases, other Member States should not be left without action perspectives when confronted with these applicants on their territory. The corpus already allows for some measures, when interpreted in the right way. However, NL feels a reference should be included in the preambles to encourage Member States to make full use of these options.
NL would therefore like to propose the following, mirroring article 5 of the Screening regulation, in order to give Member States the possibility to intercept those persons within their territory that have evaded screening and the asylum border procedure, but would have been eligible to be placed in that procedure. In those cases, Member States should be encouraged to apply the options set out in the Reception Conditions Directive in such a way that a similar effect is accomplished. This could be achieved by a notion in the preambles.
E.g.:

Member States may apply measures under the [Reception Conditions Directive] to applicants found within their territory where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorized manner and that they have already been subjected to screening in a Member State and whose claims for protection have not subsequently been assessed in an asylum border procedure under this regulation, although the application qualifies to be handled in the asylum border procedure.

With regard to the text of the new articles, NL would like to submit the following remarks.

Article 41ba

The adequate capacity at Union level

1. **For the purposes of applying Article 41b (1), the adequate capacity at Union level shall be set at XXX.**
2. **In the [Recommendation] referred to in Article 7c of Regulation (EU) XXX/XXX [AMMR] the Commission may identify a higher number for the adequate capacity at Union level than that provided in paragraph 1 depending on the needs arising from the specific challenges in the area of migration for the relevant year.**

NL cannot yet agree to this provision. While we are not against fixing numbers, we do question whether a regulation is the appropriate place to do so. Making such arrangements should primarily be a matter between Member States. Furthermore, NL would like to point out that capacity must be there where the migrants present themselves, which can be at a number of transition points. In our view, the next compromise proposal should include a similar procedure as included in the AMMR regarding solidarity numbers.

Article 41bc

Measures applicable in case the annual adequate capacity is reached

1. **By way of derogation from Article 41b(1), a Member State whose annual adequate capacity is reached shall, subject to the procedure in Article 41bd, have the possibility to:**

(…)

b. temporarily not apply the border procedure beyond that adequate capacity where the circumstances referred to in Article 40(1)(i) apply;

NL cannot support the ground under b and proposes to delete it. Besides, such a provision is redundant since if the border procedure cannot be continued in a humane way, cases cannot be handled in the border procedure, as per standing text. In this way, not handling cases in the procedure can already be effected where necessary.

c. **~~[temporarily exclude from the border procedure third country nationals or stateless persons who are habitual residents of third countries with a low probability of the enforcement of a return decision or a refusal of entry from~~ that Member State within the deadlines set in Articles 41c and 41g;~~]~~**

NL cannot support the exclusion of this group of persons from the border procedure. After all, these persons most probably will not be eligible for international protection, and experience shows that it is this group of persons that most frequently causes problems in Member States. Also, it would inadvertently become an incentive for these third countries to not improve return cooperation, as it would be perceived as beneficial to be able to gain access for its citizens.

Of course, after the asylum procedure has been finalized, detention for the purpose of returning the third country national (under article 41g) will not be feasible. However, by that time, we will already have established that the person is not eligible for international protection and should at the very least not be a burden on the reception facilities in the Member States.

In addition, we would like to include a reference to capacity support by Member States and Frontex, or by means of financial support at the EU level.

Comments regarding safe country concepts

NL believes that migration agreements can be a tool to prevent people from making the dangerous crossing to Europe. In such an agreement, the parties may agree that the protection of migrants in the third country will take place in accordance with relevant international standards and subject to the principle of non-refoulement. By offering migrants prospects for the future, further migration can be prevented.

NL therefore thinks that, where the EU and a third country jointly have come to a migration agreement that states that migrants admitted under this agreement will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement, the conditions to designate that country as a safe third country should be considered fulfilled.

As for the concept of safe third countries, NL supports the deletion of the connection requirement. There are no international obligations to adhere to such a requirement. In many cases, there will also be no connection with the Member State where an application for international protection is lodged. In our opinion, the requirement can also hinder the application of migration agreements.

NL further refers to the non-paper it distributed in 2021 regarding the Brexit. In that non-paper, NL notes that the UK is no longer party to the Dublin Regulation, meaning that it is no longer possible to transfer asylum seekers to the UK on basis of this Regulation. Furthermore, the UK is no longer bound by the APD. The UK has drawn up a national (draft) scheme, stipulating that transit through an EU Member State would be sufficient to withhold an asylum residence permit in the UK and apply the national concept of safe third country.

NL thinks there should be a level playing field. In our opinion, it should still be possible to refer asylum seekers who have stayed in or have travelled through the UK to the UK asylum procedure. We therefore propose to bring back the concept of European safe third country.

NL proposes to add:

Article 45a

The concept of European safe third country

1. A third country can be considered as a European safe third country where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

(b) it has in place an asylum procedure prescribed by law; and

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.

2. The concept of European safe third country may only be applied provided that:

(a) an individual assessment of the particular circumstances of the applicant has been carried out taking into account elements submitted by the applicant explaining why the concept of safe third country would not be applicable to him or her;

(b) in case of unaccompanied minors, where there are clear indications that the applicant will be admitted or readmitted by the third country.

3. Article 45(1a), (2) and (7) apply accordingly.

POLAND

Horizontal position:

1. We still have doubts about the proposed shape of border procedures. Independently from the comments submitted on Articles 4(x), 41ba-41bd, 60 on "adequate capacity" in border procedures, we must bear in mind that border procedures as such are still subject to discussion and require political approval at MS level.

2. Understanding the calendar of work on the Pact proposals, but also bearing the above in mind, we raise reservations to the articles 4(x), 41ba-41bd, 60.

3. In our view, the introduction of additional regulations to border procedures, such as the obligation to maintain a certain imposed pool of places for carrying out border procedures (asylum and return), further complicates them. It should be left to the MSs. We note that currently the APR gives a lot of flexibility to the MSs as regards the location of third-country nationals and stateless persons sent to the border procedure (for example by indicating that detention is a measure of the last resort, and the border procedure itself should be carried out in the proximity of the border, which is not defined precisely in order to leave the flexibility for the MSs). In such a situation imposing the reception capacity for carrying out the border procedure remains unclear. We perceive this proposal as an **unnecessary overregulation**. We agree with those MSs, which commented on the 'adequate capacity' as an additional burden for MSs, especially in financial and organizational context. We can't forget that there are a number of derogations from the application of mandatory border procedures. On the other hand, the strict term "adequate capacity" may lead to a situation where certain capacities are exhausted, which in turn will lead to a derogation from border procedures. This information can be used by smugglers of irregular migrants and lead to further abuse. In addition, we believe that the capacity to carry out border procedures should be adapted to the current needs of the MSs in this regard. Thus, PL is in favour of derogating from the proposal to regulate mandatory ceilings in the APR for adequate capacity to carry out border procedures.

4. We understand the need to maintain a balance between responsibility and solidarity, and the current proposal, which is a decal from the AMMR proposal on thresholds for relocation and transferring it to the APR in the form of thresholds for "adequate capacity" for carrying

out border procedures and the intention to maintain it. However, we believe that in this particular dimension is an unnecessary overregulation.

5. With regard to Articles 43a to 50, we do not submit any comments.

Detailed position:

Article 4(x) — "adequate capacity" — concerning the two factors "reception" and "human resources". On the other hand, later articles refer only to the value of "reception capacity" — a lack of consistency between articles.

Article 41ba (1) — reservation due to the definition of 'adequate capacity' (two factors 'reception' and 'human resources'). Numerical value (xxx) of para. (1) refers only to "reception capacity" — reservation to the setting of a numerical ceiling. Reservation to the inclusion of the "adequate capacity" ceiling in the Regulation.

We welcome AT's request for the EC to present estimates of hypothetical capacities for 2023 based on 2022 data. We would like to learn more about the "adequate capacity" and in particular its practical dimension.

Article 41ba (2) — EC Recommendations referred to in 7c AMMR: 1) refer to the Solidarity Pool, 2) identify the measures from the Permanent EU Toolbox (Article 6a AMMR) necessary to address the migration situation in the coming year. It therefore appears that the reference to this Article when the Commission identifies a higher value as to 'adequate capacity at Union level' may not be appropriate.

Article 41ba (3) — the term "processing capacity of the MS" remains unclear.

Article 41bb (4) — it should be (1) - we are wondering whether the calculation of the rate of illegal entries (crossing the state border against the regulations) and SAR for the last 3 years in order to indicate MS "adequate capacity at Union level" and additionally "annual adequate capacity of a MS" is not too long. Our concern in this respect is to keep empty places in centres dedicated to dealing with foreigners referred to the border procedure.

Article 41bb (5) — it should be (2). How will the "adequate capacity" be calculated when one value is to be indicated for all MS in the APR?

Article 41bc (1) (a) and (b) — lack of consistency on the above two elements; they're mutually exclusive.

Article 41bc (2) — erroneous reference to para. 2.

Article 41bc (3) — ibid. erroneous reference to para. 2.

Article 41bd (2) — without specifying which article refers to para. 3.

Article 60 — reservation in the context of the horizontal position against the inclusion of ceilings for ‘adequate capacity’ in the Regulation.

ROMANIA

In general terms, we appreciate the efforts of the SE PRES to introduce a number of new elements in the desire to stimulate the advancement of discussions on the proposal.

At this point, we are introducing **a scrutiny reservation** on the new aspects included in the provisions on the border procedure. We need to know more details about how these measures will be put into practice, including on analysis of the adequate capacity in relation to that established by the Commission followed, in case of reaching it, by a notification and reorganisation of the flows, i.e. a reanalysis of the cases in order to decide the admissibility rate in the application of the border procedure within the established period.

We believe that we need to have a clearer picture of how these issues are going to work in practice.

We also consider it necessary to hold a joint meeting of APR-AMMR experts in order to clarify how the provisions incidental to the two legislative proposals could be put into practice.

We also mention that, in a situation of influx, we consider it appropriate that from the asylum procedure perspective, it should intervene the possibility of relocation within the border procedure (according to art. 41d, paragraph 2), and on the reception side - the use of spaces with the transit zone regime near the external border, in accordance with the provisions of art. 41f (2).

The inclusion in the border procedure of foreigners against whom there is a high chance of returning may pose problems in terms of the guarantees provided for asylum seekers. We need to reflect further on this element, given that the actual possibility of returning to the country of origin should not be a reason for applying the procedure at the border, but only the need for international protection or, possibly, the lack thereof.

At the same time, we would like to have more details on the phrase **adequate capacity** (art. 4 x) and on its definition by reference only to the border procedure.

As for art. 41bc, para. 1, the penultimate and last subparagraphs, in the interests of better clarity of the text and to make easier reference to certain provisions, I consider it appropriate to number them and to refer them as follows:

1. *By way of derogation from Article 41b(1), a Member State whose annual adequate capacity is reached shall, subject to the procedure in Article 41bd, have the possibility to:*

   (a) *temporarily reduce the threshold of the proportion of decisions by the determining authority granting international protection according to the latest available yearly Union-wide Eurostat data foreseen in Article 40(1)(i). In any event, the reduced threshold shall not go below 5%;*

   (b) *temporarily not apply the border procedure beyond that adequate capacity where the circumstances referred to in Article 40(1)(i) apply;*

   (c) *[temporarily exclude from the border procedure third country nationals or stateless persons who are habitual residents of third countries with a low probability of the enforcement of a return decision or a refusal of entry from that Member State within the deadlines set in Articles 41c and 41g;] or to*

   (d) *carry out relocation with a view to applying the border procedure in the contributing Member State, where applicable.*

2. *The measures foreseen in points (a) to (c) may be applied for a duration of three months starting from the notification or from the authorisation as applicable. That duration may be automatically extended for an additional three months.*

3. *[By way of derogation from Article 41g, a Member State whose annual adequate capacity is reached shall have the possibility to temporarily exclude from the border procedure for carrying out return those third country nationals or stateless persons who are habitual residents of third countries with a low probability of return from that Member State. ~~This may be applied for a duration of three months starting from the notification or from the authorisation as applicable. That duration may be automatically extended for an additional 3 months.]~~ The provisions from paragraph 2 of this article may also apply.*

4. Where the measures foreseen in points (a) or (b) of paragraph 1 or in paragraph 2 need to be extended beyond six months the Council shall convene the High-Level Migration Forum.

5. The measures foreseen in paragraph 1 or in paragraph 2 shall not apply where there are reasonable grounds to consider the applicant as a danger to the national security or public order of the Member States.

6. The Member State that has notified the Commission of the need to use the measures foreseen in this article or the Member State that has been authorised to use these measures shall inform the Commission on a monthly basis about the evolution of the situation and of any extension of the measures in accordance with paragraph 1.

In relation to the concepts set out in Section V of the legislative proposal under review (safe country concepts), we reiterate the importance of establishing common lists of safe countries at EU level. At the same time, in order for their application to be carried out in a similar way and for the readmission of persons to take place rapidly in all situations regardless of the Member State from which the alien leaves and without intervening late in the answers necessary for the application of the concepts, we consider it necessary for readmission agreements to be concluded by the EU with each third country, preferably with an express mention of accelerating the steps taken in the case of asylum seekers and of their readmission to the territory of the third country, similar to the EU-Turkey Agreement.

We emphasize that the above mentioned are not a reservation to this Section, but only a proposal to supplement with the procedural aspects related to the effective application of the concepts, respectively the establishment of concrete links with these countries at EU level.

SLOVAKIA

Disclaimer: The positions stated below are based solely on the opinions of experts.

Art. 4 x There are no objections to the definition of adequate capacity

Art. 41ba

We would appreciate clarification whether the adequate capacity is related solely to the asylum border procedure (with reference to the article 41b) or also to the return border capacity (with reference to the definition in Art 4x). Referring only to the Article 41b titled *Mandatory application of the asylum border procedure* can may lead to misunderstandings.

Art. 41 ba (1)

Based on our position with respect to the exact "number" regulated by the legislation in general,

such a provision should be avoided. The main reason is that the level can be altered by the EC Report (according to art. 41(2); furthermore, it can also become a pull factor.

Art. 41ba(3)

We understand that the wording is similar to the wording in AMMR. In spite of this, there should be clear criteria for establishing adequate capacity, particularly when it comes to qualitative factors

As far as the 20% recognition rate is concerned, we are flexible

Art. 41 bb (1)

No specific comments

Art 41 bb (2)

There is no objection to moving the wording to the recitals.

Art. 41 bc(1)

If a hierarchy of options for derogations is to be offered, the wording must be clear. Generally, we would prefer to set the hierarchy; in addition, a toolbox should become a first option. There is a possibility of flexibility if the reference to the procedure in Article 41bd (1d) guarantees it. Relocation, however, is not considered a suitable option for a derogation. A relocation is a time-consuming process as opposed to a border procedure, which must be completed as quickly as possible. As for b) we understand the explanation given at the meeting that it concerns only asylum cases beyond adequate capacity. Hence, it would be better to rewrite option b).

Art. 41bc(4)

We are sceptical regarding the requirement to provide EC information on a monthly basis; aside from the administrative burden, it seems to be at odds with the three-month possibility to apply derogations.

Art. 41bd

Several questions remain regarding the practical application of the system, in particular when available capacity changes within a short period of time.

Section V - Safe country concept

Our position on relevant provisions is flexible; we particularly support the idea of establishing a list of safe third countries (article 46) and safe countries of origin (article 48) at the Union level.

SLOVENIA

General comment:

Following discussions of the SCIFA meeting and JHA Counsellors Asylum meeting, Slovenia would like to reiterate scrutiny reservations on the whole amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, especially regarding the new articles on the border procedure.

Furthermore, the Republic of Slovenia supports the mandatory implementation of the border procedure in the widest possible scope, but at the same time understands that it must be permanent, predictable and therefore also flexible. Therefore, it is also necessary to consider the Articles that refer to the very nature of the border procedure, namely Articles 41, 41a and 41b, which also needs to be amended and discussed. In our opinion, it is important to have an agreement on the basic concepts before discussing the further details, and also before discussing derogations.

Since it was evident from the explanations at the JHA Counsellors Asylum meeting that there are many connections between AMMR and APR, we propose a separate meeting with the focus on connected provisions. We believe it will positively affect discussion and have a great impact on the overall progress.

Article 41ba

From our point of view, it is important to have a clearly defined term “adequate capacity”, therefore we do not support the proposed option in Article 41ba. At the SCIFA meeting Slovenia supported option (a), which we support even now.

Like many other Member States, Slovenia also asks for additional explanations on how the provisions will work in practice, and also how it is intended to determine the proposed threshold for adequate capacity.

Article 41bb

The Republic of Slovenia still does not support the proposal that the adequate capacity is being determined on an annual basis, as migration trends are unpredictable. What may have been adequate capacity in the last three years may not necessarily be the case in future years, as circumstances change rapidly in individual countries of origin. The same applies for each Member States - what may have been adequate capacity for one may not necessarily be the case in others. The change in the proposed legislation must meet todays and future challenges, therefore must be flexible enough for implementation.

Article 41bc

As it was already pointed out at the SCIFA meeting, Slovenia is not in favour of derogations, even if it is aware that they will need to be agreed. By doing so, it is important to sufficiently consider compensatory measures with the help of agencies and other solidarity measures. As many other Member States Slovenia highlights the role of the EUAA, which just over a year ago obtained a new mandate. We believe that when the EUAA will be fully operative and will be able to carry out all the tasks specified in the regulation, there will be even greater assistance to the Member States. For this to be possible, adequate funding must also be provided.

Furthermore, for the Republic of Slovenia, a lower threshold and relocation are not suitable, as the temporary suspension of mandatory border procedures could become permanent. Derogations that would cause an additional pull factor and would deepen the issues, should be strongly avoided.

Slovenia additionally asks for clarifications regarding the proposed deadlines in the second subparagraph of paragraph 1 and paragraph 2 – we would like to know what is the maximum deadline and what happens in the event that the Member State after the prolongation still achieves the annually determined adequate capacity (perhaps even for several years in a row).

Regarding the third subparagraph of the first paragraph, we ask for an explanation as to what the mentioned provision would mean in practice.

Article 41bd

Like several other Member States, Slovenia also believes that the word "expeditiously" is not clear in paragraph 2, so we propose to specify a clear deadline. This is also important from the point of view of effective implementation of the provisions, which needs to be clear to all Member States involved.

As in the discussions on the AMMR, the opinion of the individual Member State must also be included in this assessment, or it must be carried out in cooperation with the relevant Member State.

Section V – Safe country concepts

From the beginning of the discussions, Slovenia supported the binding nature of the use of the safe country concepts, which is still the case. Namely, Slovenia is in favour of harmonizing the lists of safe countries of origin and safe third countries at the EU level, as in our opinion it is an important segment of the implementation of the procedures for the recognition of international protection.

Nevertheless, the Republic of Slovenia will re-examine the mentioned provisions, especially in the light of reaching an agreement and withdrawing scrutiny reservations and comments.

SPAIN

Following the meeting of the JHA Counsellors (Asylum) held on 15 March 2023 (CM 1976/23), the Spanish delegation submits the following written comments on the articles examined during the meeting on the border procedure (Article 4(x), Articles 41ba-41bd and Article 60).

In addition, remarks regarding Section V on safe country concepts (Articles 43a-50) are raised.

1. General remarks on the new articles regarding the border procedure

Spanish welcomes the progress on the negotiation of APR, in parallel to the negotiations of the instruments of the Pact on Migration and Asylum in order to conclude the negotiations of all the files before the end of the legislative term as agreed in the joint roadmap with the European Parliament.

In this line, Spain reiterates its general scrutiny reservation, taking into account the interdependence of this Regulation with the other legislative proposals of the Pact under negotiation, particularly the AMMR proposal and the Crisis and Force Majeure Regulation.

Furthermore, Spain upholds its reservations on the other relevant articles of the border procedure, particularly, the ones defining the scope, the locations and the timeframe of such procedure.

The Spanish delegation stresses that flexibility is required on the application of border procedures, which should be adapted to the circumstances of the Member States, including to situations of mass influx at land and maritime borders. The aim is to ensure that such procedures are workable and that they provide added value without causing vulnerabilities to the external borders. Member States implementing the border procedures should have the possibility to consider the prospect of return depending on their level of cooperation with third countries, and therefore to identify which nationalities constitute a priority to be processed through such procedures. The capacity of Member States carrying out the border procedures also need to be established on the basis of objective criteria taking into consideration geographical particularities. Finally, border procedures should be suspended with a simple notification when the capacity threshold is reached.

The specific remarks, which are limited to the examined articles and are made without prejudice to our position on the other relevant articles regarding the border procedure, are inserted directly in the text as an Annex.

Safe country concepts (Articles 43a-50)

In the spirit of compromise and in light of the joint roadmap, Spain lifts its scrutiny reservations on Articles 43a, 44, 45 and 46, following the inclusion of our previous suggestions on those provisions.

In this respect, the only reservation that is upheld concerns Article 50 and the consultation process after the expiry of the 2 year period regarding the right of objection by the Commission. Acknowledging that EU list should have primacy, national competences should also be safeguarded and thus once that 2 year period is concluded, Member States should be able to amend their national list without further consultation to the Commission.

Article 4

Definitions

For the purposes of this Regulation, the following definitions **[…]** apply:

(…)

(x) 'adequate capacity' means the annual capacity needed ~~at any given moment~~ in terms of reception and human resources to process an identified number of persons in the asylum and return border procedures for the relevant year.

Justification

In line with the temporary scope of the solidarity contributions/obligations under AMMR and in order to ensure predictibility, the adequate capacity should have an annual timeframe and relate to a number of cases/persons to be processed in a given year under the asylum and return border procedures.

Article 41ba

The adequate capacity at Union level

For the purposes of applying Article 41b (1), the adequate capacity at Union level shall be set at XXX cases per year.

Justification

The adequate capacity should be translated into a yearly objective related to a number of cases/persons, in line with the annual obligations under the solidarity scheme.

In the [Recommendation] referred to in Article 7c of Regulation (EU) XXX/XXX [AMMR] the Commission may identify a higher number, or in exceptional situations, a lower number for the adequate capacity at Union level than that provided in paragraph 1 depending on the needs arising from the specific challenges in the area of migration for the relevant year and corresponding to the number of solidarity contributions established therein.

Justification

Spain deems that the correlation between the number regarding the solidarity contributions and the number of cases under the border procedure should be clearly established in this provision.

Furthermore, the possibility to establish a lower number mirrors the provision established in para 3 of Article 7c AMMR, which foresees the situation of recommending a number of relocations below the minimum threshold.

When identifying the annual number for the adequate capacity at Union level as provided in paragraph 2, the Commission shall take into account relevant qualitative and quantitative criteria, including, for the relevant year, the number of arrivals of third country nationals or stateless persons former residents of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide Eurostat data, 20% or lower, the reception and processing capacity of Member States, the preparedness measures and the average return rates.

Justification

Spain suggests this technical adjustment to ensure consistency with paragraph 1.

Article 41bb

The annual adequate capacity of a Member State

2. The number for the adequate capacity at Union level referred to in Article 41ba(1) shall be shared among the Member States. For this purpose, the Commission shall ~~calculate~~ identify for the calendar year the annual adequate capacity of a Member State by applying that Member State's average share of ~~irregular~~ unauthorised border crossings and arrivals following disembarkations after search and rescue operations in the EU during the last three years to the adequate capacity at Union level.

2. Member States shall use the adequate capacity efficiently by prioritising third country nationals or stateless persons who are habitual residents of third countries with a high probability of return from that Member State.

Justification

Prioritization of persons with high return rates is key to ensure the efficient use of the adequate capacity and the added value of the border procedure.

1. Notwithstanding paragraph 1, each Member State shall have an adequate capacity for examining applications in the border procedure of at least [XXX].

2. A Member State that, at any time, is confronted with a significant migratory situation foreseen in Article 2(wa) AMMR on its own territory or considers itself to be in such situation, may request a partial or full reduction of its adequate capacity. The procedure foreseen in Article 44f AMMR shall apply *mutatis mutandis*.

Justification

If the significant migratory situation may lead to a full or partial reduction of the solidarity contributions, such situation should lead to a full or partial reduction of the adequate capacity commitments. This could be the case, for instance, of the cumulative effect of a high number of asylum applications by third country nationals entering legally in the EU.

Article 41bc

Measures applicable in case the annual adequate capacity is reached or close to be reached

Justification

In order to use the adequate capacity in the most efficient way, a two-tier system could be envisaged. Once a Member State has reached a high percentage of its adequate capacity, a first set of measures (e.g. reduction of the recognition rate threshold, exclusion of persons with low return prospects) could be subject to a swift authorisation procedure.

However, once a Member State has reached its adequate capacity, its obligations have been fulfilled. A simple notification should suffice to inform of the measures to be put in place, including the temporary suspension of the border procedure. Having complied with the obligations under the Regulation, no authorisation should be required.

~~2.~~3. **By way of derogation from Article 41b(1), a Member State which has reached at least 75% of its ~~whose~~ annual adequate capacity ~~is reached~~ shall, subject to the procedure in Article 41bd, have the possibility to:**

(a) **temporarily reduce the threshold of the proportion of decisions by the determining authority granting international protection according to the latest available yearly Union-wide Eurostat data foreseen in Article 40(1)(i). In any event, the reduced threshold shall not go below 5%;**

~~• temporarily not apply the border procedure beyond that adequate capacity where the circumstances referred to in Article 40(1)(i) apply;~~

~~[~~**temporarily exclude from the border procedure third country nationals or stateless persons who are habitual residents of third countries with a low probability of the enforcement of a return decision or a refusal of entry from that Member State within the deadlines set in Articles 41c and 41g;**~~]~~ ~~or~~ **and to**

(b) **carry out relocation with a view to applying the border procedure in the contributing Member State, where applicable.**

Justification

In addition to the abovementioned justification on the two-tier approach, the cumulative use of the measures should be granted without any hierarchy among them to ensure the necessary adaptability.

The measures foreseen in points (a) **and (b) and in paragraph 2** ~~**to (c)**~~ **may be applied for** **the remainder of the relevant year**~~**a duration of three months**~~ **starting from the notification or from the authorisation as applicable.** ~~**That duration may be automatically extended for an additional three months.**~~

~~**[By way of derogation from Article 41g, a Member State whose annual adequate capacity is reached shall have the possibility to temporarily exclude from the border procedure for carrying out return those third country nationals or stateless persons who are habitual residents of third countries with a low probability of return from that Member State. This may be applied for a duration of three months starting from the notification or from the authorisation as applicable. That duration may be automatically extended for an additional 3 months.]**~~

~~**Where the measures foreseen in points (a) or (b) of paragraph 1 or in paragraph 2 need to be extended beyond six months the Council shall convene the High Level Migration Forum.**~~

Justification

Since the adequate capacity entails an annual timeframe, the measures foreseen in this article should be in place for the remaining time of a given year.

4. The Member State whose annual adequate capacity is reached shall, subject to the procedure in Article 41bd (4), have the possibility to temporarily not apply the border procedure beyond that adequate capacity where the circumstances referred to in Article 40(1)(i) apply;

~~3.~~5. The measures foreseen in paragraph 1 or in paragraph 2 shall not apply where there are reasonable grounds to consider the applicant as a danger to the national security or public order of the Member States.

~~4.~~6. The Member State that has notified the Commission of the need to use the measures foreseen in this article or the Member State that has been authorised to use these measures shall inform the Commission on a monthly basis about the evolution of the situation and of any extension of the measures in accordance with paragraph 1.

~~5.~~7. *Article 41bd*

Notification of use of measures applicable in case the annual adequate capacity is reached or close to be reached

1. A Member State which has reached at least 75% of its ~~whose~~ annual adequate capacity ~~is reached,~~ shall notify the Commission and inform the Council and the European Parliament of its intention to apply any or several of the measures foreseen in Article 41bc (1). That Member State may submit the information provided in paragraph 2 as part of the notification foreseen in Articles 44c and 44d AMMR [if applicable].

2. The notification shall include:

(a) information about the extent to which its annual adequate capacity is ~~exceeded~~reached,

(b) the type of measures referred to in Article 41bc that it wishes to apply,

(c) a substantiated reasoning in support, describing how the measures could help address the situation, and

(d) if applicable, other measures that the Member State has adopted or envisages to adopt at national level to alleviate the situation, including those in the Toolbox.

3. The Commission shall expeditiously assess the notification and adopt a Commission implementing decision authorising or not the application of the measures.

This ~~P~~paragraph ~~3~~ shall not apply where the notifying Member State is identified in the [Report] referred in Article 7a of Regulation (EU) XXX/XXX [AMMR] as being under migratory pressure.

The Member State whose annual adequate capacity is reached shall notify the Commission and inform the Council and the European Parliament of its intention to apply any of the measures foreseen in Article 41bc (1) and (2). The notification shall include the elements foreseen in paragraph 2 (a) and (b) of this Article.