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COVER NOTE

From:	General Secretariat of the Council
To:	JHA Counsellors (Asylum)
No. prev. doc.:	CM 2709/23; 8464/23
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 2709/23), 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

Austria supports the efforts of the Swedish presidency to achieve an overall compromise on the asylum reform until the JHA Council on the 8./9. June 2023. Since AMR and APR are closely linked, Austria wants to share the following general remarks:

1. MS should not be obliged to provide solidarity for MS with lower per capita pressure

- At no point should a Member State with a bigger per capita burden on the asylum system be required to provide solidarity for Member States with a lower asylum burden. Previous and current disproportionate burden must sufficiently be taken into account.

2. The concept of safe third countries is of key importance to Austria

- Austria requests to uphold the deletion of the "connection criterion", especially in view of upcoming trilogue negotiations with the European Parliament.

3. The concept of "adequate capacities" can be accepted in the spirit of compromise only under two conditions:

a. The overall number that constitutes an "adequate capacity" in the respective Member States must reflect the objective need for border procedures at external border.

b. Border procedures must be conducted on an "inflow-outflow" basis i.e. available capacities for border procedures must be used "at any given moment". Once the limits of "adequate capacities" are reached in a Member State, this should not lead to the full suspension of border procedures.

The explanations received in by the Commission in various JHA Counsellor meetings (rolling i.e. inflow-outflow-system) are not yet mirrored in the text and will have to be taken up accordingly.

4. The concept of "adequate capacities" must be subject to monitoring by the European Commission

a. In view of the limits of "adequate capacities", it must be ensured that cases in the border procedures are counted correctly i.e. only those cases should be counted, where the border procedure was fully applied and an asylum and, where applicable, a return decision was made. Austria suggests an objective system of registration, such as a new Eurodac category.

b. Once the limits of "adequate capacities" are reached, the Member State concerned should not merely notify the Commission. Instead, the Commission should retain the right of objection in order to 1) ensure the quality of the notification and 2) address possible irregularities. This right is already foreseen in the asylum acquis i.e. in Dublin take-back notifications.

5. General position on mandatory border procedures

- For the record, Austria repeats its well-known positions: border procedures must be mandatory and should be conducted at or near the external borders. Exemptions should be limited and the nationality threshold increased. When "adequate capacities" are reached, these capacities should be increased and not decreased. In times of pressure, external border protection must be strengthened and not weakened.

6. In the area of responsibility rules, Austria supports generally upholding the responsibility criteria, but is critical of the newly proposed responsibility shifts

- AT welcomes that the extension of the definition of family members to include siblings is no longer proposed by the Presidency.

- AT is very critical of the Presidency proposals regarding shorter responsibility for persons whose application has been rejected in the border procedure. This incentivizes secondary migration and leads to the privileged situation of "non-returnable" persons.

7. Strong Council position necessary in view of EU-Parliament positions

- In light of the Parliament's recent proposals, the focus should be placed on achieving a strong Council position on APR and AMR in order to have negotiating leverage.

Specific remarks in the text

Article 4

Definitions

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

(x) 'adequate capacity' means the capacity required at any given moment to carry out the asylum and return border procedures.[3]

[3] **The Presidency intends to introduce the following recital 40a: "In order to carry out the asylum and return border procedures, Member States should take the necessary measures to establish an adequate capacity, in terms of reception and human resources, ~~necessary~~ required to examine at any given moment an identified number of applications."**

Article 41ba

The adequate capacity at Union level

- **The adequate capacity at Union level ~~for examining applications in the border procedure~~ for carrying out the border procedure ~~at Union level~~ shall be considered to be of XXX.**[1]

[1] The PRES proposes to move paragraph 2 in the previous version of Art. 41ba to the AMMR by adding in Art. 7c a new paragraph 5: "Depending on the needs arising from the special challenges in the area of migration for the upcoming year, the Recommendation may identify a higher or, in exceptional situations a lower, number for the adequate capacity at Union level for carrying out the border procedure as provided in Article 41ba paragraph 1 of Regulation (EU) XXX/XXX [APR]. The PRES proposes to move paragraph 3 in the previous version of the article to Art. 7b AMMR.

- ~~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.~~

- ~~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 adequate capacity of a Member State required

1. The Commission shall, by means of an implementing act, set a number that is considered to correspond to the adequate capacity of each Member State for ~~examining applications in the~~ carrying out the border procedures~~.~~

2. The number referred to in paragraph 1 shall be calculated by multiplying the number set out in Article 41ba by the number of irregular crossings of the external border and arrivals following search and rescue operations in the Member State concerned during the previous three years and dividing the result thereby obtained by the number of irregular crossings of the external border and arrivals following search and rescue operations in the EU during the same period~~.~~

3. The implementing act referred to in paragraph 1 shall be adopted by the Commission for the first time within two ~~2~~ months following the entry into force of this Regulation and then by the same month every three years thereafter.

4. Nothing in this Article shall be interpreted as requiring a Member State to take action that would undermine the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 41bc

Measure applicable in case the adequate capacity of a Member State is about to be reached

1. When the number of applicants that are subject to the border procedure in a Member State is equal to 75% of the number set out in respect of the Member State concerned in the Commission implementing act referred to in Article 41bb or higher the Member State may notify the Commission.

2. Where a Member State notifies the Commission in accordance with paragraph 1, by way of derogation from Article 41b(1), that Member State is not required to examine in a border procedure applications made by applicants referred to in Article 40(1)(i) who are of a nationality or, in the case of stateless persons, former habitual 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 average Eurostat data, higher than five percent.

3. Paragraph 2 may be applied by a Member State from the day following the date of the notification in accordance with paragraph 1 for a maximum period of six months within the same calendar year.

Article 41bd

Measure applicable in case the adequate capacity of a Member State is reached

1. When the number of applicants that are subject to the border procedure in a Member State is equal to the number set out in respect of that Member State in the Commission implementing act referred to in Article 41bb or higher, the Member State may notify the Commission.

2. Following reception of a notification in accordance with paragraph 1 by a Member State which is not identified pursuant to Article 7a AMMR as being under migratory pressure, the Commission shall promptly examine the information provided by the Member State concerned and decide, by means of an implementing act, whether or not that Member State is authorised to apply the measure referred to in paragraph 3.

For the purpose of deciding whether such authorisation is to be given, the Commission shall take account of the elements foreseen in Article 7b AMMR where applicable.

3. Where a Member State notifies the Commission in accordance with paragraph 1 and, in the case of a Member State that is not identified in Article 7a of [the AMMR] as being under migratory pressure, where authorised to do so by the implementing act referred to in paragraph 2, by way of derogation from Article 41b(1), that Member State is not, required to examine in a border procedure applications made by applicants referred to in Article 40(1)(i) at a moment when the number of applicants that are subject to the border procedure in that Member State is equal to the number referred to in Article 41bb or higher.

4. The measure in paragraph 3 may be applied by a Member State:

(i) from the day following the date of the notification in accordance with paragraph 1 until the date of the adoption by the Commission of an implementing act in accordance with paragraph 2, where the Member State is not identified pursuant to Article 7a of [the AMMR] as being under migratory pressure;

(ii) for a maximum period of six months within the same calendar year starting from the date set out in the Commission implementing act referred to in paragraph 2, where the Commission authorises a Member State that is not identified pursuant to Article 7a of [the AMMR] as being under migratory pressure to apply paragraph 3; or

(iii) for a maximum period of six months within the same calendar year starting from the day following the date of the notification in accordance with paragraph 1, where the Member State concerned is identified pursuant to Article 7a AMMR as being under migratory pressure.

5. At the expiry of the six month period referred to in points (ii) or (iii) of paragraph 4, the Member State concerned may notify the Commission that the number of applicants that are subject to the border procedure in that Member State at the time of such notification is equal to the number set out in the Commission implementing act referred to in Article 41bb or higher. In such case, where the Member State is not identified as being under migratory pressure pursuant to Article 7a AMMR, the procedure in paragraph 2 shall apply.

Article 41be

Notification by a Member State in case the adequate capacity is reached or about to be reached

1. The notifications referred to in Articles 41bc and 41bd shall contain the following information:

(a) **number of applicants that are subject to the border procedure in the Member State concerned at the time of the notification;**

(b) **the measure, referred to in Articles 41bc and 41bd, that the Member State concerned intends to apply or to continue applying;**

(c) **a substantiated reasoning in support, describing how resorting to the measure concerned could help in addressing the situation, and where applicable, other measures that the Member State concerned has adopted or envisages adopting at national level to alleviate the situation, including those referred to in Article 6a of the AMMR.**

2. Member States may notify the Commission in accordance with Article 41bc and 41bd as part of the notification referred to in Article 44c and 44d [of the AMMR], where applicable.

3. Where a Member State notifies the Commission in accordance with Articles 41bc or 41bd, the Member State concerned shall inform other Member States accordingly.

4. A Member State applying one of the measures set out in Articles 41bc or 41bd shall inform the Commission on a monthly basis about the number of applicants that are subject to the border procedure in that Member State at that time.

Article 41e

Exceptions to the asylum border procedure

[…]1. The border procedure shall be applied to unaccompanied minors only in the cases referred to in Article 40(5)(b)~~, and to minors below the age of 12 and their family members only in the cases referred to in Article 40(1)(f)~~.[2]

[…]2.Member States shall not apply or shall cease to apply the border procedure at any stage of the procedure where:

(a) the determining authority considers that the grounds for rejecting an application as inadmissible or for applying the accelerated examination procedure are not applicable or no longer applicable;

[2] A recital, clarifying that in case the applicant is subject to age assessment procedure according to Art. 24, he/she shall be exempt from the asylum border procedure, only after age assessment procedure has ended.

(b) the reception conditions and guarantees, including the specific reception needs of minors, as provided for in Directive XXX/XXX/EU [Recast Reception Conditions Directive], cannot be met in the locations referred to in Article 41f;

(c) the necessary support cannot be provided to applicants with special procedural needs in the locations referred to in […]Article 41f;

…

Article 41f

Locations for carrying out the asylum border procedure

[…]1.

[…]2.In situations where the capacity of the locations notified by Member States pursuant to paragraph […] 1 is temporarily insufficient to ~~process~~ examine the ~~applicants~~ applications covered by […]Article 41b, and for any other practical reason which renders impossible the reception in a specified location, Member States may designate other locations within the territory of the Member State and upon notification to the Commission accommodate applicants there, on a temporary basis and for the shortest time necessary.

Article 45

The concept of safe third country

1. **A third country may only […] be designated as a safe third country […] where in that country:**

…

2b. The concept of 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 justifying why the concept of safe third country would not be applicable to him or her~~ the applicant cannot demonstrate the existence of elements justifying why the concept of safe third country is not applicable to him or her, in the framework of an individual assessment;**

(b) **in case of unaccompanied minors, where there are clear indications that the applicant will be admitted or readmitted by the third country and it is not contrary to his or her best interest.**

Member States may under national law provide for rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country.

2. **[…] Where the EU and a third country have jointly come to ~~a statement, arrangement or~~ an agreement that migrants admitted under this ~~statement, arrangement or~~ agreement will be protected in accordance with the relevant international standards and in full respect of the principle of *non-refoulement*, the conditions of this Article regarding safe third country status may be presumed ~~considered~~ fulfilled in the absence of evidence to the contrary and without prejudice to paragraph 2b.**

Article 54

Suspensive effect of appeal

1. The effects of a return decision shall be automatically suspended for as long as an applicant or a person subject to withdrawal of international protection has a right to remain or is allowed to remain in accordance with this Article.

- Applicants and persons subject to withdrawal of international protection shall have the right to remain on the territory of the Member States until the time-limit within which to exercise their right to an effective remedy before a court or tribunal of first instance has expired and, where such a right has been exercised within the time-limit, pending the outcome of the remedy.

- The applicant and the person subject to withdrawal of international protection shall not have the right to remain pursuant to paragraph 2 where the competent authority has taken one of the following decisions:

  (a) a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [including safe country of origin] or in the cases subject to the border procedure;

  (b) a decision which rejects an application as inadmissible pursuant to Article 36(1a)(a) […] (f), (g) or (1aa)(a);

  (c) a decision which rejects an application as implicitly withdrawn;

  (d) a decision which rejects a subsequent application as unfounded or manifestly unfounded;

  (e) a decision to withdraw international protection in accordance with [Article 14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation No XXX/XXX (Qualification Regulation)].

BULGARIA

General comment

Bulgaria maintains its written comments on doc ST 7895/23.

It is of utmost importance for Bulgaria to achieve a compromise based on the right balance between solidarity and responsibility as laid down in the step-by-step approach of the French Presidency and in the Roadmap with the EP. At this stage, the balance has not yet been achieved, since the relocation is voluntary and border procedures are mandatory. Moreover, border procedures were further developed with the concept of adequate capacity, which additionally increases the imbalance between solidarity and responsibility. On the proposal for adequate capacity 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. A fair compromise can be achieved if sufficient flexibility is provided for border procedures without thereby weakening their ultimate purpose and creating an additional burden on frontline MS.

We would like to see, as well that there is consistency between the texts and legal terminologies used in Asylum Procedures Regulation with those used in the Schengen Borders Code and Return Directive.

Article 4

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

We maintain our reservation. 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 propose the deletion of „**at any given moment**"and the introduction of a time criterion for determining adequate capacity, for example on an annual basis. Our reservation also applies to the recital proposal in footnote number 3.

Article 41

1. Following the screening procedure carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], provided that any of the circumstances listed in Article 36 or Article 40(1)(a)–(h) and (i) and (5)(b) apply and provided that the applicant has not yet been ~~authorised~~ allowed to enter Member States' territory, a Member State may, in accordance with the basic principles and guarantees of Chapter II, examine an application in a border procedure where that application has been made by a third-country national or stateless person who does not fulfil the conditions for entry in the territory of a Member State as set out in Article 6 of Regulation (EU) 2016/399. The border procedure may take place:

2. Applicants subject to the border procedure shall not be authorised to enter the territory of a Member State, without prejudice to […]Articles 41c(2) and 41e(2). Member States shall take all appropriate measures in accordance with Directive XXX/XXX/EU [Recast Reception Conditions Directive] ~~to prevent unauthorised entry into their territory.~~

3. By way of derogation from […]Article 41c(2), the applicant shall not be authorised to enter the Member State's territory where:

In such cases, where the applicant has been subject to a return decision ~~issued in accordance with the~~ as required by Directive XXX/XXX/EU [Return Directive] ~~or a refusal of entry in accordance with Article 14 of Regulation (EU) 2016/399~~, Article 41g shall apply.

In paragraph 1, we propose to replace the phrase „*has not yet been authorised to enter"* with the phrase „*has not been allowed to enter"*. We propose this revision in order to avoid misinterpretation in relation to the application of the rules set out in the Schengen Borders Code, since in the sense of the Code *„authorised"* means that the person has been checked and found to be eligible for entry. In this case, it is not a question of fulfilling the conditions for entry, and therefore we propose to use different terminology.

In paragraph 2, we propose to delete the phrase „*to prevent unauthorised entry into their territory*". The person has already entered the territory without permission. The purpose of implementing the measures under the Reception Conditions Directive is to limit the free movement of the person and accordingly prevent the risk of absconding and secondary movement. We can accept the text „*in order to prevent absconding*" instead of „*to prevent unauthorised entry into their territory"*. The same approach was used in the Council's mandate under the Screening Regulation.

Regarding the last subparagraph of para. 3, we do not consider it necessary to make a reference to a refusal of entry issued under the Schengen Borders Code, since the Return Directive does not apply in the case of a refusal of entry within the meaning of Art. 2, para. 2, item (a) of the Return Directive. We can accept the wording in Art. 35a *„or another decision imposing the obligation to return"*, which correctly reflects the practices of the Member States.

As a compromise we are ready to discuss any proper text to be included as a recital that will underlines that authorisation does not have the meaning of authorisation of entry as provided for in the Schengen Borders Code.

Article 41ba

We maintain our reservation. 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. We are still analysing if the capacity for return should be part of the capacity for border procedure. The text should be in consistence with the definition.

On Paragraph 1, we are thankful to the Presidency for the text under footnote 5 regarding the possibility for identification of a lower number for adequate capacity in exceptional situations but we would like more clarity on the scope of those exceptional situations. Our understanding is that specific geographical and geopolitical situation of the front line MSs should be taken into account as exceptional situation in terms of risks for the security or public order.

Article 41bb

Paragraph 1 - We have real doubts that setting the concrete number for “adequate capacity” is a good approach.

Paragraph 2 – we maintain our scrutiny reservation. We are still analysing the formula if it is fair and objective. As an initial reaction, we are considering the possibility for the capacity of a member state to be calculated by multiplying the number set out in Article 41ba by the number of positive decisions for international protection for a year in each Member State and dividing the result obtained by the number of irregular crossings of the EU external borders for the same year.

Paragraph 4 - we are thankful to the Presidency for the text but we will appreciate if the text is further developed in order to underline the possibility for reducing the number for adequate capacity in case of risks for the security or public order. This comment is linked to the comment under Art 41ba Para 1.

Article 41bc

We maintain our scrutiny reservation.

Article 41bd

Paragraph 2 stipulates that if notification is sent by a Member State which is not identified in the report as being under migratory pressure authorisation from the Commission is needed in order to apply the derogation.

It is unclear what the regime is if the Member State is mentioned in the report — whether the derogation will be applied automatically or an authorisation is still needed?

We believe that authorisation should only be granted in cases where 75% of capacity is reached and automatic activation without the need for authorisation when the capacity is reached at 100%. In this situation the simple procedure of notification should apply regardless whether the Member State is under migratory pressure or not. The situation of migratory pressure is a ground for triggering the solidarity mechanism and should not be mixed with the possibility for adapting the border procedures.

Article 41c Deadlines

2. The border procedure shall be as short as possible while at the same time enabling a complete and fair examination of the claims. The duration of the border procedure shall be of 12 weeks from when the application is registered until the applicant no longer has a right to remain and is not allowed to remain. Following that period, the applicant shall be ~~authorised~~ allowed to enter the Member State's territory except when Article […] 41g is applicable.

The proposed text aims at clarifying that the person will be grant entry (as it is currently the practice under APD) but this is not authorisation under the Schengen Borders Code in the sense of fulfilling the entry conditions.

Article 41e Exceptions to the asylum border procedure

2. Member States shall not apply or shall cease to apply the border procedure at any stage of the procedure where:

…….

In such cases, the competent authority shall ~~authorise~~ allowed the applicant to enter the territory of the Member State.

Article 41f Locations for carrying out the asylum border procedure

Location is one of the red lines in the national position against mandatory nature of the border procedures. Since the Council have already agreed on flexibility on this issue in its mandate on the Screening Regulation and the position of the European Parliament is also in favour of flexibility we suggest revising that article in a way to provide Member States the possibility to decide where to conduct the border procedure. At designated locations but the Member States will have the discretion to decide where to conduct the procedure. This will provide possibilities for the Member States to use the existing capacity without creating additional burden.

In addition, we would like to draw the attention to the fact that by introducing the concept for adequate capacity there is a contradiction between the possibility for derogation under the Paragraph 2 of Article 41f (where the capacity is reached MSs may designate other locations for carrying out the border procedure) and the derogation under Article 41bc and Article 41bd (where the capacity is reached MSs may suspend the border procedure). More legal clarity is needed in terms of application. In this regard, we suggest amendments to Article 41f for the sake of consistency with Screening Regulation and the new concept for adequate capacity.

Article […] 41g Border procedure for carrying out return

2. Member States shall require the persons referred to in paragraph 1 […]to ~~reside~~ remain for a period not exceeding 12 weeks at the disposal of the competent authorities in locations referred to in Article 41f ~~at or in proximity to the external border or transit zones~~; ~~where a Member State cannot accommodate them in those locations, it may resort to the use of other locations within its territory.~~ The 12-week period shall start from when the applicant, third-country national or stateless person no longer has a right to remain and is not allowed to remain. The requirement to reside at a particular place in accordance with this paragraph shall not be regarded as authorisation to enter into and stay on the territory of a Member State.

We suggest adaptation of the text taking into account the proposal under Article 41f. The same approach is used in the Council's mandate on the Screening Regulation.

Article 41h Detention

[…]1. Persons referred to in […] Article 41g(1) who have been detained during the procedure referred to in Articles 41-41f and who no longer have a right to remain and are not allowed to remain may continue to be detained for the purpose of preventing further entry into the territory of the Member State, preparing the return or carrying out the removal process.

Since the person has already illegally entered the territory it is more accurate to refer to subsequent movement. We suggest to add 'further' or to use „ preventing absconding" instead of 'entry into the territory of the Member State'. Absconding is used in paragraph 2. The same approach is used in the Council's mandate on the Screening Regulation.

Article 41i Refusal of entry

This article raises many questions. Since it repeats the existing rules under the legislation in force and does not establish any new obligation we believe that the article should be deleted. As a compromise we can accept its removal to the recitals.

Safe third country concept

Bulgaria supports the proposals of the Presidency.

On the provisions not covered by the partial mandate for negotiations with the European Parliament as approved by the Coreper on 20 December 2022

Article 7 Obligations of applicants (paragraphs 1 and 2db)

The text is linked to AMMR and the rule of the responsibility of the country of first entry and our final position depends on the outcome of negotiations in AMMR and the agreement on responsibility component.

Article 9 (paragraphs 1 and 3(a))

Our final position depends on the outcome of negotiations in AMMR and the agreement on responsibility component.

Article 27 Registering applications for international protection

Our final position depends on the outcome of negotiations in AMMR and the agreement on responsibility component.

Article 28 Lodging of an application for international protection

Our final position depends on the outcome of negotiations in AMMR and the agreement on responsibility component.

General comment on a horizontal issue for Bulgaria, concerning all EU legal acts, international agreements and other non-legally binding documents.

Art.12, Para 6, Art.33, Para 2, p.(d) and Para 3 and Article 35 Decisions […] on applications, Para 3

We would like the deletion of the terms "**gender identity"** and **„gender issues" and** replacement of the term "**gender"** with **"sex".**

The terms are in contradiction with the basic principles of the Constitution of the Republic of Bulgaria. The Constitutional Court of Bulgaria interprets the term „sex" as both biologically determined and socially formed. All concepts related to the notion of „gender" as a socially determined sex are unacceptable to us.

If our request for the deletion/replacement of the mentioned terms is not respected, alternatively we ask the Presidency to include a provision for a derogation for Bulgaria as follows:

The Republic of Bulgaria shall not be bound by formulations, terms and/or concepts contained in [the document…] that intend to differentiate between "sex" as a biological (women and men) category and "gender" as a social construct.

THE CZECH REPUBLIC

Article 4 (x)

We support the amended wording of this article.

Article 41

Paragraph 3 – In order to avoid possible confusions, we propose to add here the exact reference. E. g.

- *By way of derogation from Article 41c(2)* ***last sentence****, the applicant shall not be authorised to enter the Member State's territory where:*

Paragraph 3 (a) – we prefer to have a reference on the whole article 9(3) not just specific sub-paragraphs.

Moreover, we propose to substitute the following sentence *"the applicant's right to remain has been revoked in accordance with Article 9(3)…"* with *the applicant does not have right to remain pursuant to Article 9 (3)."* The current text may be interpreted as the obligation to decide. In this context the decision is not necessary, as well as in Article 9.

Article 41b

Paragraph 1a – If there are grounds for the application of the border procedure in case of one family member, the applications for international protection of the other members of the family should be examined in the border procedure as well. Therefore, we do not support having this paragraph in the text.

Article 41ba

We welcome the amended wording of the text, however, we still do not agree with the exact number for the adequate capacity in the regulation. Moreover, we prefer keeping of the para 2 and 3 in the APR because, we do not agree with the linking of the adequate capacity to relocations.

Article 41bb

We take into consideration the explanation provided by the Presidency and Commission regarding the paragraph 2, however we still think that the number of applications for international protection should be incorporated in the calculation. Regarding the new paragraph 4, we do not mind having this text in the regulation, however, we prefer better wording.

Article 41bc

In paragraph 1 - following our general position we do not support an exact number to be stated in the regulation, in our view it will not help us to react adequately on the various future scenarios. Moreover, in our opinion the 5% threshold is too low.

Article 41c

At the end of paragraph 2, in our opinion, there should be also incorporated a reference to article 41/3.

Article 41d

We would like to preserve the rule that firstly a responsible MS must be determined. Thus in this context we propose to omit the may clause.

Article 41e

Paragraph 2 (b) – we do not support this paragraph due to the fact that we do not expand the list of exceptions. Moreover, this paragraph is vaguely formulated and there is a risk of abuse of the application of this exemption.

Paragraph 1 – we would like to add that the Members State does not issue a new return decision.

Paragraph 2 contains many duplications with the RCD, we prefer to clean and simplify the text.

Article 44

Paragraph 2a – we agree with the substance of the amended text, however, we would prefer better wording.

Article 45

Paragraph 1a – the Czech Republic is a strong proponent of geographic exceptions. We can agree with this amendment for the sake of compromise.

Paragraph 2b (a) - we agree with the substance of the amended text, however, we would prefer better wording.

Paragraph 2b – the last subparagraph- this wording is unacceptable, however, we agree with the idea behind. It seems like we are forced to require a connection between the applicant and the third country concerned.

Article 47

Paragraph 1a - the Czech Republic is a strong proponent of geographic exceptions. We can agree with this amendment for the sake of compromise.

FINLAND

Articles 41-41i on Border procedure

- We can be very flexible and support the compromise proposals of the Presidency what comes to articles on border procedure.

Articles 43a-50 on Safe countries

- We can be very flexible and support the compromise proposals of the Presidency what comes to articles on safe countries.

Article 53 paragraph 7 a)

- According to our position we can accept the mandatory border procedure if applicant's legal guarantees including the right to a fair trial is secured also in that procedure. For us this also includes the fact that the applicant must have an actual opportunity to make and lodge an appeal. To be able to do this it should be realistically possible for the applicant to find a lawyer and an interpreter and prepare the appeal within the given deadline.

- The maximum of 10 days proposed now in article 53 para 7 a) is simply too short for us to be able to say that applicant's legal guarantees are secured as is stated in our constitution.

- Instead of what is now in the text we propose the original text of the Commission which said AT LEAST a week.

If a maximum deadline is mandatory, we propose 21 days as a compromise from our previous proposal of one month.

We realise that border procedure itself has a very short deadline and the time to make an appeal should be in line with that. We though believe that if there is enough time to prepare the appeal in a way it is actually well prepared, it also serves the court and shortens the examination of the appeal in the court and this way helps to meet the 12 weeks deadline.

FRANCE

Projet de commentaires écrits des Conseillers JAI du 27 avril 2023

L'essentiel du règlement étant soumis à discussion, les commentaires écrits sont répartis comme suit :

1. Les mesures dérogatoires aux procédures d'asile et de retour à la frontière ;
2. Les autres articles sur les procédures d'asile et de retour à la frontière ;
3. Les concepts de pays sûrs ;
4. Les autres articles restants d'APR.

1. Les mesures dérogatoires aux procédures à la frontière :

Article 4, paragraphe 1, point x) : définition de la capacité adéquate :

La France rappelle sa demande tendant à ce que le considérant soit amendé afin que soit ajoutée l'exécution des décisions de retour.

La France demande par ailleurs que le terme de « *border procedure* » soit clarifié : il convient d'utiliser soit le singulier, soit le pluriel dans l'ensemble du règlement. En tout état de cause, ce terme doit comprendre à la fois la procédure d'asile à la frontière et la procédure de retour à la frontière.

Proposition rédactionnelle :

Recital 40a: "In order to carry out the asylum and return border procedures, Member States should take the necessary measures to establish an adequate capacity, in terms of reception and human resources, ~~necessary~~ required to examine at any given moment an identified number of applications and to enforce return decisions.

Article 41ba : la capacité adéquate au niveau de l'Union :

La France rappelle sa réserve d'examen sur cet article, ainsi que sur les déplacements de paragraphes proposés par la Présidence :

La France souligne la nécessité d'avoir une simulation chiffrée, indispensable pour pouvoir se prononcer sur l'équilibre entre cette capacité adéquate et les aménagements proposés. Les dérogations et flexibilités accordées doivent tenir compte du niveau d'exigence collective que l'UE, et par conséquent ses États membres, se fixent en termes de capacités de contrôles aux frontières.

La France indique également privilégier le maintien des dispositions relatives à la capacité adéquate dans APR. Le lien avec AMMR peut être réalisé par des références à ce règlement.

Article 60 : suivi et évaluation :

Pas de commentaire.

Article 41bb : capacité adéquate d'un État membre :

La France remercie le service juridique du Conseil pour ses précisions sur le paragraphe 4, qui est un paragraphe déclaratoire faisant référence à l'article 72 du Traité sur le fonctionnement de l'Union européenne (TFUE). La France demande que ce paragraphe, dépourvu de portée juridique, soit transféré dans un considérant au vu de sa nature purement déclarative. Une référence à l'article 72 pourrait être ajoutée, ainsi qu'un rappel de la jurisprudence pertinente de la Cour de justice de l'UE sur cet article (dont l'affaire C-72/22).

La France rappelle sa réserve d'examen sur cet article 41bb en lien avec ses remarques sur l'article 41ba. Il est impossible de se prononcer sur cette méthode de calcul sans éléments plus précis sur la capacité adéquate au niveau de l'UE.

Proposition rédactionnelle sur le considérant:

Recital X: "Nothing in ~~this Article~~ the adequate capacity of a Member State shall be interpreted as requiring a Member State to take action that would undermine the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, as provided by article 72 of the Treaty on the functioning of the European Union and as interpreted by the European Union Court of Justice."

Article 41bc : mesures applicables quand la capacité adéquate est sur le point d'être atteinte :

La France rappelle sa réserve d'examen sur cet article dans l'attente d'éléments sur le chiffrage et les modalités de calcul de la capacité adéquate.

La France rappelle également s'opposer à ce que les mesures dérogatoires soient activées de façon automatique et demande à ce que celles-ci ne soient appliquées que par les États identifiés par la Commission comme étant soumis à une pression migratoire. Plus la procédure d'autorisation et la mise en œuvre des dérogations seront encadrées, notamment par le contrôle de la proportionnalité des mesures par la Commission, voire par un avis de cette dernière, plus la France pourra se montrer flexible sur la nature des aménagements envisagés.

La France propose à nouveau que la possibilité de demander ces dérogations par notification soit autorisée par la Commission dans sa décision sur la situation de pression migratoire d'un Etat membre prévue à l'article 7a, paragraphe 4, d'AMMR.

Article 41bd : mesures applicables quand la capacité adéquate est atteinte :

La France réitère sa position selon laquelle une évaluation de la Commission est nécessaire, en particulier lorsque la dérogation vise à permettre l'exclusion automatique des demandeurs relevant d'un taux de protection inférieur à 20 %.

Par ailleurs, la France demande à nouveau que soit précisé dans le texte que les dérogations proposées ne constituent pas une suspension de la procédure, mais « une fluctuation », qui conduirait les États concernés à l'appliquer aussitôt que des places redeviendraient disponibles, comme l'a expliqué la Commission lors de la réunion des Conseillers JAI du 5 avril dernier.

Article 41be : notification d'un État membre quand la capacité adéquate est atteinte :

Pas de commentaire.

2. Les autres articles sur les procédures à la frontière :

Article 41 : conditions pour la procédure d'asile à la frontière :

La France est fermement opposée à la nouvelle rédaction du paragraphe 1 et demande le retour à la rédaction initiale : la procédure facultative à la frontière s'applique aux situations énumérées par ces articles, et non les procédures prévues par ces articles, auxquelles il doit être renvoyé pour apprécier si la procédure à la frontière s'applique. La procédure à la frontière est une procédure différente de la procédure accélérée et de la procédure d'irrecevabilité prévues aux articles 36 et 40.

Proposition rédactionnelle :

"Following the screening procedure carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], provided that any of the circumstances listed in ~~in order to apply~~ Article 36 or Article 40(1)(a)–(h) and (i) and (5)(b) apply and provided that the applicant has not yet been authorised to enter Member States' territory(…)".

En outre, la France partage l'interrogation de la Grèce sur le paragraphe 3 et sur le renvoi à la directive Retour, en particulier pour ce qui concerne la nature juridique de la décision de retour dans la mesure où la directive retour la définit comme une décision qui met fin au séjour, alors qu'en l'espèce le ressortissant de pays tiers n'a pas eu l'autorisation d'entrée sur le territoire et est même réputé ne pas y être entré.

La France demande, de plus, des précisions sur l'articulation de la procédure retour à la frontière d'APR, notamment ses articles 41g et 41i, avec la directive Retour. La France renvoie à sa demande de précision exprimée dans ses commentaires sur l'article 41g (dernier paragraphe).

La France apprécierait également que la Commission présente plusieurs situations concrètes d'application explicitant l'ensemble des procédures possibles à la frontière selon que les EM ont recours

ou non à l'article 2, paragraphe 2, sous a), de la directive Retour, et selon que l'étranger s'est présenté ou non à un point de passage frontalier.

La France estime que le renvoi à l'article 14 du CFS ne permet pas de couvrir toutes les situations. Cet article 14 n'est pertinent que pour les demandeurs qui ont présenté une demande d'asile à un point de passage frontalier (à la suite d'une demande instruite en procédure d'asile à la frontière prévue à l'article 41, paragraphe 1, sous a)). Pour les demandeurs interceptés lors d'un franchissement irrégulier de frontière, les décisions de retour prises à la frontière sont des décisions nationales juridiquement fondées sur l'article 13 du CFS et l'article 2, paragraphe 2, sous a), de la directive Retour (à la suite d'une demande instruite en procédure d'asile à la frontière prévue à l'article 41, paragraphe 1, sous b)).

La France demande l'avis du Service juridique du Conseil sur ces points.

Article 41a : décision dans le cadre de la procédure d'asile à la frontière :

Pas d'observation de fond sur le paragraphe 2, la France se rallie à la proposition de la Présidence qui introduit de la flexibilité pour les États dans la gestion de leurs frontières. Ce soutien ne vaut toutefois que dans la mesure où la nouvelle rédaction proposée n'a pas pour effet de réintroduire de dérogations aux procédures à la frontière en fonction des perspectives de retour.

Article 41b : application obligatoire de la procédure d'asile à la frontière :

Pas de commentaire.

Article 41c : durées :

Pas de commentaire.

Article 41d : détermination de l'État membre responsable et relocalisation :

Paragraphe 2 :

La France demande que les délais pour la procédure à la frontière, fixés par l'article 41c, soient réinitialisés lors de l'arrivée dans l'État membre de relocalisation : ne pas les réinitialiser limiterait très fortement l'aspect opérationnel de la possibilité de placer le demandeur en procédure d'asile à la frontière à la suite de sa relocalisation.

Article 41e : exemptions de la procédure d'asile à la frontière :

La France remercie la Présidence pour la suppression de l'exemption des mineurs de moins de 12 ans et leur famille, au profit d'une évaluation au cas par cas qui marque une orientation positive sur un sujet de forte préoccupation, identifié comme tel depuis le début des négociations.

Toutefois, la France rappelle son opposition ferme à ce que les MNA soient automatiquement exemptés de la procédure d'asile à la frontière : cette exemption présenterait un risque majeur pour la protection de nos frontières extérieures, et constituerait un signal fort en faveur des trafics de migrants de mineurs

aux frontières de l'Union européenne. La France demande à nouveau la suppression de cette exemption, au profit de l'évaluation au cas par cas prévue au paragraphe 2, point b).

En outre, la France considère que la rédaction du paragraphe 2, point b), est trop vague. Il convient de faire uniquement référence aux personnes avec des besoins d'accueil spéciaux. L'exception d'application des procédures aux frontières doit également être limitée dans son champ à ces seuls publics.

Proposition rédactionnelle :

~~[...]1. The border procedure shall be applied to unaccompanied minors only in the cases referred to in Article 40(5)(b), and to minors below the age of 12 and their family members only in the cases referred to in Article 40(1)(f).~~

[...]2. Member States shall not apply or shall cease to apply the border procedure at any stage of the procedure where:

a) the determining authority considers that the grounds for rejecting an application as inadmissible or for applying the accelerated examination procedure are not applicable or no longer applicable;

b) ~~the reception conditions and guarantees, including~~ the ~~specific~~ special reception needs ~~of minors and of unaccompanied minors,~~ as provided for in chapter IV of Directive XXX/XXX/EU [Recast Reception Conditions Directive], cannot be met in the locations referred to in Article 41f;

c) the necessary support cannot be provided to applicants with special procedural needs in the locations referred to in [...]Article 41f;

d) the determining authority considers that there are compelling medical reasons for not applying the border procedure;

e) [...]the conditions and guarantees for detention as provided for in Articles 8 to 11 of Directive XXX/XXX/EU [Recast Reception Conditions Directive] are not met or no longer met and the border procedure cannot be applied to the applicant concerned without detention.

In such cases, the competent authority shall authorise the applicant to enter the territory of the Member State.

Article 41f : lieux pour mener les procédures d'asile à la frontière :

La France indique que la rédaction est actuellement trop souple s'agissant des conditions de résidence à la frontière (« *Member State shall require [...], pursuant to Article 7 of Directive XXX/XXX/EU [Recast Reception Conditions Directive] and without prejudice to Article 8 thereof, the applicants [...]to reside at or in proximity to the external border or transit zones, fully taking into account the specific geographical circumstances of the Member States* »).

La France demande que soit ajoutée l'obligation pour les États de mettre en œuvre les mesures appropriées permettant de s'assurer que les demandeurs ne s'enfuient pas des lieux d'hébergement à la frontière. La France rappellera que les procédures d'asile à la frontière n'auront un effet utile que si le taux de départ spontané des demandeurs est minime, voire inexistant.

Article 41g : procédure de retour à la frontière :

La France rappelle que les garde-fous prévus dans le cadre de la procédure asile à la frontière, visant à prévenir le risque de fuite, doivent nécessairement être repris et même renforcés dans le cadre de la procédure de retour à la frontière, dès lors que le risque de fuite de l'étranger susceptible de faire l'objet d'une décision de retour s'accentue en raison du rejet de sa demande d'asile.

La France souhaite savoir si le renvoi général à la procédure de la directive Retour aura pour effet d'appliquer deux fois les garanties procédurales prévues : dans un premier temps celles de la procédure de retour à la frontière, puis à l'issue de la période de 12 semaines, les garanties de la directive Retour (délais de départ volontaire et délais de recours notamment).

La France exprime des réserves quant à la possibilité d'octroyer un délai de départ volontaire aux demandeurs d'asile déboutés placés en procédure de retour à la frontière, dès lors que n'étant pas entrés sur le territoire de l'Etat membre, ils n'ont pas développé de liens justifiant l'octroi d'un tel délai.

La France demande que soit précisée l'articulation entre les articles 41g et 41i : l'étranger qui s'est vu opposer un refus d'entrée conformément à l'article 41i doit-il être obligatoirement (conformément à l'article 41, paragraphe 3) placé en procédure de retour à la frontière, telle que définie par les articles 41g et 41h, ou est-il possible de le placer dans une procédure nationale de retour à la frontière respectant les garanties minimales de la directive Retour, mais en dehors du champ d'application de la procédure de retour à la frontière du présent règlement ?

Article 41h : rétention :

Pas de commentaire.

Article 41i : refus d'entrée :

Pas de commentaire.

3. Les concepts de pays sûrs :

Article 43a : la notion de protection effective :

Pas de commentaire.

Article 44 : le concept de pays de premier asile :

La France indique une coquille rédactionnelle au paragraphe 2a, où les termes de « *safe country of origine* » est utilisé au lieu de « *first country of asylum* ».

Article 45 : le concept de pays tiers sûr :

La France remercie la Présidence pour la modification au paragraphe 1a, limitant au droit national la possibilité de prévoir des exceptions pour des catégories de personnes ou des parties du territoire du pays sûr. Elle lève sa réserve sur ce paragraphe.

Toutefois, la France indique s'opposer aux modifications faites par la Présidence au paragraphe 2b, qui offrent la possibilité aux États membres de prévoir au niveau national le lien de connexion entre le demandeur d'asile et le pays tiers sûr. Ce lien de connexion devrait être obligatoire et appliqué par l'ensemble des Etats membres recourant à la notion de pays tiers sûr. La rédaction proposée conduirait à une application différenciée du concept de pays tiers sûr par les États membres, selon que les États appliquent ou non le lien de connexion, et aggraverait ainsi les mouvements secondaires entre les États membres. Ces modifications apparaissent donc en contradiction avec l'esprit du règlement visant à harmoniser les procédures nationales et à lutter contre les mouvements secondaires.

La France rappelle son soutien au maintien du lien de connexion au niveau de l'Union, ce lien constituant une garantie fondamentale pour éviter une utilisation excessive de la notion de pays tiers sûr, et pour assurer le respect des droits fondamentaux. De plus, le lien de connexion est une condition essentielle permettant d'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 et en permettant de limiter de nouveaux mouvements irréguliers vers l'Union.

Proposition rédactionnelle :

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

[...]

(b) there is a connection between the applicant and the third country in question on the basis of which it would be reasonable for that person to go to that country or if there is no such connection, the applicant explicitly consents to go there;

Article 46: La désignation des pays tiers sûrs à l'échelle européenne :

Pas de commentaire.

Article 47 : le concept de pays d'origine sûr :

Pas de commentaire.

Article 48 : La désignation des pays d'origine sûr à l'échelle européenne :

Pas de commentaire.

Article 49 : La suspension et le retrait d'un pays tiers des listes européennes communes de pays tiers sûrs ou de pays d'origine sûrs :

Pas de commentaire.

Article 50 : La désignation des pays tiers comme pays tiers sûrs ou pays d'origine sûrs au niveau national :

La France remercie la Présidence pour la suppression de l'obligation de consultation de la Commission prévue au paragraphe 3, qui répond à l'une de ses demandes.

4. Les autres articles restants d'APR :

Article 22 : garanties spéciales pour les mineurs non accompagnés :

La France rappelle sa demande au paragraphe 1 : la situation dans laquelle un demandeur de protection internationale se révèle être un mineur après l'introduction de sa demande devrait être mentionnée explicitement.

Proposition rédactionnelle :

1. [...] *Without prejudice to situations where the applicant is found to be a minor after the application is lodged*, where an application is made by a person who claims to be a minor, or in relation to whom there are objective grounds to believe that he or she is a minor, and who is unaccompanied, the competent authorities shall [...] designate:

Article 53 : le droit à un recours effectif :

La France indique que les délais minimums de recours prévus au paragraphe 7 sont trop longs et devraient être réduits pour donner plus de souplesse aux États membres dans la gestion de leur contentieux et assurer la célérité des procédures à la frontière.

Elle maintient également qu'il est indispensable que dans la grande majorité des cas, l'impératif de mener rapidement les procédures à la frontière requiert que le délai de recours prévu au paragraphe 7, point b) soit réduit à un minimum d'une semaine.

Proposition rédactionnelle :

7. Member States shall lay down the following time-limits in their national law for applicants to lodge appeals against the decisions referred to in paragraph 1:

(a) between a minimum of two days and a maximum of 10 days [...]in the case of a decision rejecting an application as inadmissible, as implicitly withdrawn, [...]as unfounded or as manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) or (5) apply;

(b) between a minimum of ~~two weeks~~ one week and a maximum of one month [...]in all other cases.

Article 54 : l'effet suspensif de l'appel :

La France demande que soit précisé à l'article 54, paragraphe 1 la mention faite sur les effets de la décision de retour qui seraient automatiquement suspendus pour l'étranger disposant d'un droit de se maintenir. Est-ce à dire qu'il ne sera pas possible de faire application de l'article 11 de l'orientation générale partielle de la directive Retour (OGP retour) et acter le report de l'éloignement tout en imposant les obligations prévues à l'article 9, paragraphe 3 ? La France propose une modification rédactionnelle pour davantage de clarté.

Proposition rédactionnelle :

1. The ~~effects~~ removal following a return decision shall be automatically suspended for as long as an applicant or a person subject to withdrawal of international protection has a right to remain or is allowed to remain in accordance with this article.

La France demande enfin que la rédaction de l'article 54, paragraphe 5, point c), soit alignée sur l'article 16, paragraphe 6, de l'orientation générale partielle sur la directive retour afin de prévoir une assistance juridique et/ou une représentation juridique.

Proposition rédactionnelle :

5. For the purpose of paragraph 4, the following conditions shall apply where relevant in the light of any *ex officio* decisions:

(a) the applicant or the person subject to withdrawal of international protection shall have a time-limit of at least 5 days from the date when the decision is notified to him or her to request to be allowed to remain on the territory pending the outcome of the remedy;

(b) the applicant or the person subject to withdrawal of international protection shall be provided with interpretation in the event of a hearing before the competent court or tribunal, where appropriate communication cannot otherwise be ensured;

(c) the applicant or the person subject to withdrawal of international protection shall be provided, upon request, with free legal assistance and/or representation in accordance with Article 15a[...];

(d) the applicant or the person subject to withdrawal of international protection shall not be removed from the territory of the Member State responsible [...]:

(i) until the time-limit for requesting a court or tribunal to be allowed to remain has expired;

(ii) where the applicant or the person subject to withdrawal of international protection has requested to be allowed to remain within the set time-limit, pending the decision of the court or tribunal on whether or not the applicant or the person subject to withdrawal of international protection shall be allowed to remain on the territory.

GERMANY

Thanks to the Presidency for further work on the Asylum Procedure Regulation.

We maintain our previous scrutiny reservations, including on the border procedure, and our comments.

On the amendments of the Presidency concerning border procedures

Article 4 (x)

We can support the amendment to the proposed recital. However, we wondered whether the clarification “in terms of reception and human resources” should not better be included in the regulatory text, so that there are no misunderstandings here? It is imperative that both personnel capacities for the procedures and reception capacities be kept available. Otherwise, the procedures cannot function.

Article 41a (2)

In principle, no objections to the adjustments. We continue to believe that it makes sense to provide for exceptions to the return border procedure for persons for whom it is unlikely that the return decision will be enforced.

Article 41ba – The adequate capacity at Union level

Para. 1: We support the more general wording ("for carrying out the border procedure"). For the rest, we uphold our scrutiny reservation (with a view to the predefinition of a certain number of adequate capacity for the Union in this regulation).

Paras. 2/3: We can also support the provision in the AMM Regulation and thank in particular for the proposal to include a new paragraph 5 in Art. 7c of the AMM Regulation instead of paragraph 2.

Article 41bb – The adequate capacity of a Member State

Para. 4 (new): After the explanations during the meeting, we ask for deletion of this new paragraph. We do not think it is necessary (in case it only states a general principle) and could lead to differing interpretations.

Article 41bc – Measures applicable in case the adequate capacity of a Member State is about to be reached

We support a lowering of the recognition rate with a fixed lower limit of 5% when the capacity of the MS is reached by 75% or more. The limitation of the measure to a maximum of six months in the same calendar year is supported in principle. However, if more capacity becomes available again after a shorter period, this should be taken into account ("inflow-outflow" proposal for Coreper).

However, we still consider a **mere notification** to be **insufficient**, but demand **prior approval by COM**. In the new text version it is not even foreseen anymore that the MS has to be under migratory pressure. At least this requirement should still be included.

Article 41bd – Measure applicable in case the adequate capacity of a Member State is reached

We can support a suspension of the application criterion of the recognition rate when the capacity is reached or exceeded as an ultima ratio.

For us, this measure can only be considered **after approval by the COM**. In this respect, we think it is right that this is still provided for here in principle. However, we wonder whether the determination according to Art. 7a AMM Regulation proposal really refers only to migratory pressure or also to the other two categories ("risk of migratory pressure" / "significant migratory situation"). We reject the latter in any case and ask for clarification accordingly (possibly in the text or at the very least in a recital).

Para. 4: Prior and possibly temporary application by the MS under point (i) in the case of a mere notification is rejected. Apart from that, the limitation to a maximum of six months in the same calendar year is supported in principle.

Para. 5: Here we wonder what should happen in the cases where the MS has been identified as being under migratory pressure? In our opinion, this is not sufficiently clarified here, as the second sentence only refers to the other cases.

Article 41be – Notification by a Member State in case the adequate capacity is reached or about to be reached

General support for this provision, in particular regarding the information to be reported by the notifying MS (paragraph 1), the information to be provided to the other MS besides COM (paragraph 3) and the monthly reporting to COM (paragraph 4).

Article 41c - Deadlines

Para. 2: DE advocates for a **duration of the asylum border procedure of 12 weeks plus 2 weeks if an appeal is filed** (maximum period; thereafter, entry).

Article 41e – Exceptions to the asylum border procedure

Para. 1: DE supports the proposal of the COM to generally exempt **unaccompanied minors** from the asylum border procedure. In addition, DE rejects the deletion in the current proposal and advocates that the general exemption for families with children under 12 years foreseen by the COM be extended to **families with children under 18 years** (definition of family for the asylum border procedure: Families with a child under 18 should not be separated, so that adult siblings would also be exempt from the border procedure). People with identifiable disabilities are to be excluded from the border procedure.

Para. 2: Finally, DE advocates for exemption possibilities for persons who have special reception/care needs or require special procedural guarantees (e.g. persons with disabilities, pregnant women, LGBTIQ*, etc.; cf. recital 15 APR proposal), if the necessary support cannot be provided. We believe this is already covered in the present compromise text of the Presidency (points (b) + (c)) and would like to get a confirmation in the next meeting.

With regard to compliance with special procedural needs of vulnerable groups, DE advocates for a monitoring by the COM in the form of an annual report.

Supplementary to the recognition rate (Art. 41b para. 1 in conjunction with. Art. 40 para. 1 (i)): DE advocates a **recognition rate of 15%**.

On the amendments of the Presidency concerning the safe country concepts

Article 43a – The notion of effective protection

DE advocates that it be added to **paragraph 2** that the minimum standard should essentially correspond to the standard guaranteed under the Refugee Convention and that this be included in the legal text. The criteria should be formulated as a non-exhaustive catalog and additionally supplemented by the item "legal protection and access to the legal system" as well as "granting access to the labor market and studies/training under the same circumstances as nationals of a foreign country in accordance with the Refugee Convention". In addition, the possibility of family reunification in accordance with ECHR standards should be added in a recital.

Article 44 – The concept of first country of asylum

The concept of the first country of asylum is supported.

Para. 2a: Scrutiny reservation. We first ask for an explanation of this adjustment and what impact it will have.

Article 45 – The concept of safe third country

DE supports provisions on safe third countries that meet the minimum level required by international/EU primary law.

Para. 1a: DE supports paragraph 1a in principle. This includes that the prerequisites are met in a not insignificant, largely autonomous **part of the third country**. It is not necessary for the requirements to be met in the entire national territory and for all groups of persons. A recital should be added to clarify the definition of the sub-territory. The envisaged annexes with the safe countries should specify which specifically defined sub-territories are excluded. With regard to **population groups**, narrowly defined exceptions for certain - clearly identifiable - groups of persons appear possible. This is also to be specified in the annex in each case. This also applies to the same provision for safe countries of origin (also in principle support of Art. 47 para. (1a)).

We still have to examine the new proposal, which would only allow this for national lists.

Para. 2 point (b): Classification as a safe third country on a case-by-case basis with respect to a particular applicant when the requirements for a safe third country are not met is rejected.

Para. 2b: We enter a scrutiny reservation with regard to the amendments made.

DE advocates that there should be a **connection criterion** between the applicant and the third country (former Art. 45 (2b)(b)), precisely in the context of EU lists. In this context, we do not think that the Presidency's proposal is enough, which is limited to the national level and framed as a "may"- instead of a "shall"-clause. We deem the connection criterion to be necessary for the application of the safe third country concept at EU level.

Para. 3: We can support the additions. However, we still have general questions of understanding. We request clarification on paragraph 3 and on the question of which constellations are to be covered by it. We share the Commission's understanding that the third country has to fulfill the criteria for a safe third country as required by the regulation.

When applying the safe country concepts, it must be ensured that the indispensable requirements of the protection of refoulement under international law are met. DE will advocate for a strong monitoring mechanism (examination of possibilities for improvement in Art. 46, 48-50). Such a mechanism is particularly necessary for the possibility of concluding bilateral agreements with third countries (Art. 45(3)).

Article 60

No objections to the addition.

Remaining articles which are not covered by the partial mandate

The following points are our **main concerns**.

Article 22

We are of the opinion that "*and **represent***" should be added with regard to the person in Art. 22 (1) (a). This is important to us, because a complete legal representation of the unaccompanied minor during the entire procedure must be guaranteed. Contrary to our footnote 74, an addition in para. (1) (a) would be sufficient. Then the comment of the Presidency in footnote 77 would also be taken into account.

Article 40

We maintain our scrutiny reservation and our amendment requests. Among other things, we are of the opinion that the accelerated examination procedure should not be applied to unaccompanied minors and therefore we request that paragraph 5 be amended accordingly.

Article 55

We continue to have a need for change here for reasons of national constitutional law respectively with a view to judicial independence, and ask at least for the addition of "***as a general rule***". The acceleration of these proceedings also has an effect on the treatment of other proceedings.

Additionally, we would like to point to a potential problem with **Article 36 (1aa) point b)**:

We believe that this provision might raise questions of which MS is responsible. We wonder whether this constellation represents an inadmissibility ground because the MS that has granted the parents international protection is to be responsible? Is this sufficiently regulated in the AMMR?

GREECE

The delegation of Greece would like to submit the following written comments to the revised text of the draft APR Regulation (Ref no 8464/23) on the topics discussed during the JHA Counselors Meeting on 27/04/2023, on the border procedures and the adequate capacity .

EL upholds scrutiny on the border procedure, particularly, in respect with the scope, the locations and the timeframe of such procedure. Furthermore, 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. In this context **national security concerns** have to be addressed in the relevant provisions.

The following drafting suggestions are proposed:

Art 4 (x) Definitions

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

In line with the solidarity provisions under AMMR, which are structured on an annual basis and in order to ensure predictability, the adequate capacity should refer to a number of cases/persons to be processed in a given year under the asylum and return border procedures.

Art 60 Monitoring and evaluation

As stated above, we support such a decision to be based on objective criteria that should always mirror the number provided for in AMMR (minimum threshold).

To this aim, the following wording should be introduced at the end of the sentence of art 60

"This assessment shall be made in conjunction with the assessment provided for in Article 69 of AMMR and by adhering to the principle of solidarity and fair sharing of responsibility'

Article 41ba The adequate capacity at Union level

Par 1 the term procedure should be provided in plural form (procedures) in alignment with the text in article 41bb (1)

We maintain our position against an arbitrary number. Instead, we would call for a system whereby the adequate capacity is established on an annual basis, based on objective criteria such as returnability,, which reflect the reality on the ground and in line with the solidarity obligations in AMMR. According to the wording of this paragraph, the respective number refers only to the capacity required to examine applications in a border procedure. Further capacity (in terms of places and personnel) would be necessary in order to carry out the return procedures, something that shouldn't be neglected in the exercise to find the right balance between responsibility and solidarity and in mirroring the level of ambition in both APR and AMMR.

Par 2 and 3 and the proposal of the Presidency to move those two paragraphs in AMMR adding a new par 5 in art 7c

We enter scrutiny reservation on these two paragraphs and the eventual moving in the AMMR regulation in relation with the final decision making process, that will be agreed and we expect further clarifications on the scope of the reference "exceptional situations"

Article 41bb The adequate capacity of a Member State

We maintain the position, that level of adequate capacity of a MS should be based on objective criteria and calculated on annual basis, as is the case in AMMR and we stress once again that the obligations derived from this Regulation in respect with infrastructure and facilities at the proximity of the external borders should in no way undermine the national security of the front line member states.

As we expressed in the last JHA Counselors meeting (27.4.2023) we support the new par 4 , or any other wording that would address this concern. Furthermore, we deem necessary to insert a recital addressing the said concerns, in addition to the necessary flexibility on the locations, as per our comments on art 41f.

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

We support the new simplified notification provisions in case the adequate capacity is about to be reached and we propose that this derogation applies for the remainder of the calendar year from the date of the notification

1. When the number of applicants that are subject to the border procedure in a Member State is equal to 75% of the number set out in respect of the Member State concerned in the Commission implementing act referred to in Article 41bb or higher the Member State may notify the Commission.

2. Where a Member State notifies the Commission in accordance with paragraph 1, by way of derogation from Article 41b(1), that Member State is not required to examine in a border procedure applications made by applicants referred to in Article 40(1)(i) who are of a nationality or, in the case of stateless persons, former habitual 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 average Eurostat data, higher than five percent.

3. Paragraph 2 may be applied by a Member State from the day following the date of the notification in accordance with paragraph 1 **for the remainder of the same calendar year.**

Art 41bd Measure applicable in case the adequate capacity of a Member State is reached

A simple notification, without any of authorization, in any case should suffice for the application of exceptional measures once the adequate capacity is reached . The following deletions in this article are suggested

1. When the number of applicants that are subject to the border procedure in a Member State is equal to the number set out in respect of that Member State in the Commission implementing act referred to in Article 41bb or higher, the Member State may notify the Commission.

2. ~~Following reception of a notification in accordance with paragraph 1 by a Member State which is not identified pursuant to Article 7a AMMR as being under migratory pressure, the Commission shall promptly examine the information provided by the Member State concerned and decide, by means of an implementing act, whether or not that Member State is authorised to apply the measure referred to in paragraph 3.~~

~~For the purpose of deciding whether such authorisation is to be given, the Commission shall take account of the elements foreseen in Article 7b AMMR where applicable.~~

3. Where a Member State notifies the Commission in accordance with paragraph 1 ~~and, in the case of a Member State that is not identified in Article 7a of [the AMMR] as being under migratory pressure, where authorised to do so by the implementing act referred to in paragraph 2,~~ by way of derogation from Article 41b(1), that Member State is not, required to examine in a border procedure applications made by applicants referred to in Article 40(1)(i) at a moment when the number of applicants that are subject to the border procedure in that Member State is equal to the number referred to in Article 41bb or higher

4. The measure in paragraph 3 may be applied by a Member State:

(i) ~~from the day following the date of the notification in accordance with paragraph 1 until the date of the adoption by the Commission of an implementing act in accordance with paragraph 2, where the Member State is not identified pursuant to Article 7a of [the AMMR] as being under migratory pressure;~~

~~(ii) for a maximum period of six months within the same calendar year starting from the date set out in the Commission implementing act referred to in paragraph 2, where the Commission authorises a Member State that is not identified pursuant to Article 7a of [the AMMR] as being under migratory pressure to apply paragraph 3;~~ ~~or~~

~~(iii)~~ (i) ~~Paragraph 2 may be applied by a Member State~~ from the day following the date of the notification in accordance with paragraph 1 for the remainder of the same calendar year. ~~for a maximum period of six months within the same calendar year starting from the day following the date of the notification in accordance with paragraph 1, where the Member State concerned is identified pursuant to Article 7a AMMR as being under migratory pressure.~~

~~5. At the expiry of the six month period referred to in points (i) (ii) or (iii) of paragraph 4, the Member State concerned may notify the Commission that the number of applicants that are subject to the border procedure in that Member State at the time of such notification is equal to the number set out in the Commission implementing act referred to in Article 41bb or higher. In such case, where the Member State is not identified as being under migratory pressure pursuant to Article 7a AMMR, the procedure in paragraph 2 shall apply.~~

Art 41 f Locations for carrying out the asylum border procedure

We support full flexibility in respect with the locations, in accordance with the provisions in the negotiating mandate of Screening. Therefore, the following amendments should be foreseen

Article 41f

Locations for carrying out the asylum border procedure

[…]1. During the examination of applications subject to a border procedure, Member States shall require, pursuant to Article 7 of Directive XXX/XXX/EU [Recast Reception Conditions Directive] and without prejudice to Article 8 thereof, the applicants […]to reside in locations situated generally at or in proximity to the external border or ~~transit zones~~ in other designated locations within the territory, fully taking into account the specific geographical circumstances of the Member States. Each Member State shall notify to the Commission, [two months after the date of the application of this Regulation] at the latest, the locations where the border procedure will be carried out~~, at the external borders, in the proximity to the external border or transit zones,~~ including when applying […]Article 41b ~~and ensure that the capacity of those locations is sufficient to process the applications covered by that Article~~. Any changes in the identification of the locations at which the border procedure is applied, shall be notified to the Commission within two months of the changes having taken place.

[…]2. ~~In situations where the capacity of the locations notified by Member States pursuant to paragraph […] 1 is temporarily insufficient to process examine the applicants applications covered by […]Article 41b, and for any other practical reason which renders impossible the reception in a specified location, Member States may designate other locations within the territory of the Member State and upon notification to the Commission accommodate applicants there, on a temporary basis and for the shortest time necessary.~~

2a. The requirement to reside at a particular place in accordance with paragraph~~s~~ 1 and 2 shall not be regarded as authorisation to enter into and stay on the territory of a Member State.

3. Where an applicant subject to the border procedure needs to be transferred to the determining authority or to a competent court or tribunal of first instance for the purposes of such a procedure, or transferred for the purposes of receiving medical treatment, such travel shall not in itself constitute an entry into the territory of a Member State.

[…]

Article 41e Exceptions to the asylum border procedure : *We maintain our scrutiny reservation to the new proposal of this article.*

Comments on the return related provisions [Art. 41(3), 41c(2), 41g & 41i]

The following comments are without prejudice to our final position in terms of the mandatory nature of the return border procedure. The amendments proposed do not aim to change anything in terms of substance. They are just addressing legal concerns.

1. The return decision issued after the rejection of an asylum application examined in the border procedure is a decision issued in a ''border context''. Therefore, to our understanding this return decision is not issued in accordance with the Return Directive, as stated in Article 41(3) [It is a not an Art. 6 RD return decision, as this applies only to third-country nationals staying illegally on the territory of a Member State – See Art. 2 of RD/ See also the approach that was followed in the Screening negotiating mandate [Art. 3a(2) – doc. 10585/2022] regarding the non-application of the Return Directive during screening conducted in a border context]. This return decision is issued in accordance with Article 35a of APR [See also the wording in Article 53(1)(e) of the current compromise text of APR].

2. Furthermore, to our understanding the border procedure for carrying out return (Art. 41g) is applicable to the following two cases:

- where a return decision has been issued in accordance with Article 35a of APR
- where a decision imposing the obligation to return (agreed wording under Art. 35a of APR in the text of the partial negotiating mandate) has been issued pursuant to Article 2(2), point (a) of the Return Directive, where the Member State has decided not to apply that Directive.

We deem that this wording covers the cases where a refusal of entry has been issued in accordance with Article 14 of Regulation (EU) 2016/399 and it is not enforceable in accordance with the rules under the Schengen Borders Code (Annex V) *(An addition should be made in Article 41c(2) in order for these cases to be addressed – See proposed amendment below)*. It also covers the cases where a decision imposing the obligation to return (not a SBC refusal of entry) has been issued after the screening process and before the application of the asylum border procedure, in case the third-country national applied for international protection after screening *(e.g. A TCN was apprehended in connection with an unauthorised border crossing and didn't make an application for international protection during screening. After screening is over, the 2 (2a) RD derogation may be applied (according to the Screening negotiating mandate reached in June 2022) and in our case that would mean that an expulsion decision, under national law, would be issued. Let's suppose that the said TCN (still being in the border context) makes an application for international protection before the expulsion decision is executed. In this case asylum border procedure would be applicable. If this application is rejected, Art. 41g would be applicable only by introducing our suggestion in the text. The current wording in Art. 41(3) doesn't cover this case, because it is not a SBC refusal of entry, which can only be issued at the border crossing points)*

3. Regarding Art. 41i, we took note of the comments made by the Commission and we suggest that this text is moved as a new paragraph to Art. 41g, as it was initially proposed in the Commission's proposal. In our view, we deem that this is more in line with the purpose of establishing a harmonized procedure (regulated by one article in the text of APR) [See suggested amendment below in Art. 41g (new paragraph 5)].

Therefore, the following amendments in the respective articles are suggested:

Article 41

Conditions for the asylum border procedure

[…]

(i) Following the screening ~~procedure~~ carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], ~~provided that any of the circumstances listed in~~ in order to apply Article 36 or Article 40(1)(a)–(h) and (i) and (5)(b) ~~apply~~ and provided that the applicant has not yet been authorised to enter Member States' territory, a Member State may, in accordance with the basic principles and guarantees of Chapter II, examine an application in a border procedure where that application has been made by a third-country national or stateless person who does not fulfil the conditions for entry in the territory of a Member State as set out in Article 6 of Regulation (EU) 2016/399. The border procedure may take place:

a. following an application made at an external border crossing point or in a transit zone;

b. following apprehension in connection with an unauthorised crossing of the external border;

c. following disembarkation in the territory of a Member State after a search and rescue operation;

d. following relocation in accordance with Article [57(9)] of Regulation (EU) No XXX/XXX [[…] Regulation on Asylum and Migration Management].

(ii) Applicants subject to the border procedure shall not be authorised to enter the territory of a Member State, without prejudice to […]Articles 41c(2) and 41e(2). Member States shall take all appropriate measures in accordance with Directive XXX/XXX/EU [Recast Reception Conditions Directive] to prevent unauthorised entry into their territory.

(iii) By way of derogation from […]Article 41c(2), the applicant shall not be authorised to enter the Member State's territory where:

a. the applicant's right to remain has been revoked in accordance with Article 9(3), points (a) or(bb);

b. the applicant has no right to remain in accordance with Article 54 and has not requested to be allowed to remain for the purposes of an appeal procedure within the applicable time-limit;

c. the applicant has no right to remain in accordance with Article 54 and a court or tribunal has decided that the applicant is not to be allowed to remain pending the outcome of an appeal procedure.

In such cases, where the applicant has been subject to a return decision issued in accordance with ~~the Directive XXX/XXX/EU [Return Directive]~~ Article 35a of this Regulation or ~~a refusal of entry in accordance with Article 14 of Regulation (EU) 2016/399~~ another decision imposing the obligation to return, where the Member States have decided not to apply Directive XXX/XXX/EU [Return Directive] pursuant to Article 2(2), point (a), Article 41g shall apply.

Article 41c

Deadlines

1. By way of derogation from Article 28 of this Regulation, applications subject to a border procedure shall be lodged no later than five days from registration for the first time or, following a relocation in accordance with Article [57(9)] of Regulation EU (No) XXX/XXX [Regulation on Asylum and Migration Management], five days from when the applicant arrives in the Member State […] of relocation following a transfer pursuant to Article […] 57(9), of that Regulation. Failure to comply with the deadline of five ~~5~~ days shall not affect the continued application of the border procedure.

[…] 2.The border procedure shall be as short as possible while at the same time enabling a complete and fair examination of the claims. The duration of the border procedure shall be of 12 weeks from when the application is registered until the applicant no longer has a right to remain and is not allowed to remain. Following that period, the applicant shall be authorised to enter the Member State's territory except when Article […] 41g is applicable **or a refusal of entry in accordance with Article 14 of Regulation (EU) 2016/399 is enforceable.**

Member States shall lay down provisions on the duration of the examination procedure by way of derogation from Article 34, of the examination by a court or tribunal of a request to remain lodged in accordance with Article 54(4) and (5) and, if applicable, of the appeal procedure which ensure that all these various procedural steps are finalised within 12 weeks from when the application is registered.

The 12-week period may be extended to 16 weeks if the procedure cannot be concluded within that time due to actions of the applicant in order to delay or frustrate the conclusion of the procedure, or where additional time is needed by the determining authority or the court or tribunal of first instance to ensure an adequate and complete examination or an effective **remedy.**

[…]

Article* […] *41g

Border procedure for carrying out return

1. Third-country nationals and stateless persons whose application is rejected in the context of the procedure referred to in Articles 41-41f shall not be authorised to enter the territory of the Member State.

2. Member States shall require the persons referred to in paragraph 1 […]to reside for a period not exceeding 12 weeks in locations situated generally at or in proximity to the external border or ~~transit zones~~ in other designated locations within the territory, fully taking into account the specific geographical circumstances of the Member States~~; where a Member State cannot accommodate them in those locations, it may resort to the use of other locations within its territory~~. The 12-week period shall start from when the applicant, third-country national or stateless person no longer has a right to remain and is not allowed to remain. The requirement to reside at a particular place in accordance with this paragraph shall not be regarded as authorisation to enter into and stay on the territory of a Member State.

3. For the purposes of this Article, Article 3, Article 4(1), Articles 5 to 7, Article 8(1) to (5), Article 9(2) to (4), Articles 10 to 13, Article 15, Article 17(1), Article 18(2) to (4) and Articles 19 to 21 of Directive XXX/XXX/EU [recast Return Directive] shall apply.

3a. When the return decision cannot be enforced within the maximum period referred to in paragraph 2, Member States shall continue return procedures in accordance with Directive XXX/XXX/EU [Recast Return Directive].

4. Without prejudice to the possibility to return voluntarily at any moment, persons referred to in paragraph 1 may be granted a period for voluntary departure. The period for voluntary departure shall be granted only upon request and shall not exceed 15 days without the right to enter the territory of the Member State. For the purpose of this provision, the person shall surrender any valid travel document in his possession to the competent authorities for as long as necessary to prevent absconding.

Member States that, following the rejection of an application in the context of the procedure referred to in Articles 41-41f, issue a refusal of entry in accordance with Article 14 of Regulation (EU) 2016/399, and that have decided not to apply Directive XXX/XXX/EU [Return Directive] in such cases pursuant to Article 2(2), point (a), of that Directive, shall ensure that the treatment and level of protection of the third- country nationals and stateless persons subject to a refusal of entry are in accordance with Article 4(4) of Directive XXX/XXX/EU [Return Directive] and are equivalent to the treatment and level of protection set out in ~~Articles 41g(2)~~ paragraph 2 and Article 41h(3).

EL Additional Comments on Article 45 and 36 of APR

1. **para 7:** Where the third country in question does not admit or readmit the applicant to its territory **after a return decision has been issued** ~~**or does not reply within a time limit set by the competent authority**~~, the **applicant […]** shall **have […]** access to the procedure in accordance with the basic principles and guarantees provided for in Chapter II and Section I of Chapter III.

   Justification

   We propose the above addition in order to clarify the stage in the process of applying the concept of the safe third country, where the possibility of readmission of the applicant to the territory of the safe third country will be assessed

2. **para 3.** […] Where the EU and a third country have jointly come to ~~a statement, arrangement or~~ an agreement that migrants admitted under this ~~statement, arrangement or~~ agreement will be protected in accordance with the relevant international standards and in full respect of the principle of *non-refoulement*, the conditions of this Article regarding safe third country status may be presumed ~~considered~~ fulfilled ~~in the absence of evidence to the contrary~~ and without prejudice to paragraph 2b.

Justification

We propose the deletion of the phrase "in the absence of evidence of the contrary" since it is covered by the provision "without prejudice to paragraph 2b" according to which a person may object to the application of the safe third country concept for his/her individual case.

In addition the phrase "the absence of evidence of the contrary" is vague (as it does not specify what this evidence might be, from which sources it will be drawn in order to ensure its reliability, who will have the obligation to invoke it? the State that will make use of the provision?), in essence it might lead in repealing the proposed provision, by establishing an additional condition, under which a third country can be established as generally safe, in case of an EU agreement / readmission agreement

3. Para 2b. : The concept of 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 justifying why the concept of safe third country would not be applicable to him or her the applicant cannot demonstrate the existence of elements justifying why the concept of safe third country is not applicable to him or her, in the framework of an individual assessment;

b. in case of unaccompanied minors, where ~~there are clear indications that the applicant will be admitted or readmitted by the third country and~~ it is not contrary to his or her best interest.

Member States may under national law provide for rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country.

Justification

We propose the deletion, since it entails that the application of the concept of a safe third country is conditional of the assessment at an earlier stage (prior to the decision) of possibility that the minor will be accepted on the territory of the third country, thus it establishes an additional criterion, which is not listed in the criteria (a) to (e) restrictively in par. 1 of article 45

In case of a readmission agreements between a third country and the EU, the possibility of to apply the concept of a safe third country, for reasons not related to its safety, but to reluctance of the third country, to fulfill its legal obligations and undermines the ability of a MS to use an important migration policy tool, such as readmission agreements.

With same argument we propose **deletion** in **art. 36 par 1a (b)**

«a country which is not a Member State is considered to be a safe third country for the applicant pursuant to Article 45 ~~,unless it is clear **beforehand** that the applicant will not be admitted or readmitted to that country;~~

HUNGARY

Article 4(x), Articles 41-41i and Article 60: Border procedure

We maintain all our comments and positions expressed in previous meetings.

We encourage a cautious approach on introducing the concept of "adequate capacity" and linking it to the derogations from the border procedure which concept may result in additional pull factors for illegal migrants and human smugglers. This is a legitimate concern, as if national capacity becomes saturated and the proposed mandatory border procedure is replaced by derogations, this will have an incentive effect and smugglers and irregular migrants will choose the external borders where these derogations are applied.

In order to reduce illegal entries, it is important that the application of the border procedure should be the general rule and that exceptions should be limited as much as possible to avoid the procedure becoming a pull factor. The apprehension criterion relating to the unauthorised crossing of the external border needs to be applied widely in order to have a real deterrent effect, which would also cover persons apprehended far from the external borders.

We still believe that automatic exemptions for minors can lead to abuse of the system and exploitation of children. Consequently, we support the amendment to Article 41e, deleting the text relating to minors under 12 and their family members. However, we believe that the automatic exclusion of unaccompanied minors could still lead to serious abuses and therefore this text still needs to be revised.

Article 43a – 50: Safe country concept

The proper development of the safe countries concept is essential for effective action against illegal migration. We maintain our previous position that countries that have been candidates for EU membership for several years should automatically be considered safe third countries.

We do not support the concept that there should be a link between the applicant and a third country, and therefore, while the proposed amendment to Article 45 (2b) does not correspond to our original idea, in order to reach the proper balance we are ready to explore the options in a spirit of compromise.

However, we continue to believe that the Commission has too much control in the current draft to decide how national lists should be amended, which we cannot support, and therefore further consideration is needed in the text on EU and national lists.

IRELAND

Border Procedure

Article 41a Para 2: We thank the Presidency for the clarification that this paragraph relates to the prioritisation of applications within the border procedure. We agree to this in principle however, we think that this should be included in Article 33 which deals with the prioritisation of applications.

Article 41b: We had previously raised concerns about para 1a and 1b which would mean that children would be included in the border procedure where one of their family members is considered a security risk. We do not support including children in the border procedure and therefore are sceptical about including these paragraphs. We recognise that this was introduced to maintain family unity however, further consideration needs to be given to what would be in child's best interest.

We also note that these paragraphs only apply where one of the family members is considered a security risk (Article 40(1)(f)) but does not apply to Article 40(1)(c) which could also result in some members of the family falling under the border procedures while others might not which would lead to the family members being separated.

Article 41ba: We can agree to the new wording in para 1 and moving para 2 and 3 to the AMMR as proposed in the footnote.

Article 41bd: We have a small text suggestion in Para 2 – replace "following reception of a notification" with "following receipt of a notification".

Article 41e: We do not support the deletion of the text in the first para, which would mean that children under 12 and their family members would no longer be automatically excluded from the mandatory border procedure and would join with some other Member States in supporting an exemption for all children under 18 years of age and their family members.

Safe Country Concepts

Article 44: Para 2a. We can agree to the changes here that puts more onus on the applicant to demonstrate why the first country of asylum concept is not applicable. The second part of the sentence refers to safe country of origin. We think this should refer to first country of asylum?

Article 45: We would like some clarification on the rationale for deleting the reference to "Union level" in para 1a. We can agree to the changes in para 2b which puts more onus on the applicant to demonstrate why the safe third country should not be applied. We can also agree to the optional application of the sufficient connection criterion.

Article 47: Similar to our comments in relation to Article 45 we would like some clarification on the rationale for deleting the reference to "Union level" in paragraph 1a and support the change in para 4(b).

Article 50: We welcome the deletion of the last sentence in paragraph 3.

Other Articles not included in the PGA on 21 December 2022

Article 28: The requirement for an application to be lodged within 21 days insofar as it relates to unaccompanied minors is a problem for us. In Ireland, unaccompanied minors are in the care of the Child and Family Agency who decide if and when it is in the best interest of the child to lodge an application.

Article 40: Our preference is for an optional accelerated procedure.

Article 58: The requirement for the effective remedy against a return decision to provide a full and ex nunc examination of both the facts and points of law before a court or tribunal is problematic for us. In Ireland, an appeal against a decision by the authority responsible for issuing a return decision can only be by way of judicial review on a point of law.

MALTA

Border procedure

Article 4 (x)

MT is opposed to the notion that the adequate capacity for carrying out border procedures would not be a maximum for a given year but rather an amount at any given time. Therefore, the definition of 'adequate capacity' should be amended as follows:

> *'adequate capacity' means the capacity* ***~~required at any given moment~~*** *to carry out the asylum and return border procedures* ***on an annual basis.***

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.

In view of the above, MT calls for 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 maintains a substantial reservation. Clarity is needed on the actual figures being discussed as this will determine the workload that will need to be handled.

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.

In view of the above, MT is of the opinion that paragraph 1 should be amended as follows:

> *The adequate capacity at Union level for carrying out the border procedure shall be* ***~~considered to be of XXX~~*** ***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 and processing capacity of Member States to carry out border procedures and the average return rates.***

In accordance with our amendment to paragraph 1, paragraphs 2 and 3 would become redundant. Hence, there would not be a need to include them in the APR or the AMMR.

Article 41bb

MT is concerned with the provision in paragraph 2 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.

Furthermore, in view of our position on Article 41ba, MT is of the opinion that the Commission implementing act should be adopted on a yearly basis to reflect the changing reality on the ground.

Article 41bd

MT is of the opinion that once the 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.

Article 60

In line with our comments on the border procedure, MT is of the opinion that the new paragraph 3 can be deleted.

Safe country concepts

Article 44

In paragraph 2a, the reference to 'safe country of origin' should be replaced with 'first country of asylum'.

The concept of first country of asylum may only be applied provided that the applicant cannot demonstrate the existence of elements justifying why the concept of **first country of asylum** ~~safe country of origin~~ is not applicable to him or her, in the framework of an individual assessment.

Article 45

In paragraph 1a, MT would like a clarification as to why this possibility has not been extended to the designation of safe third countries at Union level.

Concerning paragraph 1b, MT is still 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 the text to be amended accordingly.

Malta is of the opinion that the same provision listed in paragraph 3 could also be applied when the agreement is between an individual Member State, or a number of Member States, and a third country.

Article 47

In paragraph 1a, MT would like a clarification as to why this possibility has not been extended to the designation of safe countries of origin at Union level.

Concerning paragraph 2, MT is still 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 here. Therefore, we would like the text to be amended accordingly.

Other pending issues/concerns

Article 28:

- Paragraphs 1 and 1a

MT maintains its position that the 21 days' time limit envisaged in paragraphs 1 and 1a is too short and therefore the wording in these two paragraphs should only refer to the lodging of the application 'as soon as possible'. In view of this, MT is of the opinion that these two paragraphs should be reworded as follows:

> *The applicant shall lodge the application with the competent authority of the Member State where the application is made as soon as possible* ***~~and no later than twenty-one […] days~~*** *from […] when the application is registered, provided that he or she is given an effective opportunity to do so […] in accordance with this Article. By way of exception, in the cases referred to in Article 32, the application shall be lodged* ***~~no later than twenty-one days~~*** ***as soon as possible*** *from when the representative is designated. Where the application is not lodged with the determining authority, the competent authority shall promptly inform the determining authority that an application has been lodged.*
>
> *Following a transfer in accordance with Article 20(1)(a) of Dublin Regulation, the applicant shall lodge the application with the competent authorities of the Member State responsible as soon as possible* ***~~and no later than twenty-one days~~*** *from when the applicant identifies himself or herself to the competent authorities of the Member State responsible[…].]*

As a consequential amendment, paragraph 3 is to be deleted as this would no longer be required.

Article 40

MT maintains its substantive reservation on the whole of Article 40, due to its mandatory nature, and a specific substantive reservation on paragraph 1(i) and paragraph 5(c).

The ground for processing an application under an accelerated procedure based on a 20% or lower recognition rate, together with the obligatory nature of the accelerated and border procedures, as well as the fact that according to the current text of the AMMR persons subject to a border procedure are not eligible for relocation, will create significant burden on front line Member States.

Furthermore, MT maintains its position that the decision as to whether or not to apply an accelerated procedure should be at the discretion of the Member States, with the only acceptable 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 an accelerated procedure should be mandatory).

With regards to point paragraph 1 (d), MT is of the opinion that here we should keep the current acquis and re-word this point as follows:

> ***the applicant makes an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal from the territory of a Member State;***

Article 42:

Malta is of the opinion that Paragraphs -1 & 1 should be amended as follows:

*-1. An application made **in the Member State responsible** where a final decision on a previous application by the same applicant has not yet been taken in **that Member State** shall be considered as a further representation and not as a new application.*

That further representation shall be examined in the Member State responsible in the framework of the ongoing examination in the administrative procedure or in the framework of any ongoing appeal procedure in so far as the competent court or tribunal may take into account the elements underlying the further representation.

1. *Any further application made by the same applicant in* ***~~a~~ the*** *Member State* ***responsible*** *after a final decision has been taken on a previous application by the same applicant* ***in that Member State*** *shall be considered as a subsequent application* ***~~and shall be examined by the Member State responsible~~***.

2. ***Provided that Member States may also decide to apply this provision in case a further application is made by the same applicant in another Member State other than the one in which a final decision on a previous application by the same applicant was taken and that Member State is no longer responsible for examining this application in accordance with the AMMR.***

Justification: Malta maintains its substantive reservation on both paragraphs. Malta is concerned about the practical implementation of the provision in paragraph -1 whereby a new application made in any Member State before a final decision on the previous application is taken by the Member State responsible, is to be considered as a further representation in the Member State responsible (i.e. difficulties in sharing of data between Member States and added administrative burden on national authorities).

The same concern applies in relation to applications made in any Member State after a final decision has been taken on a previous application by the same applicant, which is to be considered as a subsequent application in the Member State responsible. Malta is concerned that these provisions will lead to a substantial increase in the number of subsequent applications that will have to be examined by the Member State responsible. Therefore, Malta is of the opinion that only new/further applications lodged in the Member State responsible by the same applicant should be considered as further representations/subsequent applications.

Article 53(1)

In point (d), MT is of the opinion that there should not be a right of appeal when protection has been withdrawn on the basis of Article 52(5) since here, we are talking about cases of explicit renunciation or where someone has become a citizen of a Member State, or someone has subsequently been granted international protection in another Member State.

ITALY

The Italian delegation wishes to acknowledge the progress made so far in this file by the Swedish Presidency thanks to its efforts in view of a fair compromise. Nonetheless, as spelled out in recent occasions – and ultimately in the COREPER meeting of May 3 – the text should (and could) be further improved to achieve the goal of an acceptable and reasonable compromise, taking mostly into consideration the special burden borne by frontline MS owing to their geographical position.

We would also like to put into value the fair collaboration and flexibility shown so far by the Italian delegation (together with other MED5 and Bulgaria) which has substantively contributed to a number of valuable achievements on both responsibility (general approaches on Eurodac and *screening*; the mandatory nature of border procedure) and solidarity (equal value of all solidarity measures; voluntary relocations, fully exchangeable with financial contributions).

With this in mind, Italy reiterates its general scrutiny reservation due to the linkages of this Regulation with the other legislative proposals of the Pact under negotiations and the need to evaluate the whole balance.

A reservation is also maintained on all relevant provisions concerning border procedure (including the definition of adequate capacity). Therefore, the following partial contribution on APR, based on ST 8464/23, is without prejudice of the previous Italian contribution dated 13.04.2023, based on ST 7895/23, which is still valid.

Article 20 (former 19) **– Applicants in need of special procedural guarantees**

Para. 3, between square brackets, is supported.

Article 40.1(i) – Accelerated examination procedure

The Italian delegation supports the German proposal to lower the threshold from 20% to 15%.

Article 41ba – The adequate capacity at Union level

With reference to the footnote 5, the Italian delegation prefers that para. 2 and 3 are maintained in this Article.

Article 41bb – The adequate capacity of a Member State

The Italian delegation can support para. 4.

Article 41e – Exceptions to the asylum border procedure

The deletion in para. 1 of minors below the age of 12 and their families cannot be supported. Alternatively, the following rewording is proposed in para. 2(b):

"The reception conditions and guarantees, including the specific ~~reception~~ needs of accompanied minors and their families, as provided for in Directive XXX/XXX/EU [Recast Reception Conditions Directive], cannot be met in the locations referred to in Article 41f;"

Article 41i – Refusal of entry

The Italian delegation can support the BG proposal to delete this provision and move the contents to a recital.

Article 42 – Subsequent applications

Para. 1 should be amended in order to clarify the application of the related provision in conjunction with **Article 27** of AMMR, para. **1a** and **2**. Furthermore, a new case could be added with reference to the discretionary clause of Article 25 of AMMR. The last sentence in the proposed wording may enable the possible return of an applicant, where rejected, by a second Member State which otherwise should apply Article 26.1(b) of AMMR.

Therefore, para. 1 should read as follows:

1. **[…]**Any further application made **by the same applicant** in a**[…]** Member State **after a final decision has been taken on a previous application by the same applicant** shall be considered **[…] as** a subsequent application **and shall be examined** by the Member State responsible~~.~~ without prejudice of Article 27, para. 1a and 2 of the Regulation (EU) No XXX/XXX [AMMR]. It may be examined by the Member State applying Article 25(1) of the same Regulation.

Article 45 – The concept of safe third country

The Italian delegation can support the new subparagraph in para. 2b referring to the "connection".

Article 53 – The right to an effective remedy

The time span in para. 7(a) should be widened: "between a minimum of five days and a maximum of ~~10~~ 15 days…", in order to not restrict the right to a remedy.

Article 62 – Entry into force and application

The entry into force provided for in para. 2 should be coordinated with the corresponding provision in AMMR (Article 75). A reservation is accordingly raised.

THE NETHERLANDS

Written comments by the Netherlands on the APR (7895/23)

We thank the Presidency for the opportunity to share our written comments on the above-mentioned document and for the compromise proposals in document 8802/23.

NL welcomes the compromise proposal the Presidency has distributed for discussion at Coreper on 3/5. The text contains important steps forward, such as the deletion of siblings in the definition of family members under the AMMR.

When it comes to the APR, we very much welcome the phrasing of 'adequate capacity at any moment'. In addition, we welcome that families with children are not automatically exempted from the border procedure (Article 41e).

However, there is still room for improvement as well. First and foremost this concerns the exclusion of unaccompanied minors from the border procedure altogether. According to NL, this will significantly increase the risk that UAMs are sent ahead by their parents. Obviously, this is very much contrary to the best interest of the child. The current phrasing may encourage this practice of bringing children into hazardous situations of illegal border crossings, and sending minors ahead of the family.

On the calculation of adequate capacity, Article 41bb, we note that not all illegal entries will result in an asylum application. Therefore, we propose to take the number of (expected) applicants for whom the border procedure is mandatory as a starting point. We do not support including paragraph 4 on concerns regarding national security and public order. According to NL, there is already existing acquis and jurisprudence in place, it does not have to be laid down in this paragraph.

On the notification procedure as proposed in the paper for Coreper, we think that derogations to the border procedure in case the adequate capacity is about to be reached should not be based on a notification by the Member State. We propose to use the same procedure as used in cases where the adequate capacity is reached.

According to NL, if an application is inadmissible or manifestly unfounded, it is often faster, more efficient and cheaper to take a decision in the border procedure on the substance than it is to determine the Member State responsible. Therefore, we think the border procedure should take precedence over the procedure to determine the responsible Member State in such cases.

Another priority concerns the concept of safe third countries. We can support the solution found in Article 45(1a) and Article 47(1a), but we have some further suggestions, which could be laid down in Article 50.

Please find more elaborate comments on the compromise text for the APR below.

Article 4(2)(x) ('adequate capacity')

We can support the proposed text. To NL, is essential that adequate capacity refers to capacity 'at any given moment'.

Article 34 - Duration of the examination procedure

NL is currently experiencing a lot of pressure on the asylum system due to a large number of applications. It is therefore difficult to act within the deadlines. Although the time limits for the examination of applications are part of partial mandate, this is still a main concern for NL. We think the time limits for the 'regular'procedure in the APR should not be shorter than those in the APD.

Furthermore, in the context of the Crisis and Force Majeure Regulation, we think that in a situation of crisis or force majeure, it should be possible to extend the time limits for taking a decision.

Article 40 (1) (i) - Accelerated examination procedure

This provision is very much linked to the border procedure. NL thinks that in principle, all applications at the external borders should start in the border procedure. However, we can agree with the idea of using a percentage for cases with a very low chance of protection, which should always be dealt with in the border procedure. In the opinion of the Netherlands, the percentage has yet to be determined.

We also note that the assessment to initiate a border procedure will be done by border guards and must therefore be objective and possible without a comprehensive assessment of the background of the asylum application. The question whether someone belongs to an ethnic minority, or whether someone has a certain sexual orientation, cannot be answered at the start of the procedure and should not be a criterion.

We propose:

(i) the applicant is of a nationality or, in the case of stateless persons, a former habitual resident 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 average Eurostat data, [20]% or lower, unless the determining authority assesses that a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data ~~or that the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs~~;

Article 41 - Conditions for the asylum border procedure

We reiterate that we consider paragraph 2 important, because of the principle of legal fiction of non-entry.

Proposal for a new Recital concerning the border procedure

In the event that applications cannot be dealt with in the border procedure because the person evades the border procedure - or where the border procedure facilities lack the capacity to deal with the cases, other Member States should not be left without action perspectives when confronted with the applicants on their territory. The standing corpus already allows for some measures, when interpreted in the right way. However, we feel we should include a reference in the preamble to encourage Member States to make full use of these options.

We think Member States should be allowed 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 Directive in such a way that a similar effect is accomplished.

We would therefore like to propose to include a new recital, mirroring article 5 of the Screening regulation. We propose:

> **(XX) Member States may apply measures under the Reception 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.**

Article 41ba - The adequate capacity at Union level

Reservation

NL can in principle support setting the adequate capacity at Union level, although the question remains how to establish this number. It is also unclear what this number will consist of.

We also note that by including this number into the regulation, it would require a recast of the regulation to adjust this number. Is this not too complicated?

We support FR that paragraphs 2 and 3 should remain in the APR.

Article 41bb - The adequate capacity of a Member State

Reservation

According to NL, this Article is going into the right direction.

However, not all illegal entries will result in an asylum application. Therefore, it might be useful to take the number of applicants for whom the border procedure is mandatory as a starting point.

We do not support including paragraph 4. According to NL, there is already existing acquis and jurisprudence in place, it does not have to be laid down in this paragraph.

Article 41bc - Measures applicable in case the adequate capacity of a Member State is about to be reached

Reservation

In general, NL thinks that derogations should be limited. Member States should take all measures available to resume border procedures again as soon as possible once maximum adequate capacity is reached, for instance by deploying additional personel in the border procedure or seeking support from EU agencies. This should be reflected in the text.

As for paragraph 2, we think the procedure as set out in Article 41bd (regarding cases where the number of applicants is equal to number set out in respect of the Member State) should also be used in these cases. We propose to delete Article 41bc (2) and (3) and replace them by provisions similar to Article 41bd (2) and (3).

Article 41d - Determination of Member State responsible and relocation

Reservation

From the text of this provision, it seems that if the Dublin procedure applies, there will be no border procedure. For NL, this is undesirable, since it will undermine the effet utile of the border procedure: quick decisions on applications for international protection with no chance of being granted. If an application is inadmissible or manifestly unfounded, it is often faster, more efficient and cheaper to take a decision in the border procedure on the substance than it is to determine the Member State responsible.

This is all the more important, because in the AMMR, it will be possible to appeal the decision not to transfer the applicant. According to NL, this will detract the border procedure too much.

Therefore, we think it should be provided for the border procedure to take precedence over the Dublin procedure in such cases.

Article 41e - Exceptions to the asylum border procedure

Reservation

We thank the Presidency for deleting the last part of paragraph 1. However, we still propose to delete the first paragraph altogether. In the opinion of the Netherlands, it will invite abuse. For the same reason we cannot support the proposed recital in the footnote.

Many member states will encounter problems to assess the age swiftly and correctly. Many applicants will state to be 17,5 years of age, thus making it impossible to assess their age as between 16 and 21, there are no reliable medical markers to assess age. Paragraph 1 may also encourage bringing children into hazardous situations of illegal border crossings, or sending minors ahead of the family.

We think that there is enough room in paragraph 2 (b) of this Article to assure the best interest of the child. In addition, the humanitarian clause i.g. in the Schengen Border Code will still allow Member States to let minors pass where they see fit to do so at an individual level. We would support a paragraph in the recitals to that effect.

Article 41f - Locations for carrying out the asylum border procedure

We welcome the possibility to carry out the border procedure in other parts of the country. As a matter of fact, we think it is not necessary that the border procedure is really applied in the proximity of the border at all in order to have the legal fiction of non-entry. In the opinion of the Netherlands, it is enough if Member States can assure that the applicant can be transferred quickly to the location and that the procedure can start swiftly and thus ensure that persons in due need of protection are not held longer than necessary in the border procedure.

This is especially important in cases where article 40(1)(f) (national security) applies. Article 41b, paragraph 1a determines that in those cases, applications of all members of a family shall be examined in the border procedure. When there are minors involved, a deprivation of liberty would be undesirable, unless it were possible to do so in a not too restrictive setting that does not closely resembles a detention facility. That can be problematic, if the border procedure can only be applied at or in proximity to the external border.

The guarantees should not be in the distance, but in the assurance of a short period.

Furthermore, we note that a different wording is used in the border procedure for carrying out returns. We suggest aligning this provision with Article 41g (2).

***Article 41g* - Border procedure for carrying out return**
Scrutiny reservation

Regarding paragraph 4, we would like to point out the following. Granting a period for voluntary departure is incompatible with deprivation of liberty. It is unclear how this relates to Article 15 of directive 2008/115 (Return Directive), Article 22 (4) of the recast Return Directive and Article 5 ECRM. Furthermore, article 5(1)(f) ECRM requires that "action is being taken with a view to deportation or extradition."

Article 41i - Refusal of entry

According to NL, this provision would imply an amendment of the Return Directive. Such a proposal should be included in the Return Directive.

Furthermore, this would imply a limitation of the exclusion clause to 12 weeks (by means of applying 41g), after which the Return Directive starts to apply in full. Ibidem for article 41h(3) in so far as a reference is made to the maximum period for detention.

Article 43a - The notion of effective protection

According to NL, migration agreements can be instrumental in preventing people to undertake the dangerous crossing to Europe. When concluding these agreements, the objective should be to guarantee a level of living conditions in accordance with relevant substantive standards of the Geneva Convention. By offering migrants a perspective for the future onward migration can be prevented.

We propose to add a recital to Article 43a:

> **(XX) In addition to the requirement of sufficient protection and with a view to effective return and sustainable reception, where the European Union and a third country jointly come to a statement, arrangement or agreement to protect migrants in the third country, the objective should be to offer a higher level of protection in accordance with relevant substantive standards of the Geneva Convention.**

Article 44 - The concept of first country of asylum

Reservation

According to NL, the assessment in Paragraph 5a regarding the possibility of (re)admission to the first country of asylum should be made in the return procedure, not during the assessment if the application is inadmissible.

Furthermore, the applicant and the representative will always state that it is in the best interest of the minor to remain in the Member State. Thus, it will in many cases be impossible in practice to apply the concept of first country of asylum to minors.

Therefore, we propose to delete this paragraph.

Article 45 - The concept of safe third country

We can support the solution in Paragraph 1a. However, we think that where a country is not designated as a safe third country at Union level, because such an exception cannot be made, an individual Member State should be allowed to designate that country and making the required exception.

We propose to add this in Article 50.

Regarding Paragraph 2b(b), we have the same comments as to Article 44 (5a) and (6).

Article 47 - The concept of safe country of origin

Regarding Paragraph 1a and the assessment of the ‘ best interest of the child’, we have the same comments as to Article 45(1a).

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

Following our comments to Articles 45 and 47, we propose to add a new paragraph to Article 50:

> **3a. By way of derogation from Paragraph 2 and 3, where from a procedure laid down in Article 46, Article 48, or Article 49, it follows that a third country is a safe third country or a safe country of origin in accordance with this Regulation, with the exception for specific parts of its territory or clearly identifiable persons, a Member State may notify the Commission that it will designate that third country as a safe third country or a safe country of origin with the exception of the specified parts of the territory or persons in accordance with Article 45(1a) or Article 47(1a).**

Article 60 - Monitoring and evaluation

The procedure in the third subparagraph would imply a recast of the APR, which means incurring Council and EP. According to NL, this is too complicated. There should be a flexible mechanism. NL would therefore prefer a delegated act or an implementing decision.

Article 62 - Entry into force and application

Reservation

According to the current text, the date of the lodging of the application determines which legal regime applies. If that date is before the start of the application of the Regulation, the current Directive will still apply. If an application is lodged on or after the date of the start of the application, the Regulation will apply. These applications will be examined in the same period. This means that there is a long period during which two different legal systems exist simultaneously.

We think this is not desirable. It would also have a negative effect on the capacity of the ICT systems that support the decision process. We would prefer to take the date of the decision as leading. In taking the date of decision as leading, the authorities can anticipate on the date of decision and follow the required procedures accordingly. This would enable them to align the procedures as much as possible.

Therefore, we propose:

3. Member States shall apply the laws, regulations and administrative provisions of this Regulation to applications for international protection and to procedures for the withdrawal of international protection on which the determining authority has at the moment of entry into force of this Regulation not yet taken a decision. Decisions taken before this Regulation has entered into force shall be governed by the laws, regulations and administrative provisions adopted pursuant to Directive 2013/32/EU.

PORTUGAL

Please find below our comments regarding the articles (or parts of them) that are not covered by the partial mandate for negotiations with the European Parliament as approved by the Coreper on 20 December 2022. The comments refer to the document that was discussed at the last JHA Counselors (ST 8464/23) and are without prejudice to the changes there will be made to the text.

Article no.	PT COMMENT
4(x)	We can agree with the current definition of "adequate capacity", including "at any given moment", as well as the proposed recital 40a.
40	We maintain our reservation on (5)(c). PT shares the opinion that the accelerated examination procedure should not be applied to unaccompanied minors.
41d	We uphold our position that there should be no relocation under the border procedure, unless the Dublin procedure was applied and the MS responsible has already been determined.
41e	We took note of the argument that the automatic exemption of families with minors from the asylum border procedure could lead to abuse and malpractice involving minors. However, we cannot support the detention of minors and thus the current version of this article where the exception is eliminated. We consider the safeguard introduced in 2(b) is not sufficient, as guarantees for minors are not solely related to reception.
42	PT maintains a scrutiny reservation on this article. We reiterate our concerns regarding the practical implementation of (1). Our main concern is the possible administrative burden that this provision would create due to the need to check bilaterally whether a final decision was issued or not in another MS. Additionally, regarding 3a, we also consider that there should be the possibility to examine a subsequent application even if the new elements presented by the applicant could have been presented earlier.
43a	On paragraph 2 we would prefer right to legally reside in the third country, rather than just "being allowed to remain on the territory".
44	We also maintain our position that this concept should not be applied to UAM (5a).
45	PT upholds a scrutiny reservation on the article, particularly paragraph 2. We thank the Presidency for the new paragraph, but maintain the opposition to the deletion of paragraph

Article no.	PT COMMENT
	2(b).We defend the existence of a relationship between the applicant and the third country considered safe. This criterion should be maintained as a safeguard for applicants, considering that the absence of such a connection could lead to the applicant being placed in a context of greater vulnerability. Regarding 2b.(a), we welcome further clarifications regarding the definition of the *elements* the applicant should provide to justify why the concept of safe country of origin is not applicable to him/her. We also maintain our position that this concept should not be applied to UAM 2b(c).
53	Scrutiny reservation considering the need for further examination at national level.
54	Scrutiny reservation considering the need for further examination at national level.
55	Scrutiny reservation considering the need for further examination at national level.

THE SLOVAK REPUBLIC

Without prejudice to the written comments that have been sent regarding the document 7895/23, following remarks are of the highest importance OR are new written comments:

ADEQUATE CAPACITY

Article 41ba. SK remains opposed to including fix quantitative data directly in the wording of the APR (similarly as in the AMMR). SK appreciates the clarification provided at the JHA Counsellors meeting regarding the adequate capacity covering both asylum and return border procedures; therefore in the event that the article remains in place, in order to avoid any misinterpretation upon adoption, it would be advisable to place it (Article 41ba) immediately after the current Article 40 and thus still before the articles regarding asylum border procedures (currently started by the Articles 41).

Article 41ba(2)(3) Our preference is to maintain the provisions in APR and not move them to AMMR, as expressed during the meeting.

Article 41bb SK understands why the word "annual" was deleted from the heading. In spite of this, we would like to suggest the following changes in the wording in order to avoid any future misunderstandings:

The Commission shall, by means of an implementing act, set a number that is considered to correspond to the ***annual*** *adequate capacity of each Member State for examining applications in the border procedure.* ***A same number should be maintained for a period of three years.***

***Article 41bd (*5)c** The SK prefers the previous wording with a brief explanation, particularly if the toolbox measures (Article 6a on the AMMR) were not used.

BORDER PROCEDURE

Art. 41c(2) According to current practice, SK considers a 12-week period as insufficient to complete all necessary steps, especially if it includes the appeal process. Despite the possibility of extending the time limit to 16 weeks, it can only be done on special occasions, which we do not consider sufficient. Since Art. 53 paragraph 9 has been deleted, this issue is even more urgent. For illustration, the current SK deadline for the court to deliver a decision on an appeal is 90 days in the first instance. It would be acceptable if the border procedure was extended to at least 16 weeks for all circumstances, with a possibility of an extension to 20 weeks in the situations already proposed by the article in question.

***Art. 41d(1*)** SK reiterates its previous statement that the deadline for determining which MS is responsible should not be included in the 12-week asylum border procedure deadline. A postponement should be made in the time limit for asylum border procedures during the period of determining the responsible MS**.**

Art. 41e SK supports the deletion of the reference to minors under the age of 12 and their family members. This is primarily due to our concern about possible misuse of children in the asylum process. Although we understand the opposition of some MS to the detention of families with young children, our understanding is that detention does not have to be mandatory, and alternatives may be implemented if necessary. This Article regulates obligatory border procedures, but not mandatory detentions.

Art. 41g SK understands that if the return decision cannot be enforced within 12 weeks, Member States must continue the return procedure in accordance with the recast return Directive. In spite of this, we would appreciate an extension of this deadline.

SAFE COUNTRIES CONCEPT

Art. 45(1a) a Čl. 47(1a) It is our preference to maintain in the text of these provisions a reference to the Union level.

***

Articles outside the adopted Council mandate

Art. 22(5) We oppose the establishment of any limit on the number of unaccompanied minors per representative. It is the exclusive responsibility of the Member State to address this issue, and we therefore propose to remove the provision.

Art. 34(1) It is our opinion that the two-month time-limit is not sufficient, particularly for subsequent applications. In such cases, the examination should not be limited in time.

Art 37(-1)(a) It is currently the practice in Slovakia to issue an inadmissible decision if another Member State is responsible. As a result of the proposed wording, we are concerned about the implications for our practice, including our IT registration systems.

Art.53(1) - second subparagraph (started by "Where a return decision is taken as a part …")

There is a potential contradiction between that provision and those in the recast Return directive. We are of the opinion that this provision does not take into account the appeal procedures outlined in the revised Return Directive. Under the relevant provisions of the recast Return Directive, Member States may provide for an administrative review procedure prior to an appeal to a court or tribunal. According to Article 53(1), there will be no possibility of an administrative review proceeding prior to an appeal before a court or tribunal in the case of a return decision. The above comments have already been discussed and incorporated into the compromise to recast the Return Directive

Administrative proceedings in Slovakia are conducted in two instances, with the first-instance administrative authority issuing the return decision and the second-instance administrative authority issuing the decision on appeal of the third-country national against the return decision. The third-country national always has the option to appeal the decision of the second administrative authority to the competent judicial authority after exhausting all administrative remedies. **A change in this system would have a significant impact on the legal order and established practice in the Slovak Republic.** Additionally, there is a risk of a significant overloading of the courts, delays in the proceedings, etc. As a result, it is imperative that the possibility of the Member State to decide whether or not the administrative review proceedings will be provided in the Member State prior to an appeal in a court or tribunal be preserved.

Finally, SK would like to thank SE PRES for providing insight regarding possible impacts of the reform, both regarding responsibility and solidarity fair share.

SLOVENIA

General comment:

Following discussions at the latest meetings, including Coreper II 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, and underline some of our main positions and red lines.

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. At the same time, we do not support the **broad determination of exceptions from the mandatory use of the border procedure**, as this may lead to abuses of procedure of international protection and consequently increase the secondary movements of applicants for international protection across the European Union and jeopardize the goals pursued by the border procedure.

Nevertheless, the Republic of Slovenia welcomes the efforts made in the discussions on responsibility, which, in our opinion, is key to reaching an agreement on the Pact. On this side, it is necessary to ensure **effective rules regarding responsibility** and more importantly to ensure their implementation, as only this will have a **significant impact on limiting secondary movements and abuses** mentioned above. That is why Slovenia advocates a mandatory border procedure, which, in our opinion, represents one of the foundations, which at the same time ensures balance and represents an important factor of deterrence. Following that, there should be as few derogations or adjustment measures as possible.

In general, the Republic of Slovenia does not oppose to the **concept of sufficient capacity**, nonetheless we want to scrutinize provisions in more details as we have several practical concerns, such as that the implementation itself does not correspond to the unpredictable nature of migration. Following that, we would like to examine the concrete share that would be determined for individual Member States. In this part, we call on the European Commission and the Presidency to prepare simulations or visualizations.

Last but not least, it is necessary to **connect all the remaining legislative proposals within the Pact**, which, in the opinion of the Republic of Slovenia, represent an inseparable part of the whole (Screening Regulation, Crisis Regulation and Eurodac Regulation).

We also have several concerns regarding specific Articles, regarding which we ask for clarifications in writing or orally as our continued support and possible withdrawal of reservations depends on received explanations.

Article 41ba in connection with Article 4, point (x)

The Republic of Slovenia maintains scrutiny reservations regarding all Articles concerning the concept of adequate capacity.

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. Also, at the SCIFA meeting Slovenia supported a different option from the one suggested in the latest compromise proposal as we believe that defining adequate capacity is challenging.

Nevertheless, we do not oppose moving text in the AMMR, but we still suggest maintaining reference to the relevant provisions in AMMR.

Article 41bb

The Republic of Slovenia still does not support the proposed determination of adequate capacity, 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 and not only stable as proposed.

As regards new paragraph 4, we understand the security concerns of some Member States at the external border, but we do not understand how this provision will be implemented in practice. Therefore, we kindly ask for clarification.

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.

Article 41bd

Slovenia asks for clarifications regarding the proposed deadlines in the fourth and fifth paragraph – 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).

We must avoid situations in which some Member States would be constantly under such pressure (adequate capacity reached) that they would not implement the border procedure for several years in a row, which would disturb or even collapse the overall balance between responsibility and solidarity.

Article 41e

As already mentioned, the Republic of Slovenia does not support the broad determination of exceptions from the mandatory use of the border procedure, as this may lead to abuses of procedure of international protection and consequently increase the secondary movements of applicants for international protection across the European Union and jeopardize the goals pursued by the border procedure. Therefore, we are not in favour of new proposals in this regard.

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.

Therefore, we kindly ask for clarification regarding the deletion of the wording "both at Union and" and having reference only on "national level", which indicates significant change in this section, which does not follow the goal of harmonization.

Chapter V

We maintain our reservation on the whole Chapter concerning appeal procedure.

SPAIN

Following the JHA Counsellors on Asylum meeting held on 27 April 2023 (CM 2565/1/23), the Spanish delegation submits the following written comments on the articles examined during the meeting on the border procedure (Article 4(x), Article 41- 41i, and Article 60), and on the safe country concepts (Section V of Chapter III, Articles 43a-50).

1. General remarks

In relation to the debate on specific issues of the above-mentioned proposal held on 27 April, the Spanish delegation stresses its overall constructive approach and flexibility with regard to the negotiation of this file. In line with this commitment, Spain considers that further work is required to progress on the discussions of this legal instrument as an essential piece of the Pact on Migration and Asylum. In this regard, this delegation underlines the need to advance in a balanced manner in order to conclude the negotiations on all the files of the Pact in line with the roadmap agreed with the European Parliament. In this line, Spain reiterates 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.

At the same time, this Regulation should be conceived as a building block of a system, which is not only agreed on paper, but also more effective, more predictable, fairer and workable in practice.

a) Border procedure

Based on the commitment to facilitate progress on the discussions of the APR proposal, Spain has moved from the initial position according to which the border procedure should be optional. Hence, it has accepted entering into discussions regarding the mandatory nature of this procedure. However, further adaptations of the border procedure are required to ensure predictability, practicability and fairness of the system.

In our view, five elements shape that landing zone regarding the border procedure:

1) the definition of adequate capacity;

2) the measures which may be applied once this adequate capacity is reached or is about to be reached;

3) the procedure to notify those measures;

4) the timeframe of the procedure;

5) the locations of the border procedure.

For Spain, the definition of "adequate capacity" is the crucial element to strike the balance. This notion cannot mean an open number of cases to process through the border procedure which multiplies "at any given moment" throughout the year. In our view, an annual cap needs to be fixed for two reasons: 1/ to ensure that the procedure is workable, effective and predictable; 2/ to ensure the balance with the solidarity mechanism, which is built on a yearly cycle and has caps and backstops in the different steps of the process. Since Member States know in advance the maximum number of solidarity contributions which they are expected to contribute to, Member States should equally know the maximum number of cases they are expected to process under the border procedure. The bigger the number on solidarity obligations, the bigger the number on border procedure and viceversa. Or will the solidarity contributions be multiplied "at any given moment"?

At the same time, determining a clear yearly target of cases to be processed under the border procedure is the basis to define with legal certainty when this adequate capacity is reached or is about to be reached, as well as the measures which may be applied following that situation.

We welcome the link with AMMR and the solidarity mechanism in order to mirror the mínimum threshold for solidarity contributions. It levels the EU ambitions on solidarity with the EU ambitions on the border procedure. We suggest that this link between both numbers is clearly established in the text. In this vein, Spain would prefer to maintain the related provisions in APR and thus not transfer them to AMMR.

In this spirit, Spain underlines that the the adequate capacity for each Member State should be determined on a yearly basis, since the whole migration management system is based on an yearly cycle to reflect reality and following the reasoning of the balancing and the mirroring exercise.

Notwithstanding the above, in the spirit of compromise, Spain considers that there is room to reconcile the notions of "at any given moment" with an annual cap of maximum cases to be processed. Spain has suggested several options, such as dividing the number in semesters or in quarters or keeping the reference to adequate capacity at any given moment in order to acknowledge the need to have sufficient resources at national level, but establishing an annual threshold of cases.

Additionally, Spain welcomes the inclusion of the obligation to prioritise non-returnable cases, in order to use the adequate capacity in the most efficient manner. This delegation also supports the reference to national security and public order with regard to the border procedure. Spain is also open to consider the exclusion of minors and other vulnerable groups from the border procedure.

Regarding the procedure, Spain welcomes the introduction of a two-tier system of measures in order to alleviate Member States who have reached a high percentage of their adequate capacity, enabling them to apply a first set of measures. However, both situations (adequate capacity reached or about to be reached) should be subject to a swift notification procedure for several reasons. On one hand, there is no margin of manoeuvre for an assessment, since no other elements, but a percentage of applied to a number of cases, will be taken into consideration. Additionally, only one measure is foreseen for each of the situations. Finally, this swiftness is required to quickly adapt the border procedure to the evolving migratory flows and the impact that a sudden or progressive reaching of the adequate capacity may have on the overall functioning of the system.

Therefore, Spain upholds its reservations on relevant articles of the border procedure, particularly, the ones defining the scope, the fiction of non-entry, the locations and the timeframe of such procedure. Therefore, this Delegation maintains previous comments on this articles.

b) Safe country concepts

The Spanish delegation welcomes changes made in Section II on the safe country concepts in line with previous suggestions.

2. Specific remarks

The specific remarks are inserted directly in the text as an Annex. These specific remarks are limited to Articles regarding the border procedure (Article 4(x), Article 41- 41i, and Article 60).

Regarding Articles on the safe country concepts (Section V of Chapter III, Articles 43a-50), this delegation supports the Presidency compromise text in the proposed terms.

ANNEX

Article 4

Definitions

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

(…)

(x) 'adequate capacity' means the annual capacity ~~needed~~ required ~~at any given moment~~ to carry out the asylum and return border procedures.

Recitals

3. In order to carry out the asylum and return border procedures, Member States should take the necessary measures to establish an annual adequate capacity, in terms of reception and human resources, necessary to examine ~~at any given moment~~ an identified number of applications each year.

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 be related to a number of cases/persons to be processed in a given year under the asylum and return border procedures. Thus, the Spanish delegation proposes to eliminate the expression at *any given moment* and introduce the reference to *annual* capacity, without prejudice to the possible alternative suggestions outlined in the general comments.

Regarding the recital proposed by the Presidency as a footnote of Article 4(x), in line with previous comment, we prefer to eliminate the expression *at any given moment* and introduce the expression *annual adequate capacity* and *an identified number of applications each year.*

The Spanish delegation would like to underline its flexibility regarding this annual timeframe as the idea is to have a concrete time frame which allows to identify and answer the question to when the adequate capacity is reached or about to be reached. Thus, this proposal set an annual timeframe but we could be flexible and adequate capacity could be measured in a quarterly or semiannual timeframe.

Finally, the Spanish delegation would prefer to keep the previous version of Article 4 by maintaining the definition of family members in that Article, rather to moving it to Article 41b. Besides ensuring the better regulation rules and technique, which recommends placing definitions in the same article and within thhe initial provisions, this approach would guarantee that this definition could be applied not only in the border procedure but to other provisions of this Regulation.

Article 41a:

Decisions in the framework of the asylum border procedure

(…)

2. **When applying the border procedure, a Member State shall prioritise the examination of applications of certain third country nationals or, in the case of stateless persons, of former habitual residents of third countries, for which there is a high probability of the enforcement of a return decision or a refusal of entry from that Member State to their country of origin, or, in the case of stateless persons, of former habitual residence, to a safe third country or a first country of asylum, within the meaning of this Regulation.**

Suggestion:

As Spain has already underlined in previous comments, Member States implementing the border procedure should 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 Spanish delegation welcomes the priorization set in paragraph 2. However, this delegations deems that this provision may not fit adequately in Article 41.a related to the type of decisions that may be taken under the border procedure. Priositisation relates more reasonably to the scope of the border procedure under Article 40, the conditions for the border procedure under Article 41 or the adequate capacity at national level under Article 41bb.

Article 41ba

The annual adequate capacity at Union level

1. **The adequate capacity at Union level ~~for examining applications in a border procedure~~ for carrying out the border procedure ~~at Union level~~ shall be considered to be of XXX cases per year.**

Footnote

The PRES proposes to move paragraph 2 in the previous version of Art. 41ba to the AMMR by adding in Art. 7c a new paragraph 5: "Depending on the needs arising from the special challenges in the area of migration for the upcoming year, the Recommendation may identify a higher or, in exceptional situations a lower, number for the adequate capacity at Union level for carrying out the border procedure as provided in Article 41ba paragraph 1 of Regulation (EU) XXX/XXX [APR] and corresponding to the number of solidarity contributions established in this Article. The PRES proposes to move paragraph 3 in the previous version of the article to Art. 7b AMMR

Justification

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

In the spirit of compromise, as it has been previously said, the adequate capacity could be translated into a timeframe (quarterly, semiannual, annual) objective related to a number of cases/persons, in line with the timeframe (annual) obligations set under the solidarity scheme. Reference to an annual adequate capacity should be kept in the title.

Regarding the footnote proposing to move paragraph 2 in the previous version of Art. 41ba to the AMMR by adding in Art. 7c a new paragraph 5, this Delegation 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 the different elements of the Pact. Thus relation between solidarity contributions and adequate capacity in the border procedure should stay in the APR proposal and be explicitly stated.

Spain welcomes the possibility to set, exceptionally, a lower number for the adequate capacity.

Article 41bb

The annual adequate capacity of a Member State

1. **The Commission shall, by means of an implementing act, set a number that is considered to correspond to the annual adequate capacity of each Member State for ~~examining applications in the~~ carrying out the border procedure.**
2. **The number referred to in paragraph 1 shall be calculated by multiplying the number set out in Article 41ba by the number of irregular crossings of the external border, the number of arrivals following search and rescue operations in the Member State concerned and the refusals of entry during the previous ~~three~~ years and dividing the result thereby obtained by the number of irregular crossings of the external border, arrivals following search and rescue operations and the refusals of entry in the EU during the same period.**
3. **The implementing act referred to in paragraph 1 shall be adopted by the Commission for the first time within two ~~2~~ months following the entry into force of this Regulation and then by the same month every ~~three~~ years thereafter.**
4. **Nothing in this Article shall be interpreted as requiring a Member State to take action that would undermine the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.**
5. **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

Spain supports efforts made by the Presidency in order to set a formula to calculate in an objective manner the adequate capacity of a Member State. However, Spain deems that this formula could lead to a situation where an adequate capacity is not set for some Member States (i.e. cases where irregular crossings are zero). In this sense, Spain proposes to introduce in that formula refusals of entry. That would lead to ensuring adequate capacity in all Member states.

This Delegation, as it was previously underlined, deems that adequate capacity at national level should be set on a yearly basis.

Spain can support the new paragraph 4.

Finally, Spain considers that if the significant migratory situation may lead to a full or partial reduction of the solidarity contributions, such situation should also 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 about to be reached

(…)

1. **When the number of applicants that are subject to the border procedure in a Member State is equal to 75% of the number set out in respect of the Member State concerned in the Commission implementing act referred to in Article 41bb or higher the Member State may notify the Commission.**
2. **Where a Member State notifies the Commission in accordance with paragraph 1, ~~by way of derogation from Article 41b(1),~~ that Member State ~~is~~ would not required to examine in a border procedure applications made by applicants referred to in Article 40(1)(i) who are of a nationality or, in the case of stateless persons, former habitual 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 average Eurostat data, higher than five percent.**
3. **Paragraph 2 may be applied by a Member State from the day following the date of the notification in accordance with paragraph 1 for a maximum period of six months within the same calendar year.**

Justification

As it has been previously underlined, the two-tier system introduced in Article 41bc and Article 41bd, and which Spain welcomes, could only be applied in practice if adequate capacity is set on a yearly basis and not *at any given moment*. If not, it will never be possible to fully determine when adequate capacity is reached or about to be reached for the purpose of triggering the measures. Besides the absolute unpredictability and uncertainty that this expression would bring into the mechanism, it would render the system inapplicable in practice. Therefore, this Delegation, in line with previous comments, would like to fix adequate capacity on an annual basis. If adequate capacity should be granted *at any given moment*, Member States may reach their adequate capacity one day, notify the application of measures that same day, but may find itself in the need of stopping the application of those measures the day after.

Furthermore, the applicable measures once the capacity is reached should not be considered a derogation from the procedure, but an integral part of the normal functioning of the procedure. Therefore, Spain suggests deleting the reference to *by way of derogation* in paragraph 2, as these measures are the ones specifically and ordinarily foreseen for these situations. These measures are meant as the ordinary legal consequences of reaching the adequate capacity and the obligations deriving from it.

Finally, Spain welcomes the notification system and the possibility of applying measures form the day after the notification is made. However, it would be necessary to foresee what would happen if after 6 months measures adequate capacity is still 75%.

Article 41bd

Measure applicable in case the annual adequate capacity of a Member State is reached

1. When the number of applicants that have been ~~are~~ subject to the border procedure in a Member State is equal to the number set out in respect of that Member State in the Commission implementing act referred to in Article 41bb or higher, the Member State may notify the Commission.

~~**2. Following reception of a notification in accordance with paragraph 1 by a Member State which is not identified pursuant to Article 7a AMMR as being under migratory pressure, the Commission shall promptly examine the information provided by the Member State concerned and decide, by means of an implementing act, whether or not that Member State is authorised to apply the measure referred to in paragraph 3.**~~

~~**For the purpose of deciding whether such authorisation is to be given, the Commission shall take account of the elements foreseen in Article 7b AMMR where applicable.**~~

3. Where a Member State notifies the Commission in accordance with paragraph 1 ~~and, in the case of a Member State that is not identified in Article 7a of [the AMMR] as being under migratory pressure, where authorised to do so by the implementing act referred to in paragraph 2, by way of derogation from Article 41b(1)~~, that Member State is not, required to examine in a border procedure applications made by applicants referred to in Article 40(1)(i) at a moment when the number of applicants that have been ~~are~~ subject to the border procedure in that Member State is equal to the number referred to in Article 41bb or higher.

(…)

Justification:

As it has been previously said regarding Art.41bc Spain welcomes this the two-tier system but underlines that in order to make it totally applicable, adequate capacity should be determined on an annual basis. Determining adequate capacity on an annual basis is the only possible way to clearly determined when it has been reached and then, when it is necessary to notify the Commission the need of applying measures included in this Article.

Spain welcomes the system based on a simple notification. However, paragraph 2 introduces the examination of the notification by the Commission transforming the notification in an authorization procedure when the Member State is not identified pursuant to Article 7a AMMR as being under migratory pressure. Spain considers that, once a Member State has reached its adequate capacity, its obligations have been fulfilled and a simple notification should be enough to inform of the measures to be put in place, including the temporary non-application of the border procedure beyond the adequate capacity. Having complied with the obligations under the Regulation, no authorization should be required, even if the Member State has not being identified as being under migratory pressure. Therefore, Spain suggests deleting the reference *to by way of derogation* in paragraph 3, as these measures are the ones specifically and ordinarily foreseen for these situations. These measures are meant as the ordinary legal consequences of reaching the adequate capacity and the obligations deriving from it.

In line with the reasoning followed throughout these comments, the adequate capacity is reached when a certain number of cases have already been processed under the border procedure.

Article 41be

Notification by a Member State in case the annual adequate capacity is reached or about to be reached

1. The notifications referred to in Articles 41bc and 41bd shall contain the following information:

(d) number of applicants that have been ~~are~~ subject to the border procedure in the Member State concerned at the time of the notification;

(e) the measure, referred to in Articles 41bc and 41bd, that the Member State concerned intends to apply or to continue applying;

(f) a substantiated reasoning in support, describing how resorting to the measure concerned could help in addressing the situation, and where applicable, other measures that the Member State concerned has adopted or envisages adopting at national level to alleviate the situation, including those referred to in Article 6a of the AMMR.

Member States may notify the Commission in accordance with Article 41bc and 41bd as part of the notification referred to in Article 44c and 44d [of the AMMR], where applicable.

3. Where a Member State notifies the Commission in accordance with Articles 41bc or 41bd, the Member State concerned shall inform other Member States accordingly.

4. A Member State applying one of the measures set out in Articles 41bc or 41bd shall inform the Commission on a monthly basis about the number of applicants that have been ~~are~~ subject to the border procedure in that Member State at that time.

Justification:

First of all, Spain would like to suggest placing Article 41be before of Articles 41bc and 41 bd for the sake of clarity.

Regarding the tittle, this delegations maintains that adequate capacity should be annual.

As this delegation has pointed out in Articles 41bc and 41bd notifications made by Member States whose adequate capacity is reached or about to be reached should be as easy and expedite as possible as the country is facing an overwhelming situation that needs to be addressed in the most effective way. It includes foreseeing procedures which don't place unnecessary administrative burdens. Thus, the Spanish delegation suggests to alleviate the content of notifications of paragraph 1.

As stated before, it should be also clarified that the adequate capacity is reached or about to be reached when a certain number of cases have already been processed and not by cases which at that moment in time are still under the border procedure.

Article 41c

Deadlines

(…)

2. The border procedure shall be as short as possible while at the same time enabling a complete and fair examination of the claims. The duration of the border procedure shall be no longer than 12 weeks from when the application is registered until the applicant no longer has a right to remain and is not allowed to remain. Following that period, the applicant shall be authorized to enter the Member State's territory except when Article […] 41g is applicable.

Member States shall lay down provisions on the duration of the examination procedure by way of derogation from Article 34, of the examination by a court or tribunal of a request to remain lodged in accordance with Article 54(4) and (5) and, if applicable, of the appeal procedure which ensure that all these various procedural steps are finalized within 12 weeks from when the application is registered.

The 12-week period may be extended to 16 weeks if the procedure cannot be concluded within that time due to actions of the applicant in order to delay or frustrate the conclusion of the procedure, or where additional time is needed by the determining authority or the court or tribunal of first instance to ensure an adequate and complete examination or an effective remedy.

Justification:

The border procedure should last for no more than 12 weeks as its main goal is to process cases with low recognition rates and high prospects of return as quick and fair as possible. Therefore, the Spanish delegation proposes to introduce the expression *no longer than 12 weeks,* to enable Member States to apply lower timeframes for decision-making.

Article 41e

Exceptions to the asylum border procedure

[…]1. The border procedure shall be applied to unaccompanied minors only in the cases referred to in Article 40(5)(b), and to minors below the age of 12 and their family members only in the cases referred to in Article 40(1)(f).

[…]2.Member States shall not apply or shall cease to apply the border procedure at any stage of the procedure where:

- ***(a) the determining authority considers that the grounds for rejecting an application as inadmissible or for applying the accelerated examination procedure are not applicable or no longer applicable;***
- ***(b) the reception conditions and guarantees, including the specific reception needs of minors, as provided for in Directive XXX/XXX/EU [Recast Reception Conditions Directive], cannot be met in the locations referred to in Article 41f;***

(…).

Justification:

The Spanish delegation would prefer to exclude minors and families with minors from the border procedure except in cases referred to in Article 40(1)[f] as minors should not be placed, as a general rule, in those procedures or in locations established for applicants of this procedure. This delegation remains flexible on the age of the minors which should be excluded from the personal scope of the border procedure.

Spain can accept new (b) of paragraph 1.

Article 41f

Locations for carrying out the asylum border procedure

[…]

1. During the examination of applications subject to a border procedure, Member States shall require, pursuant to Article 7 of Directive XXX/XXX/EU [Recast Reception Conditions Directive] and without prejudice to Article 8 thereof, the applicants […]to generally reside at or in proximity to the external border or transit zones or in other designated locations within its territory, fully taking into account the specific geographical circumstances of the Member States. Each Member State shall notify to the Commission, [two months after the date of the application of this Regulation] at the latest, the locations where the border procedure will be carried out~~, at the external borders, in the proximity to the external border or transit zones,~~ including when applying […]Article 41b and ensure that the capacity of those locations is sufficient to process the applications covered by that Article. Any changes in the identification of the locations at which the border procedure is applied, shall be notified to the Commission within two months of the changes having taken place.

(…)

Justification:

Locations for carrying out the asylum border procedure should allow for sufficient flexibility to ensure that the border procedure is effective and workable. Therefore, Spain suggests to transcribe the wording agreed in Article 6 of the negotiating mandate of the proposal for the Screening Regulation. (*In the cases referred to in Article 3, the screening shall generally be conducted at locations situated at or in proximity to the external borders or in other designated locations within its territory.*)