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From: Presidency
To: Permanent Representatives Committee
Subject: Towards the final stage of the Pact on Migration and Asylum
– Discussion paper

Migration and asylum are European challenges that require a European response. After more than seven years of negotiations, the European Parliament and the Council are closer than ever to reach a historical agreement in this field. The time has come to seize this opportunity with full determination in order to improve the current acquis by developing more efficient and sustainable systems and to foster mutual trust among Member States in this field.

The Spanish Presidency remains convinced that any final agreement on the Pact will necessarily have to respect four key features of the system that is being developed: effectiveness, practicability, fairness and balance between responsibility and solidarity.

Over the past weeks, COREPER has been extensively mobilised to discuss the advancement of the interinstitutional negotiations, with meetings on 8, 17, 27 November and 6, 10 December. This has been complemented with multiple meetings at JHA Counsellors level

In the run up to the decisive round of trilogue meetings on 18 and 19 December, the Spanish Presidency wishes to inform delegations about the latest state of play of negotiations and to discuss the outstanding political issues on which the Presidency is focusing to assess whether a deal in principle could be reached next week. This is always under the understanding that the Presidency will continue to uphold the Council mandate and lead the negotiations on the basis of the positions expressed by COREPER in preparing the political trilogues.

The Presidency will report back to Coreper after next week's trilogues. It is the intention of the Presidency to seek the support of the delegations for a deal in principle on the outstanding political issues. We already made important progress with the Parliament on questions of principle that are not negotiable for the Council and that were already to a very large extent accepted by the Parliament. Given the shared objective to conclude the Pact before the European elections, and since there is not much time left, the purpose is to agree on the main political issues with the European Parliament. To close the negotiations with the Parliament on these main political issues would pave the way to a final agreement still on time under the Belgian Presidency, avoiding the risk of dangerous steps back in the negotiations.

It goes without saying that a deal with the Parliament to conclude and not to reopen matters of principle, if possible at this stage, would be fully without prejudice to the prerogatives of Coreper to provide its final agreement on all the texts at the end of the negotiations under the Belgian Presidency. The final confirmation by Coreper of the provisional agreements will be possible only after the texts have been finalised at technical level, which will require further work under the Belgian Presidency.

1. Where we are coming from

The Pact on Migration and Asylum aims at providing for the first time a European comprehensive approach to managing migration and asylum. We have never been closer to achieving this common goal. Where we are today is thanks to the commitment and determination of all the precedent presidencies.

The Bulgarian presidency reached provisional agreements on the Reception Conditions Directive, the Qualification Regulation and the Common Resettlement Framework, the three elements from the Commission 2016 package to reform the Common European Asylum System.

In 2020, when the Commission presented its New Pact, the German presidency provided the first impetus to the negotiations inside the Council, while the Portuguese presidency had a first breakthrough by securing an agreement with the European Parliament on the European Union Asylum Agency Regulation. The Slovenian presidency continued the progress on the difficult negotiations.

The gradual approach proposed by the French presidency with an equivalent level of commitment on solidarity and responsibility allowed the Council to adopt general approaches on the Screening and Eurodac Regulations and Member states to sign a Voluntary Solidarity Mechanism declaration.

The Czech presidency secured an agreement with the European Parliament on a Roadmap that set the common objective of ensuring the Pact negotiations are concluded before the end of this mandate. It also provided for a breakthrough with the adoption of the partial general approach on the Asylum Procedure Regulation and confirmation of the provisional agreements with the European Parliament on the Reception Conditions Directive, the Qualification Regulation and the Common Resettlement Framework. In addition, the Czech presidency presented its “Way forward on EU migration solidarity and crisis response mechanism”, which became the blueprint for the most difficult elements of the negotiation.

The Swedish presidency translated the Czech concept paper into legislative texts on the Asylum and Migration Management Regulation (AMMR) and the border procedure in the Asylum Procedures Regulation (APR). This effort led to a general approach in the Council on the AMMR and APR, which represented a key breakthrough in the negotiations.

The Spanish presidency secured an agreement on the general approach on the Crisis and force majeure Regulation. In addition, in the final stage of this long process, the Spanish presidency has devoted tireless efforts in the interinstitutional negotiations with the European Parliament on the AMMR, the APR, the Screening regulation, the Eurodac regulation and Crisis and force majeure regulation.

2. What we aim to preserve

At this stage of the negotiations, it is not only important to understand the long and difficult process we have all gone through, but also to keep in mind the main purpose of this process, in terms of what the Council aims to achieve as a result of the negotiations. The cornerstone of the political agreement remains the need to secure a **balance between responsibility and solidarity**. This section contains the main core elements that, in the view of the Presidency, should be part of the final outcome of the negotiations with the Parliament.

In contrast to the current status quo, there would be **an effective mandatory screening** of all irregular arrivals to the EU, both **at the external borders** and **within the territory**, and a referral to the substantive procedures in a short period of time. This will be a major improvement in our system, allowing to control who enters into the EU territory, sending a clear message to smugglers, preventing secondary movements and ensuring security. In particular, the mandatory legal fiction of non-entry would be preserved. Member States would also have the flexibility to designate the locations where screening will take place, and on how to undergo the medical and vulnerability checks. Another key feature would be the direct access by the relevant authorities to the databases to conduct security checks. Mandatory screening within the territory will need to be secured in the very difficult negotiations with the European Parliament. Having common mandatory standards at external borders and within the territory needs to be matched with common guarantees that fundamental rights will be respected. This is why it is important to put in place an independent monitoring mechanism but limited in scope (not including border surveillance) and preserving discretion for MS in its implementation.

There would also be a **reinforced obligation to effectively register all categories in Eurodac**, be it applicants, irregular crossing, SAR cases, resettled persons, illegally staying third-country nationals and beneficiaries of temporary protection. Moreover, Member States would be able to collect data of resettled persons in third countries. The retention period for applicants of international protection would be maintained at 10 years. In coherence with Screening, the law enforcement authorities would have direct access to Eurodac, avoiding thus a cascade check prior to accessing Eurodac. Finally, Member States would be able to insert security flags in Eurodac, in order to strengthen the internal security.

The deal in principle would ensure an effective and **meaningful mandatory border procedure**, with no exclusion for unaccompanied minors posing a security risk and applicable to those applicants of a nationality for whom the proportion of decisions granting international protection is lower than 20%. The border procedure would be based on adequate capacity (30.000) and an annual cap (*4), with full application of the legal fiction of non-entry, which constitutes a key element of the reform. Moreover, Member States would have the flexibility to designate locations for the border procedure, and on how to organise the different steps of the procedure by their national authorities.

Moreover, an adequate approach towards the notion of **safe third country** would be preserved in line with the Council mandate, especially in relation to the connection criteria, which represented a key element of the Council mandate. In addition, an effective protection should remain available only until a durable solution is found. The existence of EU and national lists in this area should ensure complementarity and primacy of the EU list. Notwithstanding the above, the safe third country concept will be subject to review in line with the Council mandate.

The deal in principle would also include an effective and efficient system to determine the Member State responsible for the examination of the international protection claim. With that objective, the outcome of the negotiations should include take back notifications with no shift of responsibility and the transfer time limits set out in the Council mandate, including for situations of absconding, as well as the cessation grounds, including a differentiated approach on cases processed under the border procedure. When it comes to appeals, as a general rule, there would not be an automatic suspensive effect. Finally, siblings and beneficiaries of international protection would not be covered by the scope. Regarding the overall governance on migration and asylum, the role of the Council would be preserved when it comes to decisions on solidarity measures. A mandatory but flexible solidarity mechanism relying on a needs-based approach and providing for predictability would be preserved, which means that all solidarity measures would be considered as having equal value and Member States will have full discretion in choosing between the types of solidarity, including financial contributions in third countries.

On the Crisis regulation, the outcome of the negotiations should include **instrumentalisation** as part of the scope as well as force majeure. There should be a broad menu of derogations to respond to these exceptional situations. Moreover, the primary role of the Council would be preserved when deciding the derogations and solidarity measures.

3. What the key outstanding political issues are for a deal

The above sections clearly show an agreement on the Pact would represent a major step forward for the common European migration and asylum system, compared to the current situation.

Nevertheless, in order to preserve the above, the co-legislators should reach a political agreement on a number of key elements where positions remain apart.

Among those issues that are pending an agreement, the Presidency has identified four political elements, that are of the utmost importance and key to reach a deal in principle at the trilogues of 18 and 19 December.

Mandatory Border Procedure

On the basis of the Council mandate and the views expressed by delegations over the past weeks, a mandatory and meaningful border procedure, with a wide scope and the grounds contained in the Council mandate, is an essential prerequisite for a political agreement. During the negotiations, the Parliament has made it clear that the approach and key elements of the Council position on the border procedure could only be agreeable if additional safeguards are provided for minors and their family members, in particular minors under 12 of age, meaning they shall not be subject to the border procedure. Against this backdrop, the Presidency considers that any possible compromise would need to respect the following guiding principles to be acceptable for Member States: it would have to be a border procedure that respects the 20% recognition rate of asylum applications, and where no general automatic exclusion of families with minors is envisaged. However, delegations have expressed openness on a possible prioritisation for these cases. The adequate support for applicants with special needs and the locations where minors and their family members are accommodated could also feature as part of a compromise, provided that no additional administrative burden is placed on national authorities. Any possible compromise should also include strong and efficient safeguards to prevent any potential abuse of the system. Moreover, delegations have supported the relevance of keeping the misleading the authorities as a ground of the border procedure, although there is openness to provide for safeguards to avoid possible misuse. Finally, the request from the Parliament to include a monitoring mechanism of fundamental rights in relation to the border procedure could only be accepted if sufficient flexibility for Member States is provided.

Free legal counselling

The Presidency has carefully considered the arguments raised by a number of delegations regarding the significant administrative and financial burden that such provisions could potentially have, affecting negatively the efficiency of the border procedure as a whole. In this light, the Presidency considers that any final compromise on this aspect would need to respect the general principles outlined in the latest compromise proposal, whereby only legal counselling (not assistance) without representation would need to be ensured at the administrative phase in all procedures. Moreover, Member States would retain the possibility to organise the legal counselling in accordance with their national systems, which would be only ensured at the request of the applicant and would be financed by EU funds. In addition, in implementing these provisions Member States may request EUAA's assistance to provide legal counselling.

Responsibility and solidarity in AMMR

The scope, criteria and procedures to determine the Member State responsible are core elements of the Pact and in this regard, the Council mandate is the result of striking a delicate balance within the Council. With the aim to preserve that balance, the Presidency has shown openness to compromise on the inclusion of diplomas as a responsibility criterion. However, the Parliament deems the current state of play of the negotiations is unbalanced since accepting the core elements mentioned in section 2 means agreeing to a very large extent the Council mandate.

After extensive consultations with delegations, it has become clear that there is not enough support in the Council to support a compromise on the inclusion of siblings as part of the definition of family members, as requested by the Parliament. Alternatively, Article 16 and Article 21, pending both political agreement, are provisions where the Presidency invites delegations to consider possible compromises subject to the following conditions: regarding the criterion on family members who are beneficiaries/legally residing in another Member State (Article 16), there shall not be any overlaps with other existing legal migration instruments and it shall have a targeted scope; and regarding the irregular entry criterion (Article 21), it shall in any event apply to SAR cases (unlike the Parliament mandate).

Finally, it is essential the solidarity mechanism in AMMR remains meaningful and flexible. The Presidency believes the compromise proposal regarding Member States under migratory pressure due to recurrent SAR arrivals fully respects the Council mandate and ensures the adequate balance. No mandatory relocation or any less favourable treatment for other Member States under migratory pressure is possible under this proposal.

Instrumentalisation

The large majority of delegations considers the inclusion of instrumentalisation in the scope of the Crisis Regulation as a *condition sine qua non* for an agreement. The European Parliament strongly opposes to this inclusion and makes it conditional to further flexibility from the Council's side on derogations (mainly, the derogation on the extension of the scope of the border procedure), governance, prima facie and enhanced solidarity.

Bearing in mind the importance for the Council to preserve a menu of derogations as broad as possible, the Presidency invites delegations to explore some further flexibility regarding derogations, in particular but not only on those applicable for situations of mass arrivals.

In order to secure those core issues for the Council that are highly sensitive and problematic for the Parliament, including instrumentalisation, a broad menu of derogations and a mandatory but flexible solidarity, it is crucial that the Council shows some flexibility on governance, on the basis of a two-step approach whereby the Commission assesses the existence of a situation of crisis or force majeure, based on objective criteria, and the Council authorises the measures to be applied to address such a situation.

Given that the Parliament attaches great importance to its proposal on prima facie (swift procedure to grant international protection for certain categories of applicants in clear need of protection), the Presidency believes a compromise could be found under certain conditions, including: a non-binding instrument to be triggered only when situations of mass arrivals occur; Member States may decide to apply it on a voluntary basis.

Finally, regarding solidarity in situations of crisis, the Presidency proposes to include in the Crisis Regulation precisely the same menu of solidarity measures as set out in AMMR (relocations, financial contributions and alternative solidarity measures). Responsibility offsets will still be applied with the aim to ensure all relocation needs are met.

In view of the decisive trilogues of 18 and 19 December, the Spanish Presidency wishes to hear the views of delegations on the above mentioned elements as guidance for the negotiations during the trilogues on 18-19 December and expresses its confidence that it will continue to enjoy the trust and support shown by delegations so far.
