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LIMITE

JAI 130
MIGR 33
ASILE 13
FRONT 55

NOTE

From: Presidency
To: Delegations
Subject: Migration and asylum :
follow-up to the COREPER discussion on 28 January

As part of the gradual approach on migration and asylum, the Presidency has proposed to define the content of a first step, keeping in mind the need to preserve an equivalent level of commitment across the various aspects (notably, protection of external borders, responsibility and solidarity). Operationalizing the external dimension is also a key element in this first step.

Building on previous fruitful exchanges, notably in COREPER and during the informal JHA Ministerial meeting in Lille, it seems possible to identify areas of convergence and issues to be further discussed regarding this first step.

1. Checks and registration at the external border

Checks and registration could be based on the following elements.

Screening:

- *At the external border, checks would include a preliminary health check, a vulnerability check, an identity check and a security check.*

- These checks would apply to 3 categories of third country nationals not fulfilling the conditions of entry: those apprehended in connection with an unauthorized crossing of the external border, those disembarked following a SAR operation, and those who have made an application for international protection at the external border crossing points or in transit zones.
- Sufficient flexibility should be left to Member States as regards the choice of locations. In principle, the screening shall be conducted at locations situated at or in proximity to the external borders. However, where a Member State cannot accommodate third-country nationals in those locations, it can resort to the use of other locations within its territory.
- In any case, the persons concerned would be registered in Eurodac as part of the last stage of the screening.
- Screening within the territory : Member States would apply the screening to third-country nationals illegally staying 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 authorised manner and that they have already been subjected to screening in a Member State.

As regards the legal status of the persons concerned at the external border, the following could be considered:

For the sole duration of the screening process, the persons concerned would be considered as not having fulfilled entry conditions.

- This would help to provide a legal basis for measures taken by MS to prevent the risk of absconding. A decision of refusal of entry could be issued, in accordance with the SBC, at the end of the screening. Return could be carried out using the derogations of Article 2 §2 of Return Directive.
- This legal status will be strictly limited in time: 5 days (or 10 days in exceptional circumstances). This measure would thus be proportionated to the objectives of the screening process.

- The persons concerned should remain at the disposal of the competent authorities while checks are being processed. Flexibility should be left to MS as regards the choice of these measures. However, alternatives to detention shall be sufficiently effective to achieve the objective of the screening and prevent absconding. House arrests and residence restrictions (open or semi-open facilities, notably with monitoring) would be preferable means. It should be verified that the measures in place (be it detention or its alternatives), and the actual means devoted to their implementation, are fit for the purpose of keeping the concerned persons at the disposal of the competent authorities.

Registration in Eurodac :

- The status of persons disembarked after SAR operations could be clearly marked in Eurodac as a category. This would provide the Commission and Member States with a clear picture of these arrivals and help them to assess the pressure borne by some Member States.
- Data should be transmitted to the central system within 3 days. Within this specific time-frame, and at any time, the Member States concerned may request the support of EU Agencies (EUAA or FRONTEX) in order to complete these tasks. In extraordinary situations, in particular one of mass influx, Member States may extend the time limit to 5 days.

2. Financial, human and material support to Member States in charge of protecting the external border

The financial allocations covering the three HOME Funds for the period 2021–2027 amount to more than EUR 18 billion, of which more than 60% allocated to Member States programming and the remaining part to the Thematic Facility instrument. In addition, some EUR 11 billion are available for the functioning of the six HOME Agencies.

Member States are in the process of submitting to the Commission for approval draft programmes covering the whole programming period. Member States dispose of discretion for the programming of their national allocations. Financial resources are assigned to objectives and actions according to identified national needs and in line with minimum budgetary shares by objectives defined in the Fund-specific Regulations. Member States can also amend their programmes during the programming period to cope with evolving circumstances and new emerging needs. A mid-term review with additional allocations to Member States is foreseen in 2024.

The Thematic Facility represents slightly less than 40% of the overall funds and is a key instrument to increase financial flexibility in the implementation of the HOME Funds. Programming is done by the Commission through shorter-term multi annual work programmes with a flexibility to reattribute allocations within each work programme to face new needs. Such flexibility has been used recently to deal with the impact on Member States of the Belarus and Afghan migration crises.

Some components of the Thematic Facility are implemented by the Commission (e.g. Emergency Assistance) while others are implemented by Member States (e.g. resettlement, support for equipment to be put at the disposal of Frontex). This will progressively increase the financial allocations available to Member States. Roughly 60% of the EUR 1.7 billion available under the Thematic Facility for 2021-2022 is currently foreseen to be injected into Member States programmes.

3. EU return and readmission policy

Operationalizing the **external dimension** of migration is a key element of a EU enhanced return policy :

- A full and balanced use of all existing leverages should be made, as per EUCO conclusions, in a coherent and coordinated way between the EU and Member States, addressing third countries in a Team Europe spirit.
- To this end, MOCADDEM has been put into place and bundles the efforts of Member States and EU institutions. It has already started work on Iraq and Niger, for which “action files” have been presented, in order to bring together the various aspects of EU and Member States engagement into a coherent whole. Without prejudice to the respective competences of EU institutions, MOCADDEM discussions will clarify and proceed with the various actions to be implemented, with clear responsibilities and timeline. MOCADDEM will keep working on various third countries of interest, with a whole-of-route approach.

- The Council will identify a list of third-countries of concern when it comes to readmission cooperation, based on the report from the Commission on Article 25a of the Visa Code. This will be integrated in the ongoing engagement of the Commission and the EEAS with a number of third countries. Therefore, they will continue their ongoing outreach and take new outreach activities in order to stress to these partners the need to enhance their cooperation, taking into account the possible adoption, where necessary, of visa restrictive measures. Here as well, MOCADDEM will support this outreach for the countries mentioned in this list by coordinating the messages and streamlining the incentives and leverages.
- The Commission will present a strategic approach on readmission instruments, with the need to (i) assess the efficiency of existing agreements/arrangements, and (ii) unblock stalled negotiations, possibly by reviewing the negotiating mandates and (iii), identifying possible new third countries to formalize readmission cooperation with.
- Frontex could enhance its support to Member States, including through its international cooperation. The Council and the Commission will identify third countries with which status agreements and/or working arrangements should be negotiated.

Joint efforts on **internal aspects** are also needed beyond Frontex action.

- The soon-to-be appointed “EU return coordinator”, assisted by a “High Level Network” on return, should contribute to establishing an effective and common European return system, notably through “*fostering of operational cooperation with and between Member States in the management of return, readmission and reintegration processes*”¹. This could include: bringing closer return policies and practices, and notably on consular cooperation, contributing as well to a practical solidarity by matching the needs and the means of support between Member States. The Coordinator’s role as well as of the High Level network will be further specified by the Commission. In particular, the Coordinator assisted by the High Level Network will work towards an operational strategy on returns.
- The possibility to resume work on the “Return Directive” depends on the adoption of a position by the European Parliament. The Presidency could establish contacts with the European Parliament in order to discuss the timeline and the content.

¹ Publication of vacancy notice: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2021:411A:FULL&from=EN>

4. Support in terms of reception efforts, including a relocation mechanism as well as alternative solidarity contributions

An EU mechanism should be established that could be designed as follows:

- the mechanism should involve a sufficient number of voluntary Member States that would commit to accepting relocations under conditions to be specified. The number of people relocated to each Member State would be set taking into account objective and quantifiable criteria ;
- it should be simple, predictable, credible and effective: that implies that the mechanism must be based on : (i) clear information as regards the number and the types of relocations which can be made; (ii) a fast-track system for relocation detailed in agreed standards of operations, capitalizing on existing practices by streamlining procedures and the full use of Eurodac. Standards of operations could specify a standard deadline for contributing MS to implement/organize relocations. Members State of relocation should take over responsibility for examining the application of international protection of the persons relocated.
- the Commission should be involved in the functioning of the mechanism, given that it has a proven experience in this kind of solidarity actions. It should be given a crucial role : (i) for receiving the requests of the beneficiary Member States and ensure that their needs are given satisfaction ; (ii) for monitoring the situation and the relocations on a regular basis, so that the beneficiary Member States can be ensured all the scheduled relocations be made as swiftly as possible. The Commission, based on the contributions of the EUAA, should regularly report to the Council to guarantee the transparency and the effectiveness of the mechanism.
- Member States not participating to this mechanism would have to provide substantial and proportionate alternative solidarity measures.

Several topics in particular could be further discussed:

- Scope of the relocation mechanism :

In light of the distribution of migratory flows throughout the last months, it appears that the relocation mechanism will primarily apply to migrants disembarked after SAR operations. Moreover, in order to prevent an influx of irregular migrants, this mechanism should prioritise asylum seekers not manifestly ineligible for international protection (for instance : applicants of a nationality for which the proportion of decisions by the determining authority granting international protection is higher than 20%). The EU Agency for Asylum could help to assess this criterion, in parallel with the screening and the registration in the EURODAC database.

In addition, in order to be able to address specific situations of other Member States under pressure, in cases of mass influx manifestly exceeding the average number of asylum applications EU wide and the standard reception capacities, ad hoc voluntary programs of relocation could be implemented regarding asylum seekers not manifestly ineligible for international protection, giving priority to vulnerable persons.

- Alternative solidarity contributions from Member States not participating to the relocation mechanism should also be detailed in order to contribute to the costs related to the relocation mechanism (control procedures and accommodation systems, relocations). The alternative contributions could actually take the form of financial contributions (or other forms: human, material support if this is matching frontline MS' needs).

These contributions should : (i) be proportionate to each Member State, for example on the basis of a “fair share”; (ii) meet the needs of the beneficiary Member States—this is why the Commission should be in charge of collecting the expressions of needs/requirements from these Member States in the frame of a “hub” which would provide an interface between them and the contributing States in order to arrive at the best possible match between the contributions and the needs. In this regard, the Commission should provide an analysis of the expressions of needs/requirements, highlighting those needs not being covered by EU funding or support, for which solidarity from other MS would be necessary.

– Review clause: the mechanism would apply for one year after approval (similarly, the commitments on screening / Eurodac would apply for one year after entering into force). Commitments could then be reviewed in order to consider them to be renewed.

5. Improving the implementation of “Dublin III Regulation” as well as stepping up the work on convergence in order to prevent and remedy secondary movements

A roadmap could be defined with view to improving the implementation of the current Dublin regulation. This could include resorting to the administrative arrangements provided under Art. 36 of “Dublin III Regulation”: Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, notably as regards: (i) exchanges of liaison officers—which have proven their worth several times ; (ii) simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back applicants; (iii) progressive lifting / proportionate use of health-related restrictions. Such arrangements would be part of the elements taken into account in the first step. Timeline of entry into force could be consistent with the start phase of the relocation mechanism.

Lastly, it would be useful to promote the convergence of national practices in the field of asylum and reception systems, in particular by promoting the work of the EUAA on country guidance to ensure Member States ownership of the process.