



EUROPEAN COMMISSION

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*Ms Maria Elisabetta
ALBERTI CASELLATI
President of the
Senato della Repubblica
Piazza Madama, 1
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Dear President,

The Commission would like to thank the Senato della Repubblica for its Opinion on the five draft Regulations of the European Parliament and of the Council forming the Asylum and Migration Pact {COM(2020) 610-611-612-613-614 final}¹.

The New Pact on Migration and Asylum covers all the elements for a comprehensive European approach to migration. It sets out improved and faster procedures throughout the asylum and migration system and balances the principles of fair sharing of responsibility and solidarity. This is crucial for rebuilding trust between Member States and confidence in the capacity of the European Union to manage migration.

¹ Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (COM(2020) 610 final); 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 (COM(2020) 611 final), the proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM(2020) 612 final); proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum (COM(2020) 613 final); amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818 (COM(2020) 614 final).

The Commission takes the concerns expressed by the Senato della Repubblica seriously. In response to these comments, the Commission would like to refer to the attached annex.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Senato della Repubblica in its reasoned Opinion and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
First Vice-President*

*Ylva Johansson
Member of the Commission*

Annex

The Commission has carefully considered each of the issues raised by the Senato della Repubblica in its reasoned Opinion and is pleased to offer the following clarifications:

The Commission considers that the New Pact on Migration and Asylum strikes the right balance between responsibility and mandatory solidarity. For the first time the Asylum and Migration Management Regulation proposal sets out the different components of the principle of solidarity and fair sharing of responsibility to be applied to migration management. The border procedure and the three well-defined cases for its mandatory application, as provided for in the amended proposal for an Asylum Procedure Regulation, contain flexibility thanks to a number of exceptions foreseen and need to be considered in the context of the solidarity mechanism outlined in the proposed Asylum and Migration Management Regulation. The screening, provided for in the Screening proposal, is a pre-entry step after which persons are swiftly referred to the appropriate procedure, either the asylum or the return procedure, and in both cases, all safeguards and appeals are guaranteed.

While the responsibility criterion linked to the first country of entry remains part of the proposal for the Asylum and Migration Management Regulation, it should be considered in combination with the other responsibility criteria as amended by that proposal. These amendments include (i) the widening of the definition of family members to include siblings and families formed in transit and the simplification of the rules on evidence relating to family reunification; (ii) the extended responsibility of the Member State that issues a visa or a residence document, should the application be registered within three years after expiry of the respective document as opposed to the current rules of 6 months after expiry of the visa and two years after expiry of the residence permit; (iii) a new criterion linked to the possession of a professional or educational diploma is also added. The aim is to limit the number of cases that fall under the responsibility of the Member State of first entry.

The proposal by the European Parliament in its report to delete the first entry criterion and replace it with a distribution mechanism, although innovative, was not considered as a feasible solution during the lengthy discussions with the Member States on the Commission's 2016 proposals.

Furthermore, the Commission would like to highlight that the solidarity mechanism is built on the principle of guaranteeing effectiveness whilst also ensuring flexibility. It is therefore not clear why the proposed types of solidarity contributions are not considered apt to counterbalance the responsibilities of the countries of first entry. The purpose of the Pact's solidarity mechanism is to reduce the number of persons present in Member States with a high number of arrivals and to provide support in capacity building, operations and measures in the field of the external dimension where these affect the migration flows towards particular Member States.

The obligation for Member States to contribute to solidarity measures in situations of migratory pressure or in situations of search and rescue is set out in the main provisions

of the proposed Regulation for Asylum and Migration Management. The precise solidarity contributions of the Member States will be set out in an implementing act, laying down the conditions and timeline for implementation of the relevant measures. In the case of solidarity contributions to Member States subject to disembarkations following search and rescue operations, it is envisaged that the implementing act can be amended if the solidarity pool is drawn upon to a level of over 80%. The Commission will not hesitate to exercise its powers under the Treaties and proceed with infringement procedures if Member States do not comply with their obligations.

This proposed obligation on Member States not to allow entry to their territory pending screening (referred to as “fiction of non-entry”) does not mean that there is no jurisdiction of a Member State of (physical) entry in relation to screened persons. The Member State has jurisdiction over these persons, as clearly expressed in the case-law of the European Court of Human Rights and Union law cannot deny this. The legal fiction of non-entry can be useful given its aim, to impose the necessary measures to make sure that screened persons remain available to screening authorities until their identity is established and their status is clear, before channelling them to the right procedure. Such a possibility is laid down in Article 5 (para 1 (f) first limb) of the European Convention on Human Rights, which clearly says that detention of a person to prevent that person effecting an unauthorised entry into the country is allowed under certain conditions. This provision enables Member States to keep screened persons within a certain place, at the disposal of authorities performing the screening. Resorting to the legal fiction of non-entry has to be proportionate and used just for the period necessary for the screening or checking of the asylum status. The same fiction is already now widely used at border crossing points – at the airports or in the so-called second line checks, when there are doubts concerning the fulfilment of entry conditions, which are checked and often lead to refusal of entry. During these checks, it is assumed that the persons concerned have not been authorised to enter into the territory.

According to the proposal on Screening, the Member States should determine appropriate locations for the screening at or in proximity to the external border taking into account geography and existing infrastructures, ensuring that apprehended third-country nationals as well as those who present themselves at a border crossing point can be swiftly submitted to the screening. The proposal leaves a margin of discretion to Member States on the choice of locations as well as on the measures necessary for keeping screened persons at the disposal of authorities during the screening. The proximity of the border is considered important in ensuring that the legal fiction concerning non-entry is applied in a proportionate manner.

The screening should be as short as possible, and should in a normal situation not exceed five days. The maximum duration should only be reached in rare, difficult cases or in situations where many persons need to be subject to screening at the same time. Moreover, if the screening has reached the maximum duration of 5 days, or 10 days in exceptional situations, the screening should end immediately, even if not all steps have been finalised, and a procedure of asylum or return or refusal of entry, which will lead to a decision which can be judicially reviewed, should start immediately. As regards the

expenses related to these new tasks, the proposal sets out that these can be covered by the resources available under the new multiannual financial framework 2021-2027.

The rationale behind the 20% recognition rate threshold is linked to the principle that it concerns persons who are likely not to be in need of international protection. This principle governs all the grounds for the border procedure, mandatory or optional. It needs to be underlined, however, that the recognition rate criterion is not an absolute one. All exceptions foreseen in the amended proposal (minors under 12 and their family members, unaccompanied minors, etc.) will apply and the persons falling under the scope of these exceptions would not be put in the border procedure and as such will be eligible for relocation. Moreover, if a person comes from a third country covered by the 20% or lower recognition threshold and, due to his/her personal circumstances the low recognition rate cannot be considered as representative for his/her protection needs, that person should not be put in or should be removed from the border procedure and such a person would become eligible for relocation.

In addition, the 20% recognition rate is not relevant when determining responsibility for examining an application for international protection under the Asylum and Migration Management Regulation. Therefore, when another Member State can be designated as responsible, the Member State carrying out the border procedure may decide to allow the applicant to enter the territory while carrying out the determination procedure pursuant to that Regulation. Finally, for the persons in the border procedure, relocation is possible where another Member State contributes to voluntary solidarity. Hence, the provisions of the amended proposal for an Asylum Procedure Regulation craft a very flexible border procedure that allow for case by case assessments and tally with the relevant provisions in the Asylum and Migration Management Regulation.

Return sponsorship aims at increasing the capacity of the Member States under pressure to return and to ensure that returns take place as swiftly as possible. It is also intended as a measure to make returns more effective through mutual support and increased cooperation.

The Commission does not share the view that the mechanism for return sponsorship is not in line with the principle of proportionality. Return sponsorship would not increase the costs for the benefitting Member State. Both the benefitting and sponsoring Member States will have access to EU funding, for carrying out support activities. Therefore, there is no reason to assume that the costs for the Member State of arrival will increase. On the contrary, return sponsorship will ease the burden for the benefitting Member States by ensuring a faster return migrants without the right to stay or through the transfer of the returnee to the sponsoring Member State.

The eight-month period for supporting the return of irregular migrants from the territory of the Member States benefitting from sponsorship was set after consulting various stakeholders and taking into consideration the length of return procedures. A shorter period would have been inefficient for the completion of the process and a longer period would not provide sufficient guarantees to the Member State under pressure.