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*Mr Anglu Farrugia
Speaker of the House of Representatives
Parliament of Malta
Freedom Square
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Dear Speaker,

The Commission would like to thank the Kamra tad-Deputati for its Opinion on the five proposed 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 and its accompanying proposals addresses 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.

The Commission takes the concerns expressed by the Kamra tad-Deputati seriously. In response to these comments, the Commission would like to refer to the attached annex.

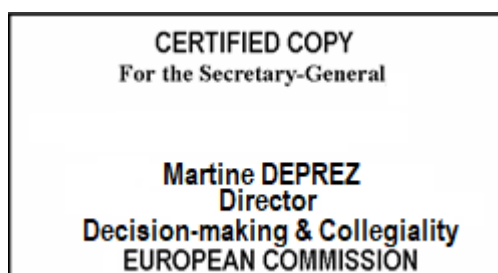
¹ Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (COM(2020) 610 final); amended proposal for a Regulation of the European Parliament 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 hopes that the clarifications provided in this reply address the issues raised by the Kamra tad-Deputati in its Opinion and looks forward to continuing the political dialogue in the future.

Yours faithfully,

Maroš Šefčovič
Vice-President

Ylva Johansson
Member of the Commission



Annex

The Commission has carefully considered each of the issues raised by the Kamra tad-Deputati in its Opinion and is pleased to offer the following clarifications:

The Commission welcomes the introductory remarks of the Kamra tad-Deputati on the proposal for an Asylum and Migration Management Regulation (COM(2020) 610 final), in particular regarding the need for a comprehensive approach and the need for a fair sharing of responsibility and solidarity.

The Commission wishes to emphasise that all solidarity measures are mandatory. It also wishes to clarify that all types of contributions to a Member State under pressure and in the case of the Commission stepping in to determine the level of contributions to Member States facing disembarkations following Search and Rescue operations need to be proportionate to each Member State's fair share.

All solidarity measures are designed to contribute to alleviating the migratory pressure for benefitting Member States. The 'other measures', including capacity building measures, operational support and measures in the field of the external dimension, will be determined by the Commission (as all solidarity measures) depending on the specific situation and needs of and in consultation with the relevant Member State. This category of 'other measures' is broad so as to ensure that effective support can be provided to the Member State under pressure or faced with disembarkations following Search and Rescue operations.

Although the proposed solidarity mechanism provides some flexibility for contributing Member States when choosing the type of solidarity measures, the correction mechanism ensures that the benefitting Member States will benefit from a solid guarantee in terms of relocations and/or return sponsorship.

The Commission has indicated its readiness to closely involve the Member State concerned in its assessment of pressure and when determining the relevant solidarity measures for both Member States under pressure and faced with disembarkations following Search and Rescue operations. The Commission needs to be able to trigger the pressure mechanism on its own initiative in case the situation faced by the relevant Member State threatens to also impact the application of the Common European Asylum System in other Member States.

The Commission understands that several comments by the Kamra tad-Deputati relate to the solidarity mechanism for disembarkations following Search and Rescue operations. The Commission notes the proposal of the Kamra tad-Deputati to provide for alternative ports in this context. Under the proposal, persons subject to the border procedure are excluded from the scope of relocation under the mandatory solidarity mechanisms for Member States under pressure or subject to disembarkations following Search and Rescue operations. The rationale is that relocation should concern persons most likely to be granted international protection.

This is why the return sponsorship solidarity measure is relevant, as it is designed to alleviate the pressure of Member States relating to persons who do not have the right to

stay in the EU and need to be returned, and is therefore directly relevant for persons who receive a negative decision in the border procedure. As underlined by the Kamra tad-Deputati, the solidarity measures proposed by the Commission are thus complementary and all seek to alleviate the burden on the benefitting Member States.

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 takes note of the suggestion of the Kamra tad-Deputati to reduce the period after which the person is transferred to the sponsoring Member State from eight months to six months. The period of eight months was set after consulting stakeholders and taking into consideration the length of return procedures. This period was considered to ensure the right balance between the time needed for return sponsorship support to produce results and the need to provide sufficient guarantees to the Member State under pressure. During the eight-month period, the sponsoring Member State can, depending on the needs of the benefitting Member State, offer a series of measures aimed at supporting the benefitting Member State to ensure swift returns, which may include measures to support reception capacity.

It is proposed that the sponsoring Member State will select the nationality to return also based on the needs of the benefitting Member State. This means that return sponsorship will not increase the burden on the benefitting Member State, but rather release the burden by ensuring a faster return of irregular migrants or, if that proves not to be possible, a transfer to the territory of the sponsoring Member State. It can therefore have a very significant beneficial effect for the Member State under migratory pressure.

The fact that certain Member States can choose return sponsorship as an alternative to relocation should not be seen as a measure that would only provide limited relief to the benefitting Member State. Return sponsorship is one of the tools of our solidarity toolbox, as well as a new measure to increase coordination and cooperation in the area of returns. The solidarity mechanism provided in the new Pact is flexible in design so that it can be applied to situations with different migratory flows and realities. The fact that there is no obligation to provide a specific solidarity measure ensures more adaptability and ultimately a more efficient system.

The proposed changes to the criteria for establishing responsibility for examining an application for international protection aims at ensuring a better balance within the hierarchy of the responsibility criteria. Therefore, the amendments should be considered in combination with each other. Both the extended responsibility should a person apply for protection after the issuance of a visa or a residence permit, as well as the inclusion of the new criterion should the person be in possession of a diploma and qualification aim, in the same way as the extended definition of family member to include siblings and families formed in transit, at limiting the number of cases that fall under the responsibility of the Member State of first entry. The extended applicability of the criterion of first entry to three years after the irregular entry took place aims at creating disincentives for third-country

nationals or stateless persons to wait for the current 12-month time limit to run out before they apply for international protection.

With respect to the 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), the Commission would like to make the following observations.

As regards the Kamra tad-Deputati's observation that relocation should apply to all third country nationals, without the need to be in a situation of crisis and not based on recognition rates, and that solidarity should be available at an early stage to avoid a situation of crisis, the Commission notes that the proposal:

- introduces specific rules on the application of the solidarity mechanism, namely a wider scope for relocation that is extended to include all applicants, be they subject to the border procedure or not, irregular migrants, and persons granted immediate protection;*
- proposes shortened timeframes for triggering the compulsory solidarity mechanism procedure provided for in the Regulation on Asylum and Migration Management;*
- as regards return sponsorship, the obligation to transfer the irregular migrant to the territory of the sponsoring Member State will be triggered if the person concerned has not returned or has not been removed within four months (instead of eight months).*

As regards prevention, the proposal puts in place more robust tools to fend off any future crises, such as situations of mass influx, but also flexibility in situations of force majeure, in light of the lessons learned from the COVID-19 pandemic.

The Commission believes that it would be very difficult to have precise definitions in the context of a crisis situation. The Commission's proposal aims to ensure that the realities of such situations may be covered by this Regulation by providing the necessary flexibility for use in a wide range of crisis that may arise and would therefore fall within the scope.

Finally, given the development of the concepts and rules of qualification for international protection, and in view of the fact that this proposal for a Regulation lays down rules for granting immediate protection status in crisis situations, the Temporary Protection Directive should be repealed. Under this proposal, immediate protection should be granted to displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin.

The screening as foreseen in the proposal on screening of third country nationals at the external borders (COM(2020) 612 final) 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. The proposed provision according to which third-country nationals apprehended in connection with an unauthorised crossing of the external border or applying for international protection at external border

crossings points shall not be authorised to enter the territory of the Member States pending screening would in no way entail a possibility for the Member States to exclude part of

their territory from being designated as such or to carry out the screening in facilities outside their territory. As provided for in Article 6 of the proposal, the screening of those third-country nationals is to be conducted at locations situated at or in proximity to the external borders which does not mean that the persons concerned should be prevented from remaining physically on the territory of the Member States concerned, including those third country nationals who have been disembarked following a Search and Rescue operation. What the proposal entails is that their entry shall not be authorised, which must be understood as an authorisation to enter in legal terms. This approach is consistent with that currently 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 set out in the Schengen Borders Code. During these checks, it is considered that the persons concerned have not been authorised to enter into the territory and necessary measures to avoid absconding can be taken.

According to the proposal on screening, 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 important for the screening at the external border. Detention may only be used as a measure of last resort and all guarantees and safeguards will be applicable.

The screening should be as short as possible, and should in a normal situation not exceed five days. Nevertheless, the proposal provides that in exceptional circumstances where a disproportionate number of third country nationals need to be subject to screening at the same time, that period may be extended by a maximum of an additional 5 days. 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. A procedure of asylum or return or refusal of entry, which will lead to a decision which that 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.

Concerning the amended proposal for an Asylum Procedure Regulation (COM (2020) 611 final), the Commission took note of the fact that the Kamra tad-Deputati agrees that “a mandatory border procedure would make a significant difference to the return of persons who do not qualify for international protection”. The proposed border procedure applies mandatorily in three well-determined and limited cases of persons who are likely not in need of international protection: persons coming from countries for which the proportion of decisions by the determining authority granting international protection is 20% or lower, persons representing a danger to security and persons misleading the authorities. With respect to the first ground, determining the nationality of an undocumented person can indeed be one of the challenging aspects of processing an asylum application. The

Commission would like to recall the European Asylum Support Office's work in this respect, which brings together UNHCR and Member States' best practices in the area.

Member States can derogate from using the border procedure when the applicant is a national of a third country that does not sufficiently cooperate on readmission, and for whom there is therefore no reasonable prospect of return. The trigger of this derogation relies on Article 25a of the Visa Code, using the possibility given to Member States to notify to the Commission that a third country does not cooperate sufficiently. Improving readmission cooperation to the benefit of all Member States is key for the successful implementation of this important component of the New Pact.

Enhanced engagement with third countries, which should be set in motion by the so-called Article 25a assessment reports, should also contribute to making return sponsorships work and in determining the nationalities that will be channeled into the border procedure. As already foreseen by the Commission proposal, and as flagged in the Opinion, irregular migrants from low recognition countries are subject to the border procedure and therefore prioritised in terms of return.

The success of the comprehensive approach to migration put forward in the New Pact relies on the successful set-up of all the pillars of the common European system on return and, in particular, on better cooperation on readmission. To make the return sponsorship, as well as the border procedure work, the Commission is committed to supporting Member States to ensure safe and swift returns.

As regards entry to the territory, the approach is similar to and consistent with that highlighted above in respect of the proposal for a Screening Regulation. The proposal for an Asylum Procedure Regulation provides that the asylum border procedure is to be applied to applicants for international protection who have not been authorised to enter the territory and that, as a rule, their entry should not be authorised during that procedure. This must be understood only as an authorisation to enter in legal terms; it cannot be interpreted as a possibility for Member States to prevent that the persons concerned remain physically on the territory during the examination of their applications. Finally, as regards changes that such a procedure will entail for Member States of first entry, the Commission would like to reiterate that the necessary financial and logistical support will be available for the implementation of the proposals accompanying the Pact, including from the EU agencies (European Asylum Support Office/European Union Agency for Asylum, Frontex).