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NOTE

From: Presidency

To: Permanent Representatives Committee

Subject: 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
- State of play and guidance for further work

1. On 13 July 2016, as a part of the reform of the Common European Asylum System (CEAS), the Commission submitted a proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU¹ (the Asylum Procedure Regulation – APR). The aim of the proposal is to streamline the procedures in all Member States to achieve a higher degree of harmonisation and greater uniformity in the outcome of asylum procedures, thereby removing incentives for asylum shopping and secondary movements between Member States.
2. The proposal has been discussed in detail at different levels. In total, more than ten rounds of examination have been completed over the last two years in the Asylum Working Party and by JHA Counsellors. General policy debates were also held in SCIFA on two occasions in May 2018 and in October 2018. The file was discussed as well in COREPER in June 2018.

¹ 11317/16

3. Since the beginning of its term and on the basis of the work done by the previous Presidencies, the Romanian Presidency has been strongly committed to further advance the discussions on the proposal and has made constant efforts to take into account the concerns expressed by Member States. As a result, the Presidency believes that the proposal as set out in 7708/19 ADD 1 is now, in most parts, a balanced text that can be supported by the required majority of the Member States, except of three difficult issues:
 - the definition of the 'final decision' (Art 4(2)(1));
 - Section V on the 'Safe Country Concepts';
 - the border procedure (Art 41).
4. Regarding the definition of the 'final decision', a few delegations have raised issues linked with the specific way in which their judicial systems are organised, particularly with regards to the number of appeal instances. However, based on the discussion during the last JHA Counsellors meeting on 19 March 2019, the Presidency believes that a compromise solution could be identified shortly. The Presidency intends to continue working on the issue to secure as broad an agreement as possible.
5. Given the very sensitive nature of Section V concerning the safe country concepts, and in particular, the proposal for an annex which should contain an EU list of safe third countries, the Presidency's intention is to tackle this question when the rest of the proposal has been agreed upon by the delegations and following a contribution by the Commission on a list of countries as requested during COREPER on 18 July 2018.

6. However, with respect to the border procedure, the Presidency believes that no further progress can be achieved at technical level without clear political guidance. Given the importance of this concept for the whole proposal, as stressed repeatedly by all the delegations, the work on the file cannot progress until an acceptable solution is found.

The issue of the border procedure has been discussed by JHA Counsellors at length. In order to propose an efficient solution, the Presidency launched a dedicated questionnaire on the most sensitive aspects of the border procedure and the current practices of the Member States. More than half of delegations provided their replies. Moreover, to help the delegations assess the possible impact of the proposal, at the request of the Presidency, EASO prepared a report on the current application of the border procedure in the Member States. Despite these efforts, it has been impossible to find a common ground and it has become clear that there are major differences between positions of delegations that cannot be resolved at technical level. Therefore, the Presidency would like to ask COREPER for further guidance on the issue.

7. There are three fundamental disagreements between delegations relating to the border procedure:

(a) the compulsory application of the border procedure

Under the currently applicable Asylum Procedure Directive, Member States are permitted, but not obliged, to apply a border procedure at the border or transit zones. A large majority of Member States request that in the APR, the application of such a border procedure should be made mandatory in case of applications made by third country nationals who do not fulfil the condition for entry in the territory of the EU and which are subject to inadmissibility examination or fall under the accelerated examination procedure. The aim would be to efficiently handle applications which are less likely to be accepted and prevent absconding and secondary movements.

A broad compulsory application of the procedure is opposed by many frontline Member States on the grounds that it would require a profound change in their national procedures, a large investment in the infrastructure necessary to accommodate the applicants and would also lead to much higher personnel costs. This is seen by those Member States as disproportionate given the perceived limited added value of such an approach.

As a compromise solution, the Presidency suggested that the border procedure should be applied in a compulsory manner only in a limited number of cases, namely for applications subject to inadmissibility examination and for three out of nine grounds for which the accelerated procedure can be applied. Moreover, in order to provide Member States with sufficient time to prepare for the implementation of the procedure, the Presidency introduced a phased approach, whereby the compulsory application of the border procedure would only take place 36 months after the adoption of the Regulation.

(b) the geographical scope of the possible compulsory application of the procedure

Apart from a more general disagreement on the compulsory nature of the border procedure, delegations also differ on the possible geographical scope of such a compulsory application. The delegations that are in favour of the compulsory procedure, would like it to be applied for applications made at border crossing points, and for persons who were apprehended in connection with irregular crossings of all the land, sea and air external borders.

Such a broad compulsory application of the procedure is strongly opposed by Member States with long external land and/or sea borders. They point out that it would not be feasible to ensure sufficient infrastructure and personnel along the whole border to accommodate and handle applicants, and would also imply a complete overhaul of the way in the which they currently deal with asylum applications made at the border. Given that in some Member States there is a high number of external border crossing points that receive very few asylum applications, the necessity and proportionality of such a procedure is also put into questioned by those delegations.

In an attempt to meet the requirement of the majority of delegations, and at the same time address the concerns raised, the Presidency proposes that the compulsory application of the border procedure should be applicable to a limited number of cases: only for applications made at the external border crossing points or transit zones. Moreover, the Presidency proposes that Member States would be able to exclude the compulsory application of the border procedure in the external border crossing points with a small number of applications made in the preceding six months, which provides for additional flexibility.

(c) the compulsory application of the border procedure to persons disembarked as a result of the Search-and-Rescue (SAR) operations

The third major disagreement between delegations regarding the border procedure concerns its compulsory application to persons disembarked following SAR operations in international waters. A majority of Member States insist that the border procedure should be applied to such persons in a compulsory manner. This is because they consider that persons saved in SAR operations in international waters constitute a large proportion of asylum applicants and excluding them would significantly diminish the efficiency of the mandatory border procedure.

At the same time, this question raises strong objections from the Member States which due to their geographical location, carry out the vast majority of SAR operations. Although it is legally possible for Member States to treat applications from such persons in a border procedure (as this is allowed under the currently applicable Asylum Procedure Directive), the issue remains very sensitive and delegations point to the humanitarian aspect of SAR operations. In order to secure overall support for the introduction of the compulsory border procedure, the Presidency proposes in its compromise text to exclude such persons from the compulsory application of the procedure, while maintaining a possibility for national authorities to do so on a voluntary basis. This would cater the concerns of the frontline Member States, while the voluntary application of the procedure would still contribute to a better management of migration, combating secondary movements in a responsible manner and correctly channelling migrants to the relevant procedures, with due respect for vulnerable and humanitarian cases.

In this context the delegations are invited to:

- *take note of the progress achieved in discussions on the proposal for the APR;*
- *take note that further work will be carried out in relation to the definition of the 'final decision', while Section V - 'Safe Countries Concept' will be discussed at a later stage, when other parts of the text have been agreed upon;*
- *provide guidance for further work concerning the border procedure by answering the following three questions:*

Question I: can the delegations support the Presidency proposal concerning the 36-month phase-in period for the mandatory application of the border procedure?

Question II: can the delegations support the Presidency compromise proposal which foresees that the mandatory border procedure would be applied at the external border crossing points or transit zones only? This includes the possibility for Member States to exclude the application of the mandatory border procedure in border crossing points with a very low number of asylum applications made in the preceding six months.

Question III: can the delegations support the Presidency compromise proposal which excludes the mandatory application of the border procedure to persons saved in SAR operations, while maintaining the possibility for Member States to do so on a voluntary basis.
