Council of the European Union
General Secretariat

Interinstitutional files:
2020/0279(COD)

Brussels, 29 September 2021

WK 11463/2021 INIT

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WORKING PAPER

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From:	Presidency
To:	Delegations
Subject:	Member States' questions regarding the Presidency compromise proposals on Part III of the AMMR

Delegates will find attached a document on the above subject containing questions posed by Member States during informal AWP meetings on 13 and 28 July 2021 and on 8 and 16 September 2021 together with answers.

MEMBER STATES' QUESTIONS REGARDING THE COMPROMISE PROPOSAL OF PART III OF THE AMMR

Questions posed by Member States during informal AWP meetings on 13 and 28 July 2021 and on 8 and 16 September 2021 that were not addressed by the Presidency or the Commission during the meeting and remained unanswered.

Article 2:

Questions regarding the additional subpara in point g) (married minors):

Does relevant national law mean only the substantive provisions or also conflict law provision (referring to private international law of the Member State)? If only substantive law was meant, then hardly any marriage concluded abroad could be affected, because the national requirements are not fulfilled. What exactly would be examined – meaning p.e. when the marriage is avoidable, or only when it is valid/ invalid?

This wording was taken from the text agreed in Qualification regulation proposal, where the MS stressed concerns regarding married minors.

We consider this provision means any relevant national law that is applicable when assessing whether the marriage of a minor would or would not be recognized in the MS concerned.

We consider that the individual assessment should primarily be based on the assessment of best interest of child, taking into account the individual circumstances of the minor, age and maturity of the minor. The assessment should primarily be based on the age of the minor and legal age of marriage. Nevertheless, it should also cover the examination of the criteria that have to be met in accordance with national law in order to recognize a marriage of minor. However, it should be kept in mind that the Regulation establishes which Member State is responsible for examining an individual application for international protection, since the consequence of applying this Regulation is not that the applicant receives a residence permit based on the family link, but rather deciding in which Member State the applicant shall have his or her rights to international protection assessed, it shall not be more difficult to apply this Regulation than it is to apply per example the family reunification directive.

There was also a diversion of views whether international private law should be taken into consideration. In this regard CLS provided further explanations. As CLS mentioned while intepreting this provision, we have to look at its effet utile, this provision was not design to incorporate the law of third countries, but rather to ensure that the best interest of the minor are taken into account (basen on the language "had it been contracted in the Member State concerned"). If the Member State assess that the needed substantive conditions (legal age, consent), then the marriage can be recognized. This provision is not meant as a conflict of law provision to incorporate the law of third country, but rather enables the Member States to apply their substantive legal provisions.

How to interpret a situation, where the minor is in Member State A and the spouse is in Member State B and where the marriage would be legal only in one of the Member States? There is nothing in AMMR that could oblige the MS to recognize the child marriage.

Based on the established practice, the Member State where the married minor is present and has relevant elements, sends the take charge request to the Member State where the spouse is legally present. The requested Member State then assesses whether the marriage of the minor could be recognized in accordance with its national law. If such marriage would not be recognized by the second Member State, the Member State should always assess the best interest of child on a case by case basis. There is also possibility for any of the two Member States to apply discretionary clause in order to reunite the minor with the spouse, regardless if the marriage is recognized by national law.

Which Member State is assessing the best interest of child (requested or requesting Member State) in relation to Art. 13(4)?

According to the already established practice and interpretation of Article 13(4) AMMR that remained unchanged compared to Dublin III regulation, except for the new point e), it is the obligation of both MS (requested and requesting Member State) that have to assess the best interest of child.

<u>Questions regarding the definition of absconding in point p):</u>

Does the definition cover only the situations where the person is missing or also scenarios where the person is not available to the authorities? What does it mean, "to remain available to the authority"?

The proposed new definition tries to encompass different situations that could be considered as absconding, in the light of concerns raised by Member States. This covers also cases where the person is missing and did not notify the authorities beforehand of their absence, where required to do so.

Taking the Commission's proposal as our starting point, we consider the notion of "remain available to the authorities" covers different situations where the person concerned is not available to the authorities in order for them to conduct the procedures set out in this Regulation. For example, where it could lead to the impossibility for the authorities to carry out the transfer, because they do not know the whereabouts of the person concerned. However, this does not cover cases of non-cooperation. We would like to emphasize once again that we addressed the concerns stressed by some Member States regarding the notion of non-cooperation in Art. 35(2), where we found it would be appropriate to provide for a consequence of non-cooperation.

As already stated during the previous meeting, we will consider how to improve the wording in definition of absconding and better address the concerns expressed by Member States.

Article 8:

Why were the rules on dependent persons (Art. 24) and discretionary clause (Art. 25) included?

This was a technical amendment; it does not change the substance, as the Member State that is identified as responsible in accordance with Art. 24 or Art. 25, shall examine the application. It is also to align it with paragraph 4 of Art. 8 (where reference to these two Articles – clauses set out in Cahpter III – is made).

What is the meaning of the addition in paragraph 4 (Screening regulation and security checks) – "has not been carried out pursuant to that regulation"?

The addition in this paragraph was added for reasons of clarity and addresses the situations where the person concerned was subject to screening procedure in accordance with Screening regulation; however, the security check pursuant to that regulation was not carried out. The paragraph makes clear that any applicant shall be subject to security check before the criteria for determining the responsible Member State are applied. This applies to applicants for whom the security check pursuant to Screening regulation was not concluded or was not carried out (for example, the applicants that entered the EU legally and therefore were not subject to security check pursuant to Screening regulation). It is based on a proposal made by a Member State to refer to Art. 14(7) of the Screening Regulation, however, it seemed more appropriate to refer to the whole Regulation.

Article 9:

What was the reasoning behind the new term regarding visas or residence permits whose "validity has ceased"? Some Member States expressed this should be aligned with the Visa code.

The Presidency proposed this new wording in order to cover the cases where the visa or residence permit was revoked or annulled in accordance with Art. 34 of Visa code. Previous wording "expiry" is only one way of cessation of validity. The important aspect here is that the issued visa or residence permit actually enabled the person concerned to enter the territory of the EU. In order to align the wording with the Visa code and for better clarity, it would be more appropriate instead of "whose validity has ceased" to consider keeping "has expired" and add "or was revoked or annulled".

How does paragraph 2 relate to Art. 34(2) of Visa code? It can be understood that the visa will have to be revoked when it becomes evident that the conditions for issuing a visa are no longer met (p.e. when the Member State finds out that the person concerned has entered Schengen area with a short term visa, issued by another Member State and now they claim for asylum). According to Art. 9 this person will be required to go to the Member State which issued a visa

and at the same time, a visa code would oblige the Member State to revoke the visa. It would not be valid anymore if we revoke it. How do we read those two articles together?

Where the applicant is in possession of a valid residence permit or visa, then he or she is obliged to apply for international protection in the Member State that issued the residence permit or visa in accordance with Art. 9(1). Where the visa or residence permit is still valid at the time of making the application, the applicant shall make the application in the Member State that issued it.

The expressed concern is now covered with the change in Art. 9(2), which refers to cessation instead of expiry. Cessation of validity would cover cases where the residence permit or visa has either expired, was revoked or annulled. However, as stated earlier, it would be better to consider revising the text and explicitly add the wording "revoked or annulled" instead of "whose validity has ceased".

The obligation set out in Art. 9(2) for the applicant to apply in the Member State where he or she is present is based on the fact that once the visa or residence permit expired, was revoked or annulled and shall therefore apply for international protection in the Member State where he or she is present. This is without prejudice to the rule set out in Art. 19(4), where the Member State that issued the visa or residence permit whose validity has ceased less than three years before application was registered, shall be responsible for examining the application.

What does the obligation to cooperate with the authorities in paragraph 5 include? What was intended here?

This amendment was added to emphasize that the applicant has the obligation to cooperate with the authorities in order for the transfer decision to be realized. The applicant has to comply with the transfer decision (this covers also situations of voluntary departure to the responsible Member State) but also to cooperate with the authorities in order to carry out the transfer. This is closely connected to the possibility of the transferring Member State to notify the responsible Member State and to retain the right to carry out the transfer in the remaining time according to Art. 35(2). This was added in order to address the situations where the applicant would frustrate or try to delay the transfer with his or her own actions or omissions, but would not abscond.

<u>Article 11:</u>

New subparagraph in paragraph 2 (information supplied to unaccompanied minors) – does this cover written or oral information? If it is orally it should be clearly stated.

As explained by the Commission during first reading, the information is provided to the unaccompanied minor applicants in form of a special leaflet, which includes the explanations to the information and the application of AMMR in a child-friendly manner.

The new subparagraph has to be seen together with the first two subparagraphs, as it only provides for additional safeguard in case of an applicant who is unaccompanied minor. First two paragraphs would still be applicable. The information have to be therefore provided in writing and where necessary to ensure applicant's proper understanding, also orally. We don't consider it necessary to clearly state, that information shall be supplied orally in the new subparagraph, however, we can further reflect on how to better express the additional nature of this new subparagraph.

Article 12:

Does the change in paragraph 4 impose a new obligation for the Member State to conduct a personal interview with the accompanied minors?

We did not intent to impose a new obligation of the Member State to conduct a personal interview. This wording is in line with Art. 21 of APR, which sets out guarantees for minors and does not impose an obligation of the Member State to conduct a personal interview with accompanied minor. However, when such interview is carried out, the competent authorities should take into account the age and maturity of the minor. We can consider possible further redrafting in order to clarify that this is only applicable when the Member State decides to conduct an interview with the minor.

Article 28

In connection to Art. 35(2), where the notion of non-compliance with the transfer decision was added as a reason for possible suspension of time limit for carrying out a transfer in addition to absconding. The question was why the Presidency did not add this notion of non-cooperation also in Art. 28(2).

The obligation for the applicant to cooperate with the competent authorities of the Member States in the matters covered by AMMR as well as consequences of failling to do so, are captured in Art. 9(3), detemining the obligation of the applicant to fully cooperate with the competent authorities of the MS in matters covered by this regulation, in particular by submitting as soon as possible and at the latest during the interview all the elements and information available to him or her relevant for determining the MS responsible and Article 12, determining that perosnal interview may be omitted where the applicant has not attended the personal interview and has not provided justified reason for his/her absence. However, Article 28(2) ensures that even though the applicant absconds, the Member States still have the obligation to continue the process of determining the Member State responsible even in the person's physical absence. Since the applicant is still present when he or she does not cooperate with the authorities, we did not find it necessary to include notion of non-cooperation in Article 28(2).

Article 34

On what conditions are the grounds (where protection of national security or public order so requires) mentioned in paragraph 2 applied? It should be made clear that this danger to national security comes from the person concerned.

This addition was based on a proposal made by a Member State and is in line with the wording from Article 8 of Reception Conditions Directive as well as Article 18 of Return Directive. The purpose of the amandment of the provision is to provide for possibility for the MS to detain person when he/she poses a danger to national security or public order in order to secure transfer procedure.

The assessment of whether there are grounds for a person to be detained in order to protect national security or public order is based on an individual assesment of the person's circumstances, as stipulated in the last part of the provision. Danger should thus come from person concerned, the existence of threat to public security and public order, in the absence of an individual assessment of the circumstances of the person concerned, therefore cannot be a sufficient reason for detention under the provision paragrapf 2 of article 34.

Why was the last part of the sentence in paragraph 2 changed? This is important in order to ensure proportionality of detention and to examine the alternatives to detention in each individual case.

The change made in the last part of the sentence is rather technical in order not to unnecesarily repeat the wording "based on individual assessment" and does not change the scope of the provision. The Member States still need to assess all the person's individual circumstances and apply detention only when it is proportional and other less coercive alternative measures cannot be applied effectively.

What situations are covered with the new addition in subparagraph 2 of paragraph 3, where the text refers to situations of Eurodac hit when no new application has been registered in the notifying Member State.

This addition was made based on a proposal of a Member State, as there were practical cases of persons for whom Eurodac hit was received and are subject to take back procedure, however, they did not apply for international protection in the notifying Member State. Such situations were not explicitly covered before as the time limit for submitting a take back notification started from the moment of registration of the application, however, clear time limit should also apply in these situations.

Article 35

What it means to comply with the transfer decision? Does this have to be documented in written?

Subparagraph 2 of paragraph 2 is closely connected to the definition of absconding, where several Member States proposed to include the notion of non-cooperation. We consider this was better put here, as the notion of non-cooperation is already covered in Articles 9 and 10. However, when talking about the cooperation with authorities in order for the transfer to be realized, wording "to comply with the transfer decision" seemed more suitable, this would reflect situations where the person concerned deliberately seeks to avoid the transfer, not with absconding, but with other actions or rather a lack of those, which make it difficult and burdensome for the authorities to carry out the transfer. We consider this notion applies to any kind of actions or inactions of the person concerned which would delay or otherwise obstruct the transfer (also e.g. refusing to undergo COVID-19 testing). We did not consider written and formal assessment of non-compliance would be needed here, in light of the fact this might pose additional administrative burden. However, it is stipulated in the provision that the time limit for transfer stops running under two conditions, first, the person absconds or does not comply with the transfer decision and second, Member State responsible is informed of this fact by the transferring Member State. Given the obligation to inform the responsible Member State, the authorities of the transferring Member State should state on which grounds set out in the second subparagraph of paragraph 2 the time limit is suspended. The intention is not to change the current practice in that regard, which is based on mutual trust that suspensive effect has in fact been granted pending the outcome of the appeal or review, that the person concerned is in fact imprisoned or has in fact absconded. The time-limit for transfer will cease to run on the day the responsible Member State will be informed of that fact.

Does the addition in subparagraph 2 of paragraph 2 entail that the authorities have to engage in the burdensome search of absconded person? When can we say that the person becomes available again?

With the new addition in this paragraph, we did not propose an obligation of the Member State to engange in the search to a wider extent than the current practice as regards absconded persons. We consider this remains unchanged. When the person concerned reapers again after absconding or when he or she no longer refuses to comply with the transfer decision and is therefore available for transfer again, the authorities of the transferring Member State can continue with the transfer procedure. Notion of "availability" of the person concerned remained unchanged compared to the Commission's proposal and in connection to the definition of absconding. We also tried to explain it above in relation to the definition in Art. 2. As already stated, further drafting is needed in regards to the definition of absconding, consequently text in Article 35(2) will be aligned.

Is possibility to extend the time limit for transfer for three months where the remaining time is less than three months a one-time opportunity?

We did not consider this to be only a one-off opportunity, this proposal was made in order to address concerns expressed by several Member States in order to avoid situations where the person concerned

would try to abuse the system and abscond or obstruct the transfer shortly before the end of the time limit to carry out the transfer, so that when he or she would become available again, the remaining time to carry out the transfer would not be sufficient. We considered three months to be a good compromise.

Article 36

Is the reference to Article 17 correct?

In this Article, we added a footnote stating, this reference will be checked again in light of eventual amendments in Article 72.

Article 38

Would it be worth considering to provide for a formal procedure for the exchange of security related information (e.g. Article 22 of the Visa Code)?

The new addition which diffentiates between competent authorities and law enforcement authorities was added in order to address the concerns states by several Member States that immigration authorities may not be in a possession of classified information or may not be in position to share those information with other Member States, which depends on the national law of the Member States. As Commission also explained during the WP meeting, the intention was not to regulate how the law enforcement authorities should exchange such information, therefore, we consider this proposal would not be applicable in regards to Article 38 of AMMR.