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From:	General Secretariat of the Council
To:	Asylum Working Party
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Subject:	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 - Revised compilation of comments of delegations

Delegations will find attached a revised compilation of drafting suggestions and observations received in response to the request for comments from the Presidency on the above-mentioned proposal.

Written comments submitted by the Member States

**– 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 –**

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AUSTRIA

Introductory comments:

AT enters a scrutiny reservation regarding the parts of the APR that refer to other acts that are still under negotiation.

As already brought forward during the meeting, AT wants to emphasize that the provisions of the APR cannot be considered in isolation from other relevant acts of the pact and, to that extent, any comments from AT are subject to further evaluation in relation to developments in other acts.

Article 4 – Definitions

The proposal made by the presidency, namely the shifting of parts of Art. 4 to the Articles concerning the border procedure, would in our opinion not solve the issue at hand. AT deems it necessary to create harmonized definitions and a uniform concept of family in the CEAS legal acts.

(1)i:

As already stated, AT has a strong reservation against the extension of the family definition, as proposed in lit. i. AT is notably opposed to an extension on “unmarried partner in a stable relationship” and siblings.

In addition, the definitions should be considered in conjunction with other CEAS legal acts, which are also under negotiation. The goal should be a uniform concept of family in the legal acts which requires harmonized definitions.

(2)(l):

With regard to the definition of “final decision” AT enters a scrutiny reservation.

In our opinion the definition should also cover a decision rejecting an application as “**explicitly withdrawn**”. Notwithstanding the mentioning in Art 38(1b) (“*That decision shall be final and shall not be subject to an appeal as referred to in Chapter V of this Regulation.*”) “explicitly withdrawn” should be included in the text of the definition to avoid any unclear situations.

Article 5 – Competent authorities

(3): AT enters a scrutiny reservation.

Article 6 – Confidentiality principle

(1):

Under specific circumstances information exchange should always be possible. In this regard we deem it necessary to give an example in the provision which is why AT proposes to add at the end of para 1: “Where necessary for reasons of national security and public order, information may be provided to relevant authorities of Member States in accordance with national law.”

Article 7 – Obligations of applicants

(3):

In so far as it is not covered by Article 39, AT would prefer to keep this provision. The consequence for not providing biometric data is stipulated in Art. 39 para 1 lit. ca. The consequences for not complying with Art. 7 para 2 lit. a and c are regulated in Art. 39 para 1 lit. c. But Art. 7 para 2 lit. d (elements to substantiate the application) is not included in Art. 39 but would be covered by Art. 7 para 3. Therefore, AT proposes to keep this paragraph or to include Art. 7 para 2 lit. d in Art. 39.

(4):

With regards to the “most recent place of residence or address” AT suggests deleting “as indicated by himself or herself”, since this is a subjective criterion.

(6):

AT would prefer to keep this provision since the obligations like these would help Member States tackling the issue of absconding applicants.

Article 8 – General guarantees for applicants

(2):

AT would prefer to delete the wording “or if necessary orally”.

(3):

Since applicants should only be provided with the services of an interpreter for the personal interview, AT calls to delete the wording “to assist with lodging their applications”.

Article 13 – Report and recording of personal interviews

AT enters a scrutiny reservation because of data protection considerations.

Article 15 – Free information on legal and procedural aspects

(3):

Since Members States should have the ability to exclude the provisions of free information and legal and procedural aspects in cases where applicants have sufficient resources or subsequent applications, AT proposes to add “*or the applicant has sufficient resources or the application is a subsequent application*” at the end of para 3.

Article 20 – Applicants in need of special procedural guarantees

(3):

For AT one of the utmost important aspects of the APR is the broad scope and mandatory nature of the border procedure. Due to the fact that the border procedure is still under negotiation, AT enters a scrutiny reservation for para 3.

CROATIA

Croatia welcomes the reopening of the discussion on the Proposal for the Asylum Procedure Regulation. However, it would like to enter a general scrutiny reservation at this stage on the entire text of the Proposal due to references to the Dublin Regulation. We think that the Proposal for the Asylum Procedure Regulation should be discussed in parallel with the progress made in the negotiations on other legislative proposals of the Pact. We would also like to point out that some parts of the Proposal for the Asylum Procedure Regulation need to be updated, namely those relating to the Regulation on the European Union Agency for Asylum which has entered into force in the meantime.

Article 4 Definitions item i) family members and item v) siblings

Croatia is not in favour of broadening the scope of the definition of family members to include siblings. However, we find acceptable the proposal to move the definition of family members to the part prescribing border procedures.

When defining family members, one should be very careful with the definition that will refer exclusively to the application of border procedures since this is a sensitive area of border procedures where families with children under the age of 12 are exempt from border procedures. We believe that the definition of a family needs to be consistently implemented in practice and this would inevitably require the prior establishment of family ties.

Moreover, considering the exemptions to border procedures (children under the age of 12 and those who pose threat to national security), we would like to point out that in practice it will be very difficult to assess the exact age of the child which means that the procedure for determining the child's age will have to be carried out during border procedures, which requires time. However, Article 24 of the Proposal for a Regulation (*Age assessment of minors*) states that age assessment determines whether a person is a minor. It is therefore questionable whether this procedure will be adequate for determining whether a child is older or younger than 12.

We therefore believe that each additional border procedure will require, among other things, additional time, whereas the point of border procedures is primarily to speed up asylum and return procedures. This could ultimately become a pull factor attracting a large number of migrants to the external borders of the EU.

Item 1) final decision

Croatia welcomes the reference to national legislation but it is not entirely clear what “*definitive according to national law*” means. We would also like to receive a clarification of what has priority in this definition: the application of national legislation or Chapter V of the Proposal for the Asylum Procedure Regulation (*Appeal procedure*).

FINLAND

We still have a general scrutiny reservation to the whole proposed text.

Kindly note that we may later submit further comments and/or specification on all of the articles.

We would see it highly valuable if the presidency could continue the practice to share the written comments submitted by MSs.

Article 4 Definitions

1) *final decision*

- **We strongly support the version that is in the current document (WK 11990/2022 INIT)**

The term final decision is central in our legal system. Even if the term here is meant to apply only in this regulation, a different meaning of 'final decision' in some matters could potentially cause confusion and problems in general. We cannot support a proposal that would only refer to Chapter V of the proposal.

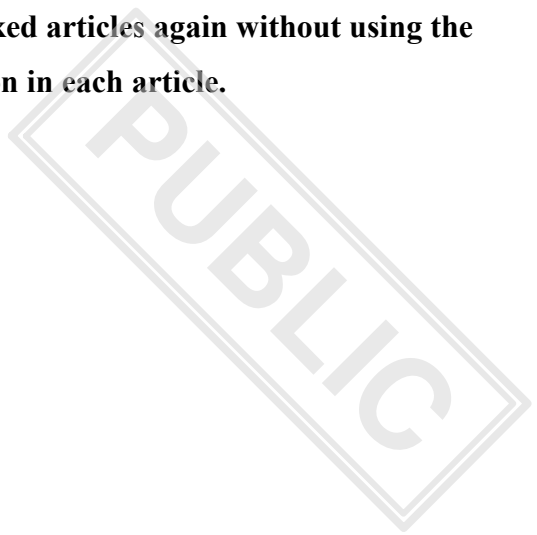
There should be room for different solutions in Member States' legal systems as long as they do not affect for example the right of the applicant to remain in the Member State. For example in Finland applicants have no automatic right to remain in Finland if they lodge an appeal to the second level of appeal.

It should also be kept in mind that with definition 'final decision' there are also links to other articles, which should be synchronised with the wording in point 1).

- **Another possible version could be something based on the original proposal by the Commission, for example:**

'final decision' means a decision on whether or not a third-country national or stateless person is granted refugee status or subsidiary protection status by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation), including a decision rejecting the application as inadmissible or a or a decision rejecting an application [...] as implicitly withdrawn and which can no longer be subject to an appeal procedure in the Member State concerned;

- **We have also suggested that a possible solution could be to delete the definition all together from article 4 and draft the other linked articles again without using the words 'final decision' but opening the definition in each article.**



FRANCE (new)

La France remercie la Présidence pour la relance des discussions sur le règlement Procédure (APR) lors du groupe asile du 21 septembre 2022 et propose plusieurs commentaires afin d'améliorer la clarté des articles et assurer la pérennité de certaines garanties prévues par la directive Procédures (APD) en vigueur.

Les propositions rédactionnelles sont indiquées sous chaque article commenté, surlignées en jaune.

De manière générale, les références aux dispositions du « règlement Dublin » n'appartiennent pas à un seul et même texte (Dublin III, proposition Dublin IV, ou proposition AMMR selon les articles). Il convient d'actualiser les références aux articles de la proposition de règlement AMMR, c'est-à-dire aux :

- Article 7, paragraphes 1 et 2 ;
- Article 9, paragraphe 1 ;
- Article 10, paragraphe 2a.

Les références aux autres textes du Pacte (dont le nouveau règlement relatif à l'Agence de l'Union européenne pour l'asile) devront également être actualisées.

*

Article 4 « Définitions » :

Paragraphe 1, point i), sur la définition des membres de la famille : la France ne soutient pas la proposition de transférer la définition des membres de la famille dans les articles relatifs aux procédures d'asile et de retour à la frontière. Toutes les définitions doivent être incluses dans l'article 4, consacré à ces définitions.

Pour la clarté de la lecture du paragraphe 1, point i), relatif à la définition des membres de la famille, il convient de fusionner les deux points ((iii) et (iv)), dès lors qu'ils recouvrent la même définition (père, mère ou autre adulte responsable d'un mineur non marié présent dans l'État membre où l'adulte (iii) ou le mineur (iv) est présent).

Proposition rédactionnelle :

1. [...]

(iii) *where the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult **or the minor applicant** is present,*

~~(iv) *where the beneficiary of international protection applicant is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary applicant is present,*~~

Paragraphe 1, point 1), sur la définition de la décision finale : la France propose de mentionner explicitement les décisions de retrait explicite de l'article 38, paragraphe 1b).

Proposition rédactionnelle :

*[...]l) 'final decision' means a decision on whether or not a third-country national or stateless person is granted refugee status or subsidiary protection status by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation), including a decision rejecting the application as inadmissible or a decision rejecting an application [...] as implicitly withdrawn, [...] [...] which has become definitive according to national law and is no longer subject to a remedy within the framework of Chapter V of this Regulation, irrespective of whether the applicant has the right to remain in accordance with this Regulation. **It also includes a decision of explicit withdrawal as referred to Article 38(1b);***

Article 13 « Rapport et enregistrement des entretiens personnels » :

Sur le paragraphe 6, il convient de restreindre le refus de la communication du rapport, de la transcription de l'entretien ou de la transcription de l'enregistrement avant que l'autorité de détermination ne prenne sa décision à des situations exceptionnelles, et soumettre ce refus à une justification de l'autorité de détermination.

Proposition rédactionnelle :

6. Where, **in exceptional cases**, the application is examined in accordance with the accelerated examination procedure **and it is necessary to take a decision without delay**, the determining authority may grant access to the report, the transcript of the interview or the transcript of the recording at the same time as the decision is made.

Article 15 “Information gratuite sur les aspects légaux et procéduraux” :

La France soutient la proposition de la Présidence de restreindre les cas dans lesquels un État membre peut refuser la fourniture gratuite d’informations : lorsque la demande n’a pas de perspectives tangibles de succès (« *no sufficient prospect of success* »).

La France demande la suppression dans le paragraphe 1 des termes suivants : « *upon the request of the applicant* ». Le requérant doit être informé de ses droits, qu’il en ait fait la demande ou non, en particulier lorsqu’il se trouve dans une situation de vulnérabilité.

Article 15a « Assistance juridique et représentation gratuite dans la procédure de recours » :

La France remercie la présidence pour sa proposition visant à sonder les États membres sur les termes « *no sufficient prospect of success* » comme condition permettant de ne pas accorder d’aide juridictionnelle gratuite lors du recours. La France recommande sa suppression. Si ces termes sont maintenus, ils devraient être encadrés.

GERMANY

Our general scrutiny reservation on the entire text of the proposal remains. However, we welcome the fact that the Presidency is taking up this proposal as a whole again and wants to move the negotiations forward.

Article 1

The footnote is out of date, because of the AMMR proposal. In any case, the entire text of the APR must be adjusted in view of the AMMR proposal. However, this does not change our assessment that Article 1 can remain highlighted in green.

Article 2:

Can remain green.

Article 4

- The article is rightly marked yellow.
- Para. (1) (i): We still have a scrutiny reservation (esp. on point (v)). We generally welcome the suggestion of the Presidency to find a solution for the definition of family members within the requirements on the border procedure and look forward to the concrete proposal. This could clear Article 4 of this issue. However, please note that the term “family members” is also relevant in recitals or other articles (e.g. recital 18, Article 6, 7, 12 etc.). As the Commission’s proposal from 2016 did not contain a definition of family members, it would be helpful for the Commission to explain why they did not think this was necessary.
- The first footnote on para. (2) (page 55) can be deleted. We reserve the right to address the question of additional definitions within the requirements on the border procedure as per para.1 and the definition of family members.
- The second footnote to para. (2) (i) (page 55) can be deleted.

- Regarding (l) / “final decision“ we still have a scrutiny reservation, which must be seen within the context of Art. 38 (1b) and Art. 53 Abs. 1 (c). If the explicit withdrawal of the application is not included in this text, the necessity of an effective remedy against a decision rejecting an application as “explicitly withdrawn” is not clear. We refer to our text proposal with regard to Article 53. Therefore, we suggest to insert the term „or explicitly“ in the definition of „final decision“: [...] as implicitly **or explicitly** withdrawn [...].

Article 5

- We can withdraw our scrutiny reservations and support the green marking.
- Para. (3a) would have to be adapted to the amended proposals.

Article 5a:

Can remain green.

Article 5b:

Can remain green, although we are against the deletion of para. (2): *„Paragraph 1 shall also apply to an organisation which is working in the territory of the Member State concerned on behalf of the United Nations High Commissioner for Refugees pursuant to an agreement with that Member State.“*

Article 6:

Can remain green; footnote 1 can be deleted.

Article 7

- Should remain yellow.
- As already pointed out by the Presidency, para. (1) and (2) (db) need to be adapted to the AMMR proposal.
- We still have a scrutiny reservation on para. (2) as the German law contains more specific requirements as to applicants' obligations. We therefore believe it makes sense to use "fully cooperate" and "in particular" here. At the same time, German law defines the purpose and thus specifies the obligations to cooperate, stating that they are necessary to establish the facts of the case. We therefore suggest the following wording: *"The applicant shall fully cooperate with the [...] competent authorities [...] **for them to establish the facts of the case in matters covered by this Regulation**, in particular, by: ..."*
- Para. (7): We can withdraw our scrutiny reservation following the explanation by the Commission. We therefore assume that "have his or her items searched in accordance with national law" includes the reading of data carriers. This is also clarified in recital 19.

Artikel 8

- We can accept the green marking as concluded by the Presidency.
- Para. (2) Sentence (1) (c): We can withdraw our scrutiny reservation.
- Para. (2) Sentence (3): We can withdraw our scrutiny reservation regarding the electronic information provision after the explanation by the Commission.

Article 9

- Should be yellow (due to necessary text changes).
- Para. (1) needs to be adapted to the AMMR proposal.
- Para. (2): We still ask to keep the deleted text *"and it shall not give the applicant the right to travel to the territory of other MS without authorisation"*. We could not find this in one of the other proposals.
- Para. (3): We still have a scrutiny reservation. As the word "surrender" is mostly used for a transfer of a person based on a European Arrest Warrant (e.g. in the title of the FD EAW) paragraph (3) (ba) and (3a) deal partly with the same situation but foresee different rules ("may" vs. "shall"). It should be made clear that paragraph (3a) prevails. The original COM proposal did not differentiate between these two paragraphs.

- Para. 3 (bb): This proposal is not part of the current APD and COM did not propose this exception that is problematic especially with regard to the principle of non-refoulement. We doubt that there could be no possibility of legal remedy. Furthermore, we have to be aware that in these constellations a border or an accelerated procedure is mandatory. We would therefore like to hear the Commission's point of view and look forward to an exchange of views on this topic in the next AWP.
- Para (3a): Taking into account the decision of the ECJ in C-804/21, it seems that Art. 23 (3) of the FD EAW will not be in line with paragraph (3a) as asylum is no legal reason to prolong arrest in the executing state. Ongoing asylum proceedings will thus lead to a release of a person from arrest and might hinder prosecution for severe crimes. It should be made clear whether FD EAW or this regulation prevails.

Article 10:

Can remain green and we can withdraw our scrutiny reservation.

Article 11:

Can remain green.

Article 12:

We can support the conclusion by the Presidency that the article can be marked green, when para. (1) is deleted as this is already contained in article 11 para. (1).

Article 13

- The article should remain yellow.
- We still have a scrutiny reservation on para. (2) and refer to the footnote, which should rather say „language/dialect recognition“ / „speech-text-analysis“. We suggest the following clarification: *“This shall be without prejudice to any provisions of national law enabling the use of the recording for other lawful purposes connected with the procedure for international protection.”*

- On para. (5), we still have a scrutiny reservation with regard to the German law and we therefore request the deletion of *“before the determining authority takes a decision”*.

Article 14:

The article can remain green and we can withdraw our scrutiny reservations.

Article 15

- We still need to examine whether the article can remain marked green. This also depends on whether the Presidency decides to change para. (3).
- Para. (2): We understood that “upon the request of the applicant” should not exclude the introduction of independent, nationwide asylum procedure counseling.
- Para. (3): Counseling must also be guaranteed for people who seek protection but have little chance of being granted the right to stay. Therefore, we request the deletion of *“or the application has no sufficient prospect of success”*.

We already have a suggestion for recital 14 (after the first sentence):

*“It is in the interests of both Member States and applicants that applicants receive at a very early stage comprehensive information on the procedure to be followed and on their rights and obligations. **This information should be in an appropriate manner taking into account the age and gender of the person concerned as well as possible vulnerabilities.**”*

Article 15a

- The article should remain yellow.
- We keep our scrutiny reservation with regard to para. (2) (b); a deletion is not acceptable for us. We suggest the following text: *“the appeal is considered as not having any sufficient prospects of success or seems abusive”*. To make only the smallest change necessary, it would be sufficient to delete the word “clearly”.

Article 16

- Should be yellow (due to necessary text changes).
- We continue to have a reservation on para. (2). We suggest to delete the second sentence („*In such cases, access to such information or sources shall be made available to the courts or tribunals in the appeal procedure.*“) and to amend „classified“ to „confidential“.

Article 17

- Should be yellow (due to necessary text changes).
- We keep our request regarding para. (3) and refer to our text proposal in the first footnote on page 86. We could withdraw our reservation on Article 17 para. (3) only under the condition that at least in recital 14 it is clarified that “free legal assistance“ does not exclude a small own financial contribution.

Article 19:

- We can withdraw our scrutiny reservation; can remain green.
- However, our request to inform the individual why specific needs are being recorded should be included in an appropriate place in the recitals (“*The competent authority shall inform the applicant about the purpose of the assessment.* “).

We already have a suggestion for recital 15:

*“(15) Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, sex, sexual orientation, gender identity, disability, serious physical or mental illness or disorders, including when these are a consequence of torture, rape or other serious forms of psychological, physical sexual or gender-based violence. **Those applicants should be provided with the necessary support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection. ...**”*

Article 20:

Can remain green.

GREECE

Comments on Articles 1-20:

Following the Working Group meeting on the 21/09/2022, we would like to state the following: We agree with the classification as “green” on **Articles 1, 2, 3, 5, 5a, 5b, 6, 8, 9, 10, 11, 12**. As a general comment, we would like to point out that the references to Dublin Regulation need to be updated.

Article 4

Par. 1 (i) : Following the discussion, EL maintains **a scrutiny reservation on this article**. To be more precise, EL is in agreement with the definition of “family members” for the purposes of the APR, but the provision has to be agreed in tandem with the respective AMMR Provision on “family members”.

Par. 2 (i) : EL stands by its reservation on keeping uniformity within the current acquis for purposes of clarity, also in the light of the implementation of the Temporary Protection Directive. EL therefore suggests the following wording: *“application for international protection” or ‘application’ means a request [...] made [...] by a third-country national or a stateless person for protection from a Member State [...], who can be understood [...] to seek[...] refugee status or subsidiary protection status and who does not explicitly request another kind of protection outside the scope of Directive 2011/95/EU, that can be applied for separately”* **Par. 2 (l):** For reasons of clarity, EL maintains the position of deleting the phrase “which has become definitive under national law”, since this phrase does not add substance to the definition of “final decision” and may create ambiguity to other MS in its application. In consequence, we withdraw the previous redrafting proposal here (footnote 1 p.56 of WK11990/2022).

Article 13, Par 4a (a)

EL would like to propose the following redrafting: “the personal interview is recorded and according to national law the recording **or the transcript of the recording** may be admitted as evidence [...]

Justification: Provides more flexibility to national administrations

Article 14,

in principal EL agrees with the classification as “green” and retains the reservation in connection with the content of Article 15a(2).

Article 15,

EL reiterates its reservation on para. 3, last lines. The phrase “*prospect of success*” presents problems in practice. It is impossible for the determining authority to make that kind of assessment before entering into the examination on the case.

Regarding Article 15a,

we have a substantial reservation on para. 2 Justification: While recognizing that the provision is a “may” clause, the assessment of the financial situation of the applicant (sub-provision a), as well as the “prospect of success” (sub-provision b) raise questions of practical implementation. See also our reservation under Article 14 (2).

HUNGARY

General comments

Hungary wishes to reiterate its **general scrutiny reservation on the whole proposal**.

The APR file remains a highly important item of the asylum dossiers. As the proposal is closely linked to the other parts of the asylum legislation, its main, most difficult parts can be properly discussed only if the major elements of the whole CEAS reform have been clarified.

The most difficult but also the most important issues regarding the file are clearly the border procedures, the safe country concepts, the special procedures (accelerated, inadmissibility, manifestly unfounded), and the deadlines.

We stress that our scrutiny reservation on the whole proposal remains valid. Until there is agreement on the other dossiers we cannot accept cross-references.

Article 4

For the sake of legal certainty, it is necessary to apply identical definitions in all elements of the asylum dossiers in the Articles on definitions.

Article 4(1) (i) – definition of family members

Hungary's position on the definition of family members remains unchanged. The new concept of family member, given that it includes all family relationships established before entry into the territory of the Member State and extends to siblings, could give rise to massive abuses, given that family members are treated differently from a single applicant. The use of such a broad definition of family members leaves the possibility for further abuses, therefore we cannot support it, even in case the content of the definition is moved to other Articles in the text.

Article 4(2) (l) – definition of final decision

Hungary can agree with the definition set out in the document or can also accept the current definition in the Asylum Procedures Directive. As the definition is problematic for some Member States, Hungary is open to consider other textual suggestions.

Article 5

Hungary maintains its footnote.

Paragraph 3aa of Article 5 remains unacceptable, as it provides that an asylum application can be made at the police, border guards and authorities responsible for detention facilities.

Article 7 and 9.

Hungary maintains its footnotes. Until there is agreement on the other dossiers we cannot accept cross-references.

Article 15

Hungary does not support the deletion of the may clause in the last sentence of Paragraph 3.

Article 15a

Hungary does not support the deletion of point (b) of Paragraph 2. The may clause should apply to this category as well.

Article 19

Hungary can accept the placement of the content of Paragraph 4b to a recital.

ITALY

Articles 1-20 of APR.

1. Article 4.1(i): the definition of family members should be kept in this article; roman v) should be amended (by aligning the text to AMMR, art. 2.g) as follows: the sibling or siblings of the applicant.
2. note to article 4.2.i) is lifted;
3. Article 4.2.l) is accepted and the relevant note is accordingly lifted.
4. Article 15.2: the footnote is lifted.

All other footnotes not mentioned above are kept.

THE NETHERLANDS

Articles 1-20

We thank the Presidency for the opportunity to share our written comments on the above-mentioned articles as proposed in working document 11990 2022 INIT. You will find our remarks below, as well as some text proposals we announced in the meeting of the Asylum Working Party on 21 September 2022.

Article 4 – Definitions

4(1)(i) ‘family members’

Reservation

According to the Netherlands, the definitions in this regulation should be feasible: in the asylum procedure it should be possible to establish swiftly if a person fits the definition. This would be hampered by an extensive interpretation of ‘family members’.

We also think the definition in this regulation does not need to be exactly the same as the one in the Return Directive or the AMMR: it serves different purposes. It could be argued that in the AMMR it can be an advantage to keep different members of a family together, which arguably would be advantageous if they were to receive a residence permit (support system). Please note our reservation in the AMMR.

We think that the definition should comply with Article 8 of the European Convention on Human Rights, which means that nuclear families should not be separated. We propose not to include other family members.

Therefore, we propose to delete (i)(v) (siblings of the applicant).

4(2)(l) ‘final decision’

Reservation

In the meeting of the Asylum Working Party on 21 September 2022, we have put forward that the reference to ‘national law’ is problematic for the Netherlands. Therefore, we prefer the definition in the current APD.

This has to do with the fact that there are two instances of appeal in the Netherlands. After the appeal decision by the court, a further appeal can be made to the Council of State. The assessment of the Council of State, however, mainly concerns the correct application of the law in the appeal procedure. A new application, therefore, cannot be included in the assessment by the Council of State. At the same time, following the proposed text of this provision, the procedure of Article 42 cannot be applied as long as there is no final decision.

This means that the administrative burden for our determining authority will increase. Moreover, if the third-country national makes a further request pending the further appeal, it will not be possible to deny him the right to stay in the territory (Article 9 in conjunction with Article 43). Compared to the current APD, it would also be a step backwards in harmonization, as it differs per Member State when a decision is final.

However, as we noticed that the reference to ‘national law’ is important to several Member States, we consider that an amendment to the Articles concerning subsequent applications could also help.

We propose (this proposal replaces our footnote in Article 42 (-1)):

Article 42

Subsequent applications

- 1. An application made where a final decision on a previous application by the same applicant has not yet been taken shall be considered as a further representation and not as a new application.**

That further representation shall be examined in the Member State responsible in the framework of the ongoing examination in the administrative procedure or in the framework of any ongoing appeal procedure in so far as the competent court or tribunal may take into account the elements underlying the further representation and conducts a full and ex nunc examination of both facts and points of law.

1. [...]Any further application made **by the same applicant** in a[...] Member State **after a final decision has been taken on a previous application by the same applicant** shall be considered [...] as a subsequent application **and shall be examined** by the Member State responsible.

Where the court or tribunal does not conduct a full and ex nunc examination of both facts and points of law in a second level appeal procedure, Member States may also consider any further application during an ongoing further appeal procedure as a subsequent application and apply paragraphs 2 - 5 of this Article and Article 43.

(...)

Article 6 – Confidentiality Principle

6(2)(b)

Scrutiny reservation

With apologies for not having mentioned this in the meeting of the Working Party, we consider that this provision might interfere with the judgement of the Court in the Case T.Q.. This judgement states that, before issuing a return decision in respect of an unaccompanied minor, a Member State must verify that adequate reception facilities are available for the minor in the State of return.

When a final decision also includes a return decision, this provision could be problematic because the (local) authorities / alleged actors of persecution should be consulted first and could thereby be indirectly informed of the asylum application. As for the wording ‘directly informed’, this is unclear, since requests for information would (mostly) provide an indirect way of informing the authorities. The question is also what this provision adds, now that In 6(2)(a) it is already been stated that we are not allowed to directly inform the authorities of the third country about an asylum application.

Article 7 – Obligations of applicants

7(2)

Scrutiny reservation

In the Netherlands, there is a small group of young applicants who have no actual asylum motives, but who cause a lot of nuisance in and outside the reception centers and who often display criminal behavior. Although the criminal behavior of this group does not constitute sufficient grounds for rejecting the asylum application, it is clear that these persons are not seeking protection. This group therefore poses a threat to public support for the reception of bona fide applicants. The Netherlands believes that such behavior shows that the applicant essentially has no real interest in the decision on the application. NL therefore proposes to add this as a ground to consider the application as implicitly withdrawn.

As announced in the meeting of the Asylum Working Party on 21 September 2022, we have some proposals to Article 7, as well as Article 39.

In Article 7, paragraph 2, we propose to add a new littera:

Article 7

Obligations of applicants

1. (...)
2. The applicant shall **fully** cooperate with the [...] **competent** authorities [...] **in matters covered by this Regulation, in particular, by:**
 - a. (...)
 - (...)

(dc) where applicable, observing the rules of the accomodation centre.

In Article 39, we propose to add the following:

Article 39

Implicit withdrawal of applications

1. The [...] **competent** authority shall reject an application as [...] **implicitly withdrawn** where:
 - (a) (...)
 - (...)

(ha) the applicant has been subject to a decision in accordance with [Article 19(1)(e)] [recast Reception Directive, version 15204/17] and/or has been apprehended for being involved in causing public nuisance or criminal behaviour on more than one occasion, and, according to the competent authority, his or her overall behaviour shows no intention to cooperate with the competent authority according to Article 7(2).

Article 11 – Substantive interview

11(3)

Because of the high pressure on the asylum system, the Netherlands has developed a procedure in which the foreign national is asked to put down in writing (in his or her own language) his or her asylum motives and the answers to a number of general questions. In some cases, we can already grant international protection on that basis. In other cases, the written explanation can prevent the personal interview from taking up a disproportionate amount of time.

We are not sure if this written procedure needs codification in the APR. If so, we propose:

Article 11

Substantive interview

1. Before a decision is taken by the determining authority on [...] **whether the applicant qualifies as a refugee or is eligible for subsidiary protection**, the applicant shall be given the opportunity of a substantive interview on his or her application.

2. In the substantive interview, the applicant shall be given an [...] opportunity to present the elements needed to substantiate his or her application in accordance with Regulation (EU) No XXX/XXX (Qualification Regulation), and he or she shall provide [...] the elements **referred to in Article 4(2) of Regulation (EU) No XXX/XXX (Qualification Regulation)** [...] as completely as possible. The applicant shall be given the opportunity to provide an explanation regarding elements which may be missing or any inconsistencies or contradictions in [...] **his or her** statements.
3. **Member States may use a written interview to enable the applicant to present the elements needed to substantiate his or her application in writing prior to the substantive interview and answer a number of general questions regarding the reasons for submitting the application.**

Article 12 – Requirements for personal interviews

12(9)

Scrutiny reservation

We propose:

9. The absence of a personal interview, **where it is omitted pursuant to paragraph 5 or where the applicant otherwise does not attend or refuses to respond to the questions asked without reasonable justification**, shall not prevent the determining authority from taking a decision on [...] **the** application for international protection.

Article 13 – Report and recording of personal interviews

13(4)

Scrutiny reservation

To us, this paragraph seems superfluous and it would require an additional administrative action. From the comments or clarification provided in accordance with paragraph 3, it will already be clear whether the applicant is of the opinion that the content of the report correctly reflects the personal interview. We therefore propose to delete this paragraph.

Article 15 - Free information on legal and procedural aspects

15(3)

Reservation

We maintain our reservation in the footnote.

Article 15a - Free legal assistance and representation in the appeal procedure

15a(2)(b)

Scrutiny reservation

We maintain our scrutiny reservation in the footnote

SLOVAKIA

We would like to confirm **general scrutiny reservation** to the whole proposal.

Art. 2(i) family members –

our position remains unchanged. We still oppose the extension of the definition beyond the family that existed in the country of origin. Despite the changes made in point v), our reservation relating to the extension of the definition to siblings of the applicant still persists. We would like to delete point v) with the reference to siblings from the definition.

Art. 2(l) final decision – scrutiny reservation,
however we can accept current text.

Art. 2(p) withdrawal of international protection – we maintain our comment in FN 1.

Art. 6(1) – our FN2 can be withdrawn.

Art. 7(6) – our FN3 can be withdrawn.

Art. 15(3a) – scrutiny reservation.

We wonder whether this provision covers not only situation where the Member State provides for legal assistance and representation in the administrative procedure but also situation where the applicant himself has legal representative regardless whether he/she pays him/her or not. Therefore in order to have more clear provision, we propose formulation as follows: ***“where applicant is provided by legal assistance and representation in the administrative procedure in accordance with national law, this Article may not be applied by MS”***.

Art. 15a(2) –

we maintain our FN1 (add a new point (d) drafted as follows: *“where the applicant already has legal assistance or representation.”*) due to the reason that it is not clear from para 1 that there is an exclusion ground that the fact that an applicant has legal representative (whether paid or not) satisfies the condition that the Member State ensures that an applicant is provided with free legal assistance and representation.

In Slovakia, the State provides free legal assistance and representation through the Centre for legal aid which provides its services to the applicant only in case that he/she has no legal representative. The aim is not to provide free legal assistance and representation to a person which already has legal representative, because it would be an unnecessary financial burden and also inefficient. We speak mainly about situations pro bono (which are not included here) because if the applicant has sufficient resources to afford legal assistance and representation at his or her own costs, it is already covered as an exclusion ground.

Therefore we also would like to know whether we can regulate nationally that the free legal assistance and representation provided by the State will only be granted to an applicant if he or she renounces his/her current legal representative.

SPAIN

1. General remarks.

Spanish delegation expresses its gratitude and support to the efforts of the Presidency for activating discussions on this document and stepping up the implementation of the Pact rules.

Spain is fully aware of the need to reach a wide agreement on the international protection procedure as the basis for the whole Common European Asylum System and it is willing to have a proactive and constructive approach to this negotiation. Our position will be flexible unless specific provisions attempt directly to core and essential issues for our country.

2. Specific remarks.

Concerning the discussions on articles 1-20 of the draft Regulation establishing a common procedure for international protection in the Union, we have taken into account this flexible approach and we will focus our attention mostly in the few contents affecting the core of our national system and procedure, removing most scrutiny reservations existing in the last version discussed at the Asylum Working Party on 21/09/2022.

We only maintain scrutiny reservation to the articles art.5.3b and art.12.3 as we consider there is no clear or explicit reference to the possibility of conducting interviews by law enforcement officers, even if they belong to the determining authority. The current draft could be interpreted in a way to include this possibility but we prefer to add an explicit reference in the wording of article 12.3.

We, therefore, propose a new wording for article 12.3

3. Without prejudice to art 5a(2), personal interviews shall be conducted by the **civil or law enforcement** personnel of the determining authority.

The acceptance of this proposal would remove our scrutiny reservation to the mentioned articles.

SWEDEN

Article 4.1 (i) – ‘family member’

Sweden has a scrutiny reservation. Sweden agrees with the yellow marking of this paragraph. The definition needs further discussions to be aligned and coherent with the proposal for mandatory border procedures and its objectives.

As stated during AWP-meetings and in written comments, Sweden generally finds references to married minors very problematic since such references can be perceived as an indirect approval of child marriages. According to Swedish law it is prohibited to recognize child marriages regardless of where and when the marriage was contracted. Sweden therefore reiterates its position that the last subparagraph, that states that a minor should be considered unmarried if his or her marriage could not be contracted in accordance with the relevant national law in the Member States concerned, should apply for all situations in the definition. I.e., also for the purpose of points (iv) and (v).

Article 4.2 (l) – ‘final decision’

Sweden can be deleted from footnote 1 (page 56).

Sweden can accept the present text proposal (with the reference to national law included). For Sweden it is vital that a decision can be considered final when all national remedies are exhausted.

Article 8.2 – General guarantees for applicants

Paragraph 2 - Sweden can be deleted from footnote 1 (page 66) and footnote 1 (page 67).

Sweden would have preferred some more flexibility for the Member States regarding the timing for when the information referred to in this paragraph should be given to the applicant. Nonetheless, Sweden can accept the current text proposal.

Article 9 – Right to remain during the administrative procedure

Sweden can accept the current textproposal and can be deleted from footnote 3 (page 69) and footnote 1 (page 70).

However, Sweden is hesitant to green mark this Article with regard to paragraph 3 (a) and the link to Article 43, which regulates exceptions to the right to remain in subsequent applications and which is still subject for discussion.

Article 13 – Report and recording of personal interviews

Sweden agrees with the yellow marking and would like to stress our concerns with regard to paragraph 6 raised in footnote 2 (page 79).

Unless it is necessary, for example due to an imminent enforcement of a return decision, the general rule should be that the same guarantees apply for applicants in accelerated procedures as in the normal procedure. Sweden therefore would like to reiterate our position that failure to grant access to the report, the transcript of the interview or the transcript of the recording before the decision is taken, should only be possible in exceptional cases and if it is necessary to make a decision without delay (see footnote 2, page 79).

Textproposal:

6. Where, **in exceptional cases,** the application is examined in accordance with the accelerated examination procedure, **and it is necessary to without delay take a decision,** the determining authority may grant access to the report, the transcript of the interview or the transcript of the recording at the same time as the decision is made.

Article 15 a – Free legal assistance and representation in the appeal procedure

Sweden can accept the current text proposal.

However, Sweden took note of the discussion during the meeting regarding paragraph 3 and the possibility to make exceptions from the provision of free legal assistance and representation for the purpose of an appeal when the appeal has *no sufficient prospect of success*. Several Member States found the assessment of the prospect of success problematic. However, the Asylum Procedures Directive already provides for a corresponding possibility (“no tangible prospect of success”, Article 20). This is currently applied by Sweden. For persons whose applications are manifestly unfounded, a free legal representative will not be provided according to Swedish national law. From our point of view, our concern is that deletion of this exception would risk causing additional administrative burden, lengthening procedures and increased costs. Sweden would therefore not be in favour of deleting this possibility in paragraph 3.