

Statement on behalf of the Meijers Committee

**During the Public Hearing on 'The reform of the Dublin System and Crisis Relocation' of 10
October 2016**

By Ms. Nejra Kalkan, Executive Secretary

Good afternoon,

Thank you for the opportunity to speak on the proposed reforms of the Dublin Regulation on behalf of the Meijers Committee.

We, the Meijers Committee, are an independent group of legal experts in Civil Rights, Justice and Home Affairs.

The Meijers Committee is concerned with this recast because it has been a very short time since the latest Dublin III proposal entered into force. Moreover, it envisages a continuation of the present Dublin system, a system that has so far proven to be ineffective.

Member States on the EU's external borders have been overburdened with the high amount of asylum seekers entering the EU through their territories.

I will take you through some cases of the European Court of Human Right and EU Court of Justice and shed light on certain aspects of the proposal.

Often when we talk about rules and legislation and even numbers, we tend to forget the people and the stories behind it.

I will take you back to a prominent case. M.S.S. vs Belgium.

M.S.S. is an asylum seeker of Afghan nationality and arrived here in Belgium, where he

applied for asylum in 2009.

In the framework of the Dublin Regulation back then, he was transferred to Greece, where he was immediately placed in detention. The conditions in the detention center were appalling. After his release, he was granted a refugee permit so that he could remain in the country but lived on the streets without any resources.

The European Court of Human Rights found that both Greece and Belgium have violated Art. 3 of the Convention. Greece violated Article 3 due to poor detention facilities and living conditions and also Art. 13 because of the deficiencies in the asylum procedure and the complainant's risk of deportation to Afghanistan without any substantive examination of the asylum application and without access to effective remedies.

Moreover, The Court also held that Belgium could not maintain that the transfer resulted from international obligations. By transferring the plaintiff to Greece, while aware of the humiliating detention and living conditions in Greece, Belgium also violated Art. 3 ECHR. Belgium offered no effective remedy to the plaintiff and violated Article 13 as well.

This was in 2011. After the MSS case Dublin transfers to Greece have largely been suspended. Moreover, in the case Tarakhel vs. Switzerland from 2014 concerning the Dublin transfer of a family from Switzerland to Italy, the ECHR found a violation of Article 3 because Italy could at the time not guarantee placement in reception centers suitable for families with children.

Coming back to Greece, just last week the European Commission announced that it is planning to resume Dublin transfers to Greece from December this year, while at the same time stating and I quote:

"Greece is still facing a challenging situation in dealing with a large number of new asylum applicants, notably arising from the implementation of the pre-registration exercise and the continuing irregular arrivals of migrants, albeit at lower levels than before March 2016.

There are moreover further important steps to be taken to remedy the remaining systemic

deficiencies in the Greek asylum system, in particular given the capacity shortfalls.”

While the suggested corrective fairness mechanism can go some way to remedy overburdened Member States at the external borders of the EU, it will not change the fact that it is these Member States who will bear the brunt of new arrivals.

Additionally, the Commission must face the fact that its attempt in September 2015 for a relocation mechanism has so far not been very successful.

The proposals under Dublin III recast do very little to address this unsustainable burden sharing, focusing instead on the risk of abuse of the rules laid down in the Dublin III regulation by individual asylum seekers, including their absconding.

The sanctions on asylum seekers

We are worried about the harsh sanctions which the proposal imposes on applicants who fail to claim asylum in the first Member State of entry in articles 4 and 5. In particular we are concerned that that their application must be processed in an accelerated procedure and that they are not entitled to suitable reception conditions, except emergency health care, if they are present in another Member State.

These articles are questionable in the light of aforementioned cases of the European Convention on Human Rights. In the M.S.S. judgment the Court gave considerable importance to the applicant’s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It noted the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the EU Directives.

In view of the current reality that very substantial numbers of asylum applicants do not claim asylum upon arriving in the EU, this could lead to curtailment on a very large scale of procedural rights and asylum seekers being forced to live on the streets. Furthermore, it is

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legally questionable that no exception is made for persons not having applied for asylum in a Member State where there are systematic flaws in the asylum procedure or reception conditions.

The rights of minors

When it comes to minors in the proposal the key judgment here of the European Court of Justice is MA vs. United Kingdom.

The Court held that unaccompanied minors form a category of particularly vulnerable persons and that it is important not to prolong the procedure for determining the Member State responsible more than is strictly necessary, which means that, as a rule, unaccompanied minors should not be transferred to another Member State (Para. 55). The Court pointed to Article 24(2) of the Charter, whereby in all actions relating to children, the child's best interests are to be a primary consideration.

In 2014, the European Commission proposed to amend the Dublin Regulation in accordance with the ruling in MA. However, the current proposal now proposes to leave the article unchanged, disregarding the Court's decision. It may lead to violations of the Charter and the Convention on the Rights of the Child.

The right to an effective remedy

The Meijers committee is concerned about the intention of the European Commission to curtail the right of an effective remedy for asylum seekers.

In Ghezelbash (7 June 2016; C-63/15), a very recent judgment from the European Court of Justice, the Court gives answers on how to deal with the right to effective remedies in the current Dublin system.

The case concerns a 30 year old man from Iran, who applied for asylum in the Netherlands but he had previously received a visa from France. Based on the Dublin rules, the

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Netherlands and France agree to transfer him to France. Mr. Ghazelbash claimed, however, that he did receive a French visa but that after his stay in France, he returned again to Iran, which would “reset” the Dublin rules, and he has documents to prove this.

The main question of this case is not whether France or the Netherlands are responsible but who should decide on the case, one of the two Member States or a judge.

From the point of administrative national law, it is actually unthinkable not to be able to have a legal remedy against a decision to reject an asylum application.

The ECJ held in the earlier *Abdullahi case*, which was about the Dublin II Regulation, that “only Member States can enjoy individual rights under the Regulation.” And that it is not problematic (I quote the ECJ in *Abdullahi*), “because it may be assumed that all participating states respect fundamental rights” Besides, the harmonized rules are allowing for asylum seekers to “largely” be treated the same. So the applicant is therefore not interested in where he ends up.

After this ruling the Dublin III Regulation entered into force, with a new article 27 on legal remedies.

In the *Ghazelbash case*, the ECJ overturned this earlier reasoning on the basis of the Dublin III Regulation having strengthened the procedural rights of the applicant (including the right to be informed and the right to a personal interview). The Court found that, the right to a remedy should not be interpreted restrictively. Legal action must be open against the application of all transfer criteria.

The present proposal will reverse this ruling by laying down in the new Article 28, paragraph 4, that the right to a remedy is limited to decisions based on Article 3(2) and Articles 10 to 13 and 18. Those are the provisions dealing with situations such as in the *MSS case* (Greece), minors and family reunification.

Apart from the fact that the proposal means a step back for asylum seekers' rights, there are three major reasons why restricting their right to appeal is problematic.

First, the proposal still gives asylum seekers the rights to information and a personal interview. On that basis, restricting the situations in which there is a right to appeal is not in line with the *Ghezelbash* judgment.

Second, the European Convention gives specific protection to aliens who are subjected to expulsions in its Protocol 7: an alien shall not be expelled except in pursuance of a decision taken in accordance with the law – and if the alien believes that the expulsion is not in accordance with the law he or she should have the right to appeal according to art. 13 ECHR. In other words, any expulsion, also a Dublin removal, entitles the expellee to access to a Court if he or she believes the law was incorrectly applied.

Third, the proposal seems incompatible with Article 47 of the EU Charter, which holds that everyone whose rights and freedoms guaranteed by Union law shall have the right to an effective remedy.

We would therefore suggest amending recital 24 and deleting Article 28 (4).

Furthermore, *Ghezelbash* case and the recent judgment in the *Karim* case suggest that it is not so much the individual asylum seekers who seek to abuse the Dublin system but it is the Member States who choose to withhold information from each other when sending “take back” requests, with the apparent aim that the sending Member State can thereby avoid responsibility.

In light of this, the Meijers Committee is concerned by the proposal to transform take-back requests into take-back notifications, without addressing the identified problems of an evidential nature.

We are also concerned about the short period given to asylum seekers to bring remedies:

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within 7 days after the notification of a transfer decision instead of the current 'reasonable period'.

This may be problematic in light of the *Diouf* judgment (Case C-69/10), where the CJEU held that a 15-day time limit in general seemed to be sufficient, but that the period prescribed must always be sufficient in practical terms to enable the applicant to prepare and bring an effective action.

We believe that the national judge should be competent to determine whether, in an individual situation, the time limit is sufficient in view of the specific circumstances.

We do welcome the proposal to extend the right to an effective remedy to situations in which no transfer decision is taken, and where the applicant wishes to be reunited with family present in another Member State (Art. 28(5)).

With regard to this proposal one may wonder:

Should we not establish a system that works *with* the interests of asylum-seekers and Member States which are in the frontlines – instead of coercing unwilling Member States and asylum seekers into cooperation? As long as the system is deemed to be unfair by the key players in Dublin and does not serve their interests, Dublin may be bound to fail, regardless of how much coercion is put into the system. That coercion is moreover problematic from the perspective of human rights.

Would we not call a builder of a house irresponsible if he or she would build more floors to a house whose foundations are, to say the least, shaky?

Thank you for your attention.

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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