Meijers Committee
standing committee of experts on international immigration,
refugee and criminal law

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CM1805 Note on the proposal for the Procedures Regulation and Dublin Regulation

21 March 2018

The Meijers Committee wants to draw your attention to the negotiations in the Justice and Home Affairs Council on the Procedures Regulation and Dublin Regulation (Council Documents 1599/17 of 9 January and 6238/18 of 19 February). Below, we make a few observations on the most recent compromise proposals of the Presidency for both legislative instruments. These concern the safe third country and first country of asylum concepts, effective remedies in both proposals, the pre-Dublin procedure, the scope of family members in the Dublin regulation, the definition of the risk of absconding and sanctions on asylum-seekers who are in a non-responsible Member State.

1. Procedures Regulation

A key compromise proposal of the Presidency in the Procedures Regulation is to lower the requirements that a third country must satisfy in order to be considered a first country of asylum or a safe third country. According to the current Directive, this requires, inter alia, that the applicant in that country is recognized as a refugee and he can still enjoy that protection or otherwise enjoys sufficient protection in that country (first country of asylum); or that there is a possibility to request refugee status and, if the refugee is recognized, to receive protection in accordance with the Geneva Convention (safe third country). The current directive does not define what "sufficient protection" entails.

1.1 The concept of first country of asylum (Article 44)

The Council proposes that a country of a first asylum can be considered safe if it inter alia guarantees "sufficient protection" in paragraph 1a. This means protection in accordance with the Geneva Convention *or* protection including "a right to lawfully stay", "access to means of subsistence sufficient to maintain an adequate standard of living", "access to emergency medical care and essential treatment of illnesses" and "access to elementary education." The Meijers Committee welcomes the proposal to define more precisely what sufficient protection means. That definition, however, implies that the asylum seeker will not be guaranteed access to socio-economic benefits (education, healthcare, access to the labour market) on the same level as nationals of the third country. This results in the Refugee Convention no longer forming the benchmark of protection. The conceptualisation of "sufficient protection" raises a number of specific concerns:

- The standards of "sufficient means of subsistence" and "adequate standard of living" remain imprecise. They are subject to different interpretation and application by Member States. Principle 1.1. of the EU guidelines on the drafting of legislation state that a legal text must be unambiguous and precise.

- To require only access to elementary education runs counter to Art. 13(2)(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which holds that "Secondary education shall be made generally available and accessible to all by every appropriate means". It also ignores Article 22(2) of the Refugee Convention, which accords as favourable treatment as possible with respect to education other than elementary education.

- To require access only to emergency healthcare and essential treatment of illness is below the standard recognised by all Member States of the EU in their capacity as State Parties to the ICESCR that "everyone has the right to the enjoyment of the highest attainable standard of physical and mental health" (Article 12 ICESCR).

- The condition in paragraph 1(b)(i) that there must be a right to lawfully stay in the territory of the third country does not secure that lawful residence is granted for a certain duration. Neither does it clarify how exactly it is to be established whether there are indeed prospects of lawful residence in the territory of the third country.

1.2 The concept of safe third country (Article 45)

In respect of the safe third country concept, the Council likewise proposes to delete explicit references to the Geneva Convention and to consider sufficient protection as described in Article 44 (1a)(b) adequate. In addition to the concerns mentioned above, the Meijers Committee makes the following remarks:

- In proposed article 45, paragraph 2b, following the Commission proposal, sole transit is considered sufficient for the adoption of a connection between the asylum seeker and the safe third country in question. UNHCR has repeatedly expressed opposition to consider mere transit through a country as sufficient to constitute a bond.[1] A viable future for an asylum seeker in a safe third country is best served with a real connection with that country, for example because of previous stay or because of relatives living there. Further, it is unclear how having transited through a third country relates to the notion of sufficient protection, especially the requirement that the person must previously have stayed lawfully in the third country (proposed Article 44 paragraph 1(b)(i)).

- The Meijers Committee notes that neither Article 44 nor Article 45 specify that the first country of asylum or the safe third country must guarantee to take back the applicant. This is only mentioned for unaccompanied minors. This may result, in practice, to refugees being denied asylum in the EU without being able to access asylum elsewhere and hence being left "in orbit." The Meijers Committee is of the opinion that the effectiveness of the right to asylum requires the question whether a first country of asylum or safe third country will take back the asylum seeker to be part of the asylum procedure and that it therefore should be one of the substantive requirements for applying the safe country concepts. Article 44 paragraph 6 provides that a Member State shall examine the application on the merits if the third country in question does not admit or readmit the applicant to its territory. This means that an inadmissibility decision is taken and a return process is started and that if it turns out that a third country will not readmit the person, a fresh asylum application must be brought. The Meijers Committee recalls that as a condition for the return of an asylum seeker to a third country, UNHCR has consistently required the third country's advance consent to readmit the person.[2]

1.3 National and European lists of safe countries of origin and third countries

[1] See. UNHCR ExCom Conclusion no. 15 (XXX) 1979 under h(iv) and UNHCR ExCom Subcom. On International Protection, Background Note on the Safe Country Concept, 1991, para. 15 and UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), August 2010.

[2] UN High Commissioner for Refugees (UNHCR), *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, February 2003, PPLA/2003/01, available at: http://www.refworld.org/docid/3f4de85d4.html Page 59.

On the amendment to Article 48 the Meijers Committee recalls its previous note (CM1614) and wonders from perspectives of subsidiarity and justifiability whether the European Commission is best placed to decide for all Member States that and how they should apply the concepts of safe country of origin and third country. The Netherlands is among a number of Member States that is using a national list of safe countries of origin. The decision to place a country on this list can give rise to extensive and complex litigation in national courts. In the Netherlands, for example, the highest administrative court asked the advocate-general for a legal opinion prior to its examination of Albania as a safe country of origin for a homosexual applicant.[3] The administrative court found that the decision to render Albania a safe country of origin should be based on the legal and factual situation in that country, and that Member State authorities need to provide evidence that the country is safe not just in general but also for a specific applicant, given his/her individual circumstances.[4]

This judgment illustrates that whether a country can be considered safe can vary from applicant to applicant, depending on specific circumstances. It also illustrates that it is important for asylum seekers to be able to legally challenge safe third country designations. In other Member States, such as Belgium and the UK, national safe third country designations have also been challenged on a frequent basis, sometimes successfully. The flexibility to include or exclude a country from the safe country of origin list can be easily attained at a national level, where it is at the executive's discretion to do so. Such flexibility would be more problematic at the European level. In this light the Meijers Committee points out that the turnaround time between the decision of the immigration authorities in the Netherlands to declare Albania a safe country and the judicial review by the highest administrative court (i.e. not the first instance decision but the appeal) was less than 10 months. It is hard to imagine that such procedural speed can be achieved at the European level.

The crucial issue here is that whilst in national systems ample possibilities exist to challenge national safe country designations, there are no direct legal challenges possible against the inclusion of a country on the common EU lists (see further our earlier note). As it stands, the proposal guarantees neither flexibility nor judicial oversight in respect of the common lists of safe third countries and safe countries of origin. If the proposal is maintained to introduce lists at the EU level, the Meijers Committee suggests to include a provision to the effect that it is clarified that national courts can ask the Court of Justice of the EU for a preliminary ruling on whether the designation of a country meets the requirements of the regulation. This can be a new paragraph in both Articles 46 and 48:

> "The Court of Justice of the European Union shall, in accordance with Article 267 TFEU, have jurisdiction to give a preliminary ruling on the question whether the designation of a country as safe meets the conditions laid down in Article 45/47."

The Council further includes the use of two safe (third) country lists at both the Union and the national level (proposed Articles 50), which may give rise to confusion and contradiction. The Meijers Committee suggests that such duality should be avoided. For applicants, lawyers, Member State authorities, parliamentarians and the judiciary such duality can cause the undesirable situation that a country that is considered safe at the Union level is considered not to be so at the national level. This leads to complex questions such as to which list prevails. Article 50(2) and (3) do not resolve this situation.

The Meijers Committee also wonders how the use of safe (third) country lists at both the Union and the national level corresponds to the proposed pre-Dublin admissibility procedure provided in article 3(3)

[3] Conclusion Advocate-General Widdershoven of 20 July 2016, in case number 201603036/3/V2, ECLI:NL:RVS:2016:2040

[4] Afdeling Bestuursrechtspraak Raad van State, 14 september 2016, case number 201603036/3/V2, ECLI:NL:RVS:2016:2474.

(a) of the recast Dublin Regulation (COM (2016) 270). It is the Meijers Committee's understanding that prior to applying the Dublin criteria the first Member State in which the application for international protection was lodged is to apply an admissibility procedure (referred to as the pre-Dublin procedure) on the basis of the concepts of first country of asylum and safe third country. If an applicant is declared inadmissible he will not qualify for possible relocation to another Member State (according to Article 36(3)), nor will his application be examined on its merits. If there is divergence as to which countries are considered safe by different Member States, this may lead to applications being declared inadmissible for reason of the applicant coming from a country on the national list, while the application would have been found admissible by the Member State that would otherwise have been responsible for the asylum seeker. Or, an asylum seeker is first relocated to a Member State that subsequently declares the application inadmissible on the basis of it applying a different national list than the Member State of relocation. This jeopardizes the effectiveness and integrity of the Dublin system.

1.4 Effective remedy

In the proposed Article 53 paragraph 3a, elements of appeal are excluded from the judicial investigation unless they could not previously be invoked. The Meijers Commission wonders how this relates to the proposed Article 53 (3) which proposes a "full and ex nunc examination." It seems to impossible for a court to assess ex nunc on the one hand and, on the other hand, exclude elements from its assessment that could have been brought forward earlier.

2. Dublin Regulation

Depending on the degree of migratory pressure ("normal circumstances"or "challenging circumstances"), Article 3(3) and (3a) propose the establishment of a procedure, prior to the Dublin procedure (pre-Dublin procedure), in which it is determined whether the asylum application is admissible in view of the safe third country/first country of asylum concept. It is unclear to our Committee whether Article 3(3) and (3a) will also have to be applied in situations of "(severe) crisis" as set out in the earlier Estonian Presidency paper on solidarity and responsibility.[5]

2.1 Pre-Dublin procedure

The Meijers Committee is concerned that the proposed system is rather complex, not fully thought through and doubts its feasibility in practice. Multiple readings of Article 3(3) and 3(3a) are possible, thus leaving room for diverging interpretation among the Member States.
If, for example, an asylum seeker lodges an application for international protection in a Member State at an external border, e.g. Italy, then travels to another Member State, e.g. the Netherlands, and also lodges an asylum application there, the Netherlands cannot apply Articles 3(3) and 3(3a), because it is not the *first* Member State in which the application was lodged. The Netherlands will then apply the criteria for determining the Member State responsible under Chapter III, as is the case under the current Dublin Regulation. If the Netherlands finds Italy to be responsible, Article 3 is most likely no longer applicable, since Article 3(3)-(3a) may (respectively shall) only be applied *before* applying the criteria in Chapters III and IV. However, there might be room for interpretation as one could also read Article 3(3) and (3a) as leaving open the possibility/obligation for Italy to also apply these provisions before the application of the criteria in Chapter III and IV. In this case, The Meijers Committee questions the added value of these provisions with regard to Article 36(1) and Article 40 of the Asylum Procedures Regulation.

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[5] ECRE, Beyond Solidarity: rights and reform of Dublin. ECRE's call on states to ensure fundamental rights protection in the reform of the Dublin system, Legal Note 3, February 2018, p. 2-3.

A second example is that of an asylum seeker entering Europe through Italy who, after having his finger prints taken, travels to the Netherlands to lodge an application there. In this situation, the Netherlands may or shall apply an inadmissibility or accelerated procedure before applying the criteria in Chapter III and IV, because it is the first Member State where the asylum application was lodged. If the Netherlands comes to the conclusion that the case is admissible, the Netherlands then proceeds to the assessment of the criteria under Chapter III and IV. However, when the Netherlands comes to the conclusion that the application is inadmissible or rejects the application in the accelerated procedure, the Netherlands shall be considered as the Member State responsible (see Article 3(4)). The Dublin Regulation no longer comes into play after that point. This raises the question whether Italy, through which the asylum seeker has entered the EU, can also apply Article 3(3) or (3a) if the Netherlands (where the asylum seeker has lodged his first application) has already applied the criteria in Chapter III and IV and deemed Italy responsible.

Another concern the Meijers Committee would like to raise is that of legal remedies, especially when a Member State *chooses* to apply the inadmissibility or accelerated procedure under Article 3(3). It should be clarified whether a legal remedy is provided against the decision to apply an admissibility or accelerated procedure before the Dublin procedure.

In sum, the Meijers Commission fears a very complex set of different, partly overlapping procedures in different Member States. The following issues regarding Article 3(3) and Article 3(3a) need to be addressed:

- Does the application of Article 3(3) or (3a) mean that a Member State, when it has indications that an applicant for asylum has traveled through another Member State, is conducting an admissibility procedure seizing responsibility under the Dublin Regulation? Or does this imply, in view of the parallel introduction of the obligation to apply for asylum in the Member State of first arrival, an additional administrative burden for Member States at the external borders?

- Is it possible to challenge a decision deciding on an asylum application in an inadmissibility procedure or an accelerated procedure before assessing the criteria under Chapter III and IV? If so, do the provisions of the Asylum Procedure Regulation apply and do they apply in the Member State that has applied Article 3(3)-(3a)?

- If the Member State, where the application was lodged, has applied Article 3(3)-(3a), which Member State is responsible for the costs of the admissibility or accelerated procedure and of the return procedure? Is there a difference between the financial burden sharing in case of 'normal circumstances' and in 'challenging circumstances'?

2.2 Family members

The proposal of the Council deletes in Article 2(g) the sibling or siblings of the applicant from the list of family members. The inclusion of siblings in the definition of family members is of particular relevance in cases concerning unaccompanied minors, since siblings of minors that are not unaccompanied usually are included as family members through the fact that they are the parent's children. Given the precarious position of unaccompanied minors, the Family Reunification Directive gives room for Members States to use a wider definition of a family members in Article 10(3)(b) and it stipulates in Articles 5(5) and 17 that Member States in each case have due regard to the best interests of the children. Moreover, from the ECtHR's ruling in Olsson v. Sweden, it follows that in situations where a State is directly responsible for the care of siblings, sufficient efforts must be made to ensure that the

family ties between these siblings are not unnecessarily weakened.[6] Excluding siblings from the definition of 'family members' altogether, as is proposed, would therefore be in contrast with the Family Reunification Directive and with Strasbourg case law on this issue.

2.3 Risk of absconding

The reference in Article 2(n) on the definition of the risk of absconding to national law sustains the questionable practice that Member State apply different criteria for establishing a risk of absconding.

2.4 Sanctions

Article 5 introducing sanctions as consequence of non-compliance including the implicit withdrawal of and no entitlements to the reception conditions remain a concern. In this regard the Meijers Committee repeats what its previously stated in our comment CM1609: "In view of the current reality that very substantial numbers of asylum applicants do not claim asylum upon arrival in the EU, this could lead to curtailment of procedural rights and asylum seekers being forced to live on the streets on a massive scale. Although the idea underlying this proposal apparently is that it will encourage asylum seekers to apply for asylum immediately, or to cooperate with their transfer, another reasonable outcome can be that asylum seekers will prefer an irregular presence in another Member State than the one responsible. This is not only questionable from a public order perspective, it also disregards the fact that asylum seekers are a vulnerable group and on that basis entitled to shelter and decent living conditions.[7] Legally questionable, further, is that no exception is made for persons who have not applied for asylum in a Member State where there are systematic flaws in the asylum procedure and reception conditions.

2.5 Effective remedies

Article 6(e) limits the possibility to challenge a transfer decision to an assessment whether Articles 3 (2) in relation to the existence of a risk of inhuman and degrading treatment or Articles 10 to 13 and 18 are infringed upon. Narrowing down the scope of the remedy runs counter to the most recent case law of the CJEU (*Ghezelbash* and *Karim*[8]) and is questionable in view of Article 47 of the EU Charter, which requires a remedy before a tribunal for everyone whose rights guaranteed by Union law are violated.

[6] 24 March 1988, Olsson v. Sweden ECHR judgment (number 10465/83).

[7] 21 January 2011 M.S.S. v Belgium and Greece ECHR judgement (number 30696/09).

[8] Cases C-63/15 and C-155/15.