

Meijers Committee

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



CM2012 Meijers Committee Comments on the Migration Pact – The Asylum and Migration Management Regulation

November 2020

In this document, the Meijers Committee presents its comments on the Commission proposal for an Asylum and Migration Management Regulation.

The Meijers Committee finds that the new Asylum and Migration Management Regulation (hereafter AMMR) does not address the fundamental shortcomings of the existing Dublin Regulation which it seeks to replace. It is common knowledge that the current Dublin system is problematic from a solidarity standpoint, as it places an excessive responsibility on Member States with external borders. Those Member States have indicated that they are not able or willing to shoulder this burden any longer. The Asylum and Migration Management Regulation regrettably does not address this issue in a significant manner.

In 2018, the Meijers Committee expressed its concerns on the proposed recast of the current Dublin III Regulation (henceforth referred to as Dublin IV).¹ The Meijers Committee noted that the proposed system appeared complex, its goals were not fully thought through, and its feasibility in practice seemed doubtful. The Meijers Committee also expressed its concerns with regard to the proposed limitations to the right to legal remedies. Since the Dublin IV proposal was blocked by the Council, the European Commission now proposes new amendments to the Dublin system in the new AMMR.

Below we will express concerns and recommendations with regard to this proposal, concerning

1. The proposed solidarity mechanisms.
2. The right to effective legal protection.
3. The reception facilities.
4. Unaccompanied children.
5. Detention.

1. The lack of real solidarity mechanisms

Article 21 of the AMMR maintains responsibility for the handling of an asylum application with the Member State of first entry, while clarifying that it applies also to persons disembarked after a search and rescue operation. The Meijers Committee finds that this will continue to overburden the Member States at the external borders, rendering the AMMR unworkable and ineffective.

¹ CM1805 Note on the proposal for the Procedures Regulation and Dublin Regulation, see https://www.commissie-meijers.nl/sites/all/files/cm1805_note.pdf.

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One of the expressed aims of the Migration Pact is ‘reinforcing mutual trust by a new solidarity system’. The AMMR contains two solidarity mechanisms. One for disembarkations following search and rescue and one for situations of “migratory pressure”. The Meijers Committee observes that these two solidarity mechanisms both are so flexible that they cannot be referred to as an expression of genuine solidarity among Member States.

In case of migratory pressure all Member States are required to contribute to relieving this pressure, either by relocation, return sponsorship or capacity building. The system entails a complicated combination of voluntary pledges and solidarity contributions according to a distribution key based on a Member State’s GDP and number of residents. It is disappointing that the proposed mechanism in the AMMR does not aim for a fair distribution or allocation of asylum applicants among Member States. The proposal instead institutionalises a questionable mechanism of political wheeling and dealing.

The Meijers Committee is concerned about the proposals relating to so-called return sponsorship. In the proposal, applicants may be kept in detention for up to eight months, after which, if return is not effected, a transfer to the responsible Member State is foreseen. It is not clear to what extent detention may continue after the transfer has taken place. Furthermore, the Member State sponsoring the return of the applicant must endeavour to obtain documentation enabling the applicant to be returned to his country of origin. However, it seems that return to the country of origin is not a given, as the recast Returns Directive proposes to also seek return to countries of transit or ‘any other country’ as long as this country agrees to accept the applicant. This means that an applicant may be deported to a country with which he or she has no ties or connection whatsoever.

The proposal does not include personal preferences of applicants who are subject to relocation transfers. Applicants are thus fully dependent on agreements of the Member States, reducing them in effect to commodities. In this way, the proposal neglects established knowledge regarding prospects of labour and integration of asylum applicants, which increase exponentially when there is a connection to the host state. The Meijers Committee therefore recommends to strengthen the agency of applicants in the relocation procedure by giving adequate weight to their preferences and by establishing legal remedies.

Additionally, the term ‘migratory pressure’ is not clearly defined in the AMMR. This leaves the interpretation of this concept to the European Commission alone. The Meijers Committee recommends to clearly define migratory pressure and to make the Commission’s assessment subject to democratic scrutiny by the European Parliament.

Recommendations

- Clearly define the term migratory pressure.
- Make the assessment of the European Commission on migratory pressure subject to approval by the European Parliament.
- Set clear obligations for relocation and refrain from a mechanism that allows for political maneuvering.
- Give applicants a say in the relocation procedure by giving weight to their preferences and by including legal remedies.

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2. The right to effective legal protection and Dublin transfers

Effective legal protection

The Meijers Committee finds that the AMMR proposal seriously restricts the access of asylum applicants to effective legal protection. This includes the access to the asylum procedure, the personal interview, the access to legal aid, and the access to appeal procedures.

The current Article 18 (2) of the Dublin III Regulation protects asylum seekers who are transferred back to a State that has meanwhile discontinued or rejected the asylum application. The receiving Member State is in that case obliged to reopen the asylum procedure. The proposal to delete Article 18 (2) will restrict access to asylum procedures. As a result, the proposal risks to lead to violations of the principle of non-refoulement, as no assessment to this effect has to be made by the receiving Member State.

Article 12 (2) of the AMMR permits Member States to refrain from conducting a personal interview in a number of circumstances, including the situation in which the applicant has not attended the personal interview and has not provided justified reasons for his or her absence and also if the applicant has already provided the information relevant to determine the responsible Member State by other means. This last exception is problematic, as it cannot be established *ex ante* that the provided information is complete. In practice, the personal interview is a crucial occasion where the applicant may put forward all the relevant information. It must be borne in mind that the right to be heard is a fundamental principle of EU law and is guaranteed by Article 41 of the EU Charter of Fundamental Rights. The applicant must therefore be given an effective opportunity to set out all of the relevant circumstances, including personal circumstances. This is of particular importance when it concerns information with regard to the existence of a real risk of treatment contrary to Article 4 of the Charter.²

Article 27 of the Dublin Regulation, which concerns the right to legal remedies against Dublin transfers is dismantled in the new Article 33 AMMR. The Meijers Committee finds that the proposed provision does not fulfil the requirements of Article 47 of the Charter. According to the proposal, the scope of the legal remedy is limited to the question whether a transfer would lead to a real risk of violation of Article 4 of the Charter and to whether Articles 15 to 18 (protection of unaccompanied minors and family union) and Article 24 (protection dependent persons) have been infringed, 'in the case of the persons taken charge of pursuant to Article 26 (1), point (a)'. It is true the CJEU has held that an applicant who is subject to a take back procedure is not entitled to rely, in an action brought under Article 27 (1) of the Dublin Regulation in a second Member State against a decision to transfer him or her, on the criteria for determining responsibility set out in Chapter III of that regulation.³ However, in this same judgment, the CJEU held that in circumstances where the criteria for determining responsibility set out in Articles 8 to 10 of the Dublin III Regulation, read in the light of recitals 13 and 14 thereof, are at stake, which are intended to promote the best interests of the child and the family life of the persons concerned, a Member State cannot, in accordance with the principle of sincere cooperation, properly make a take back request, when the person concerned has

² See by analogy CJEU 16 July 2020, *Addis*, C-517/17.

³ CJEU 2 April 2019, C-582/17, C-583/17, *H. & R.*

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provided the competent authority with information clearly establishing that that Member State must be regarded as the Member State responsible for examining the application pursuant to those criteria for determining responsibility. In such a situation, it is, on the contrary, for that Member State to accept its own responsibility, and the applicant must have the right to appeal and to invoke, by way of exception, that criterion for determining responsibility on the basis (point 83-84). The scope of the right to appeal in this proposal is therefore too narrow.

The Meijers Committee further observes that the AMMR proposal allows Member States to withhold free legal assistance and representation where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success (Article 33 (5)). Yet the proposal does not clarify how and when the competent authority can deem an appeal to have no tangible prospect of success. This seriously hampers access to an effective remedy guaranteed by Article 47 of the Charter.

Dublin transfers

Transfers of Dublin claimants are meant to take place in a more effective manner, but it is not clear how this effectiveness will be achieved. On the one hand, there will be shorter deadlines (Article 29(1)) and a simplified take back procedure (Article 31), but on the other hand Member States will have a three year period to return asylum seekers to the Member State of first arrival if that is the responsible State. Under the current Dublin Regulation this period is 18 months. The proposal of extending this period to three years will further increase pressure on the Member States at the EU external borders and lead to a very long period of uncertainty for the individual. During this period it will be impossible for the asylum seeker to integrate in either the Member State he is in or the Member State considered responsible. The system seems to be based on questionable confidence in fast border procedures and the principle of mutual trust.

Recommendations

- Reinstall Article 18 (2) of the Dublin III Regulation.
- Delete the ground laid down in Article 12 (2) to omit conducting a personal interview.
- Amend Article 33 (1) to expand the scope of the appeal with regard to transfer decisions on the basis of take back requests.
- Amend Article 33 (5) as to ensure that all applicants have access to free legal assistance and representation.
- Shorten the maximum time period for the execution of Dublin transfers.

3. Reception facilities

Unauthorised movements of asylum seekers will be discouraged by withholding reception facilities as guaranteed by the Reception Conditions Directive to asylum seekers who have irregularly crossed the internal borders. Nonetheless, Member States will have to provide 'a standard of living in accordance with Union law'. The Meijers Committee notes that the AMMR proposal does not clarify what kind of living standards have to be offered, nor includes a legal remedy to challenge the lawfulness of concretely offered living standards. In light of this, the Meijers Committee finds that the proposal may lead to violations of the right to safe and healthy living conditions as protected by the Article 1 of the Charter and the European Social Charter

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Recommendations

- Delete Article 10 of the proposed AMMR as it provides a genuine risk that asylum seekers are unlawfully withheld appropriate reception conditions.
- Clarify the living conditions Member States are obliged to offer to unlawfully present asylum seekers.
- Ensure that asylum seekers who are withheld reception conditions have access to legal aid.

4. Unaccompanied children

The Meijers Committee takes note of the proposal that unaccompanied children will be transferred to the first Member State where they applied if no family criterion is deemed applicable (Article 15 (5) AMMR). This proposal contradicts the *MA* judgment of the CJEU which provides that the best interests of the child must override all other considerations, and that this requires that the Member State in which the minor is present after having lodged an application there is designated as the responsible Member State.⁴ This judgment is currently codified in the Dublin III Regulation. According to the current Dublin criteria, the asylum claim of the unaccompanied minor (UAM) should be examined in the Member State where the child *last* applied for asylum and is present. This reading of the principle should be respected. Under the new proposal, children will again have to face transfers and long waiting periods. This is incredibly harmful, especially to young, unaccompanied children and will lead to violations of Article 24 of the Charter.

Recommendation

- Delete the possibility in Art. 15(5) AMMR to transfer a UAM to the first Member State where the UAM applied for international protection, in line with the interpretation of the CJEU of the best interest of the child principle.

5. Detention

The Meijers Committee finds that the AMMR proposal may lead to an increased resort to detention. Detention may become the standard, rather than a measure of last resort. In the AMMR proposal, this follows from Article 34 (2), which no longer requires there to be a *significant* risk of absconding. Although the proposal stresses that detention should only be used when other less coercive alternative measures cannot be applied effectively, lowering the threshold will lead to more applicants being detained.

Recommendation

- Amend Article 34 (2) by reintroducing the requirement that there must be a serious risk of absconding before an applicant may be detained.

⁴ CJEU 23 January 2019, C-661/17, *M.A. and others*, par 60.