



to The Members of the LIBE Committee  
c/o Secretariat  
European Parliament  
By e-mail

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

**Mailing address**  
Postbus 201  
3500 AE Utrecht

date 2 December 2014

**Visitor address**  
Kanaalweg 86  
3533 HG Utrecht

reference CM1415

**Ph** +31(0)30 297 4328  
**F** +31(0)30 296 0050

subject **Note on the proposal of the European Commission of 26 June 2014 to amend Regulation (EU) 604/2013 (the Dublin III Regulation)**

**W** [www.commissie-meijers.nl](http://www.commissie-meijers.nl)

**E** [I.middelkoop@commissie-meijers.nl](mailto:I.middelkoop@commissie-meijers.nl)

Dear members of the LIBE Committee,

In view proposal of the European Commission of 26 June 2014 to amend Regulation (EU) 604/2013 (the Dublin III Regulation) and the presidency compromise text of 20 November 2014, concerning the position of unaccompanied minors, the Meijers Committee prepared attached note.

As always, we remain at your disposal for questions and comments.

Identical letters were sent to the Commission and the General Secretariat of the Council.

Sincerely,



Theo de Roos  
Chairman

## Note on the proposal of the European Commission of 26 June 2014 to amend Regulation (EU) 604/2013 (the Dublin III Regulation)

*The Meijers Committee is of the opinion that the judgment in case C-646/11 on the position of unaccompanied minors should be implemented fully. This would be in conformity with both the political agreement reached by the co-legislators upon the adoption of the Dublin III regulation and the requirements of the Charter of Fundamental Rights. Accordingly, the original Commission proposal should be adopted, without the changes made in the Council Presidency compromise text. In addition, the Meijers Committee believes that it is in the best interest of the child to extend these provisions to unaccompanied minors who do not lodge an application for international protection. Finally, the Meijers Committee suggests that effective remedies should also be ensured against decisions not to transfer an asylum applicant.*

### Introduction

The Meijers Committee has taken note of the proposal<sup>1</sup> of the European Commission of 26 June 2014 to amend Regulation 604/2013 (the Dublin III Regulation) and the changes made to this proposal in the Presidency compromise text of 20 November 2014.<sup>2</sup> The proposal seeks to revise Article 8(4) of the Regulation in the light of the judgment of the Court of Justice of the European Union in case C-648/11 *MA and Others vs. Secretary of State for the Home Department*. In this judgment the Court of Justice ruled that ‘where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the Member State responsible’. Article 8(4a) of the proposal reflects this judgment. However, Articles 8(4b and c) of the Presidency compromise text of 20 November 2014 state that, by way of derogation from Article 8(4a), the Member State which has already taken a decision at first instance on the basis of an adequate and complete examination of its substance is responsible under the Dublin Regulation. This does not conform with the judgment in Case C-648/11.

The proposal also addresses the situation of unaccompanied minor asylum applicants who are present in the territory of a Member State and who do not lodge an application there. Such a situation was not covered by the judgment in case C-648/11. Article 8(4b) of the proposal provides that in that case the unaccompanied child should be transferred to the Member State where he has lodged his or her most recent application, unless this is not in his best interest.

The Meijers Committee welcomes the fact that the proposal ‘takes highest account of the Court of Justice's ruling in case C-648/11’. However, the Committee also wishes to put forward several comments, in particular with regard to Articles 8(4b and c) of the compromise text and Article 8(4d) of the proposal.

---

<sup>1</sup> COM(2014) 382 final.

<sup>2</sup> Council Document No 15567/14 of 20 November 2014.

### A full implementation of the judgment in Case C-648/11

Case C-648/11 concerned the interpretation of Article 6 of Regulation 343/2003 (the Dublin II Regulation). Some Governments contend that this judgment therefore does not require the Union legislator to bring the Dublin III Regulation into conformity with the Court's judgment. In fact, the Dutch Government put forward the counterargument that such a rule promotes asylum shopping.<sup>3</sup> It therefore argues that the rules for transferring asylum seekers pursuant to the Dublin III Regulation should be the same for children and adults alike.<sup>4</sup>

The Meijers Committee is of the opinion that the Union Legislator cannot but implement the judgment in case C-648/11. It is true that the Court of Justice in case C-648/11 pertained to the old Dublin II regulation. However, the Meijers Committee recalls that upon adoption of the final text of the Dublin III regulation, the co-legislators attached a declaration in which they committed themselves to amending Article 8, once the judgment in C-648/11 was delivered. The Meijers Committee understands this to mean that the Council and Parliament settled their differences by seeking guidance from the Court. Moreover, as explained below, the Court in its ruling explicitly addressed concerns about so-called 'asylum shopping.'

There are sound legal reasons to implement the Court's ruling. The Court took into account the objectives of Article 6 (i.e. to make separate provisions for unaccompanied minors) and the Dublin II regulation as a whole (i.e. to guarantee effective access to an assessment of the applicant's refugee status). The Court held that '[s]ince unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.' The protection of (unaccompanied) minors and effective access to the procedures for granting international protection are also important objectives of the Dublin III regulation.<sup>5</sup>

Further, the Court of Justice held that Article 24(2) of the Charter of Fundamental Rights of the European Union (the Charter) requires that the child's best interests must be a primary consideration in decisions concerning the transfer of unaccompanied minors. According to the Court of Justice it is in the interest of unaccompanied minors 'not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status'. Therefore an unaccompanied minor who lodges an asylum claim in a Member State and is present there should not be transferred to the Member State where he first lodged an asylum claim. Article 8(4) of the current Dublin III regulation should also be interpreted in conformity with Article 24(2) of the Charter and thus, in principle, prevent the transfer of an unaccompanied minor.<sup>6</sup>

### Legality of the derogation provisions laid down in Article 8(4b and c) of the compromise text

The principles set out by the Court of Justice in its judgment in Case C-648/11 apply to all unaccompanied minors. The question whether these minors still have an asylum procedure pending or completed in another Member State was irrelevant to the Court. However, Article 8(4b and c) of the compromise text provides that an accompanied minor who is present and lodges an asylum claim in a Member State should be transferred to another Member State if that Member State has already

---

<sup>3</sup> Case C-648/11 *MA and Others vs. Secretary of State for the Home Department*, para 63.

<sup>4</sup> TK 2013-2014, 22 112, nr. 1895.

<sup>5</sup> See recitals 5, 13 and 16 and Art. 8 of the Regulation.

<sup>6</sup> Case C-648/11 *MA and Others vs. Secretary of State for the Home Department*, para 58.

■

taken a final decision on the basis of an adequate and complete examination of its substance. Article 8(4c) contains short time limits in order to guarantee a relatively swift completion of the Dublin procedure. However, it may still take several months (six weeks for the decision in first instance and the time necessary to lodge an effective remedy and obtain a court decision) before the unaccompanied minor will be transferred. This is not in conformity with the requirement following from the judgment in case C-648/11 that the Dublin procedure must not be prolonged unnecessarily and prompt access to the procedures for determining refugee status must be ensured. Therefore these provisions violate Article 24(2) of the Charter. There is a clear risk that Articles 8(4b and c) of the compromise text will be declared invalid by the Court of Justice, should they be adopted by the Union legislator.

In this respect, it is important to note that the Court of Justice found that a rule as laid down in Article 8(4a) as originally proposed does not entail a risk of asylum shopping.<sup>7</sup> The Court considered that an unaccompanied minor whose application for asylum is substantively rejected in one Member State cannot subsequently compel another Member State to examine an application for asylum. According to the Court, Article 25 of Directive 2005/85/EC (asylum procedures directive) allows Member States to declare an asylum application inadmissible (and thus avoid examination of the substance of the application), if the asylum applicant has lodged an identical application after a final decision has been taken against him in another Member State. The Member State which becomes responsible under Article 8(4) of the proposal needs to inform the Member State with which the first application has been lodged accordingly. In the reasoning of the Court therefore, there is no risk of asylum shopping, because a Member State may declare inadmissible an asylum application that is identical to an application on which another Member State has already finally decided. This possibility is maintained in the recast asylum procedures directive 2013/32/EU (Art. 33(1)(d)).

**The Meijers Committee recommends deletion of paragraphs 4b and 4c (I – IV) in their entirety, as they do not comply with the Charter and the case law of the Court of Justice.**

#### Taking back unaccompanied minors who have not claimed asylum

Article 8(4b) of the Commission proposal (Article 8(4d) of the compromise text) provides that Member States should inform unaccompanied minors who are present on their territory of their right to make an application and give them an effective opportunity to lodge an application in that Member State. If the unaccompanied minor does not lodge such application, he will as a general rule be transferred to the Member State where he has lodged his most recent asylum claim. Member States should refrain from transferring the minor if the transfer is not in his best interests.

The Meijers Committee finds that Article 24(2) of the Charter requires that the best interest of the child is a primary consideration in all decisions concerning the transfer of unaccompanied minors to another Member State. Unaccompanied minors belong to a category of particularly vulnerable persons, whether or not they have applied for asylum.<sup>8</sup> It follows from the Court of Justice's judgment in case C-648/11 that extensive procedures for determining the responsible Member State are not in a child's best interest. This should therefore also apply to unaccompanied minors who did not lodge an application in the Member State in which they are present, as referred to in Article 8(4b) of the proposal.

---

<sup>7</sup> Case C-648/11 *MA and Others vs. Secretary of State for the Home Department*, para 63.

<sup>8</sup> ECtHR 4 November 2014, *Tarakhel v Switzerland*, Appl. no. , para 119.

█

The Meijers Committee is concerned that the rule laid down in the proposed Article 8(4b) will place the burden on the unaccompanied minor to prove that transfer is not in her or his best interest. Member States may be inclined to apply the general rule rather than performing a full best-interest determination before taking a decision to transfer or not. Furthermore, the proposed Article 8(4b) will encourage unaccompanied minors who do not wish to be transferred to another Member State to lodge an application, even if such an application has no chance of success. This would not be in the interest of the Member States nor in the best interest of the unaccompanied minor.

The Meijer Committee proposes that when the unaccompanied minor makes an informed decision not to apply for asylum, the Member State in which he is present shall perform a best interest determination before taking a decision on his transfer to another Member State. The duty to perform such a best interest determination should be included in Article 8(4b) of the proposal. The rule that the minor should be transferred to the Member State where he has lodged his most recent asylum claim should be deleted.

#### Legal protection in case the Member State decides not to transfer

The position of unaccompanied minors also highlights an anomaly in the Dublin Regulation in the sphere of effective remedies. Article 27 of the Regulation only ensures the right to an effective remedy 'against a transfer decision'. Presumably this means that decisions *not* to transfer an applicant cannot be challenged before a court pursuant to the Regulation. The Meijers Committee has been informed of a number of cases in which an unaccompanied minor has expressly stated a preference to be transferred to another Member State, because a family member is present there, but where no take-charge request is submitted, or where the requested Member State refuses to accept such a request. The Regulation presumes that this a matter for the Member States to settle among themselves.

Where, however, a decision not to transfer affects the asylum applicant in the enjoyment of his or her fundamental rights, such as the right to family life or the child's best interests, an effective remedy against such a decision must be available. This follows clearly from Article 47 of the EU Charter of Fundamental Rights, which lays down that '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy'.

The Meijers Committee therefore proposes to change the text of Article 27(1) of the Regulation in such a way that an effective remedy is also open to decisions not to transfer an applicant:

#### *Article 27 Remedies*

1. The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, before a court or tribunal, against a transfer decision, a failure to submit a take-charge or take-back request as referred to in Articles 21, 23 and 24, or a decision on the request to take charge or to take back as referred to in Articles 22 and 25] before a court or tribunal.

...

\*\*\*

## 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.*

*The Meijers Committee is funded by the Dutch Bar Association (NOvA), the Dutch Refugee Council (VWN), Forum Institute on Multicultural Affairs, the Dutch Section of the International Commission of Jurists (NJCM), Art. 1 Anti-Discrimination Office, and the Dutch Foundation for Refugee Students UAF.*

### Contact info:

Louis Middelkoop

Executive secretary

[l.middelkoop@commissie-meijers.nl](mailto:l.middelkoop@commissie-meijers.nl)

+31(0)30 297 4328

Please visit [www.commissie-meijers.nl](http://www.commissie-meijers.nl) for more information.