

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

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To

European Parliament
Civil Liberties, Justice and Home Affairs Committee
Rue Wiertz
BE-1047 BRUXELLES

**Reference
Regarding**

CM0902
The proposals to amend the Dublin Regulation, COM(2008) 820 final of
3.12.2008 and the Reception Conditions Directive, COM(2008) 815 final

Date

18 March 2009

Dear Members of the Civil Liberties, Justice and Home Affairs Committee,

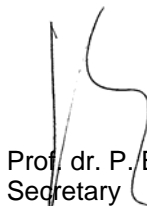
Please find attached the note of the Standing Committee of experts on international immigration, refugees and criminal law ('the Meijers Committee') on the proposals to amend the Dublin Regulation, COM(2008) 820 final of 3.12.2008 and the Reception Conditions Directive, COM(2008) 815 final.

We noted that there are already draft reports available on both proposals. We would like to draw your attention to a number of remarks we make in our comment that are not included in the amendments proposed by the rapporteurs. Especially with regard to detention we have our concerns. The Meijers Committee doubts the wisdom of including separate provisions on detention and procedures in different instruments. The Meijers Committee is of the opinion that the Returns Directive should serve as the general instrument on the topic whereas the basic provisions on detention are already to be found in this directive. The other instruments should refer to this common set of provisions and contain only the specific deviations if necessary.

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman



Prof. dr. P. Boeles
Secretary

cc. - European Commission
- Council of the European Union

• **Meijers Committee**

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

• **Comité Meijers**

Comité permanent d'experts en droit
international de l'immigration,
des réfugiés et du droit pénal

• **Meijers-Ausschuss**

Ständiger Ausschuss von
Experten im internationalen
Ausländer-, Flüchtlings- und Strafrecht

Note on the proposals to amend the Dublin Regulation, COM(2008) 820 final of 3.12.2008 and the Reception Conditions Directive, COM(2008) 815

Introduction

The Meijers Committee (Standing Committee of experts on international immigration, refugees and criminal law) has read the proposals to amend the Dublin Regulation and the Reception Conditions Directive mainly with approval. In particular, it appreciated that both proposals extend their scope in order to include applicants for subsidiary protection. Nevertheless, the Committee has serious concerns about the (overlapping) *provisions on detention* in both instruments. Furthermore, with regard to the amended Reception Conditions Directive the Committee has its doubts about the provision concerning *access to employment* and the provision to reduce material reception conditions in cases of a *subsequent application*. Although, the Committee agrees in principle with the provisions concerning the *temporary suspension of transfers* in the amended Dublin Regulation, it notes with concern that no criteria are mentioned for the Council to take a different decision as the Commission in this respect.

In this comment the provisions will be referred to according to the new numbering in the drafts.

Reception Conditions Directive

In the proposal to amend the Reception Conditions Directive the Committee noted with appreciation the new provision for schooling and education for minors (Article 14), the calculating standard (comparable social assistance granted to nationals) for the amount of assistance (Article 17, par. 5), the obligation concerning housing to take into account gender and age and the situation of persons with special needs (Article 18, par. 2), the provision that in cases of reduction or withdrawal of reception conditions subsistence and access to essential medical treatment should be guaranteed (Article 20, par. 4), the elaborated provisions for persons with special needs (Chapter IV), the provision on access to (in principle) free legal assistance (Article 25, par. 2) and the improved reporting to the Commission (Article 27, par. 2).

Although the provision concerning the *access to the labour market* is considerably improved as well, the Committee is still not convinced that by this new provision all undue restrictions in Member States are abandoned. The measure that applicants will be able to access employment after a period of maximum 6 months after lodging an application for international protection meets agreement. Nevertheless, the reference in this respect in Article 15, par. 2 to the national legislation of the Member States does not guarantee an unrestricted access to the labour market as envisaged by the proposal. It seems still to condone national practices as applied for example in the Netherlands to allow according to its national legislation access to employment only for a limited period of 12 or 24 weeks a year. The Committee deems it important for the directive to clarify more precisely its intent to provide applicants with international protection with fair opportunities to full access to employment in the Member States after maximum 6 months. This period provision makes it the more important to clarify precisely when an application for international protection should be considered as submitted. The Procedures Directive is silent on the issue as well.

The Meijers Committee emphasises that access to adequate reception should be given throughout the asylum procedure, and that only in very clear cases this access can be denied. Therefore, the withdrawal of the present provision of Article 16, par. 2 (refusal of reception when the asylum claim was not made as soon as possible) meets full agreement. In particular, the Committee appreciates that the possibility to withdraw material reception conditions altogether in the instances mentioned in Article 20, par. 1 is deleted. In these cases only the reduction of the reception conditions is allowed. Nevertheless, the possibility to reduce material reception conditions in cases of a *subsequent request* is worded too broadly (Article 20, par.1.c) and neglects that a subsequent request may be based on new information which justifies the reinstallation of some or all of the reception conditions. The Committee recommends that withdrawal of reception only takes place in case a subsequent application can be seen as a repeated request, as described in Article 23, par. 4, sub h of the Procedures Directive and may reasonably be considered to be lodged for the sole purpose of receiving reception.

Dublin Regulation

Although the Committee favours, in line with other civil society organisations and UNHCR, a completely different approach for allocating responsibility by choosing the country of application as the responsible country, it accepts the political reality that a majority of Member States strongly adheres to the existing principles of the Dublin Regulation for allocation of responsibility and that the political will is absent for a fundamental change. Nevertheless, the levels of protection offered by the Member States are still widely divergent, and in some Member States important shortcomings continue to exist in asylum systems.

Against the background of the continuation of the existing, very complicated rules for allocation of responsibility the Committee appreciates the proposed common information leaflet to be used across the Member States, the improved legal safeguards and the right to legal assistance and/or representation, the transfer of the provisions concerning dependent relatives from the humanitarian clause to the binding responsibility determination criteria and the emphasis on the “best interests of the child” in this respect and with regard to unaccompanied minors.

In principle, the Committee agrees as well with the provisions concerning the *temporary suspension of transfers* (Article 31). Nevertheless, it noted with concern that in Article 31, par. 5 no criteria are mentioned for the Council to take a different decision in cases in which a Member State has referred the Commission’s decision to suspend the transfers to the Council. The Dublin proposal lays down that in deciding upon the suspension of all transfers to a particular Member State, the Commission must take into account the applicable Community legislation, in particular the Reception Conditions Directive and the Procedures Directive (Article 31, par. 2 and 3) and state the reasons on which the decision is based, which must include, in particular, four considerations: the relevant circumstances in the Member State to which transfers are suspended; the potential impact of the suspension on the other Member States; the date on which the suspension takes effect; and the conditions attached to the suspension (Article 31, par. 4). The Council may subsequently, upon the request of any Member State, take a different decision by qualified majority (Article 31, par. 5). Article 31, par. 5 does not specify on what basis the Council may take a different decision, nor does it stipulate that the Council’s decision must state any reasons. Although a decision to suspend transfers is obviously a decision which may have notorious repercussions on all Member States involved, warranting the supervision of a political body such as the Council, the Meijers Committee finds that the current proposal insufficiently provides for transparency in the procedure and not to provide meaningful guarantees against arbitrary application. The Committee suggests therefore, that the Regulation would oblige the Council to base its decision on the same body of legislation and considerations as the decision of the Commission is based on and that the decision must state reasons. Furthermore, the Committee is of the opinion that Article 31, par 2 and 3 should also contain a reference to the Qualification Directive (2004/83/EC).

Overlapping rules on detention in the Procedures Directive, the Returns Directive, the Reception Directive and the Dublin Regulation

The main concerns of the Committee relate to the provisions on detention in the Reception Conditions Directive and the Dublin Regulation. First of all, the Committee doubts the wisdom of including separate provisions on detention and procedures in different instruments. Provisions on detention do appear now in the Procedures Directive, the recently adopted Returns Directive, and in the pending proposals concerning the Reception Conditions Directive and the Dublin Regulation; rules on decision making and appeal in the Dublin Regulation and the Procedures Directive. These sets of rules are to some extent comparable, but differ on details while the reasons for the differentiation are not always clear and evident. If these various sets of rules serve the purpose of securing observance of the same standards in international human rights law and general Community law on detention and procedures, there is no ground for differences. Furthermore, if proportionality and subsidiarity considerations require that rules on detention and procedures are laid down in a directive (or, as the case may be, in a regulation), the Committee does not understand why for Dublin transfers such rules should be codified in a regulation.

The Committee thus favours of a common, harmonised set of provisions. The Committee is of the opinion that the Returns Directive should serve as the general instrument on the topic because the basic provisions on detention are already to be found in this directive. The other instruments may refer to this common set of provisions and contain only the specific deviations if necessary.

Detention in the Receptions Conditions Directive and the Dublin Regulation

As the detention of applicants for international protection in both instruments is not aiming at their return, it is necessary that the Receptions Conditions Directive and the Dublin Regulation contain provisions precisely delimiting the grounds on which detention of the persons concerned is justified. More in detail, the Committee requests specific attention as regards the following provisions on detention in the Reception Conditions Directive and the Dublin Regulation:

Judicial review of the lawfulness of detention (Article 9, par. 5 Reception Conditions Directive and Article 27, par. 8 Dublin Regulation)

According to Article 9, par. 5 Reception Conditions Directive and Article 27, par. 8 Dublin Regulation, continued detention shall be reviewed by a judicial authority at reasonable intervals of time either on request by the asylum seeker or ex officio. This requirement is already laid down in Article 15, par. 3 of the Returns Directive. On the other hand, Article 9, par. 5 Reception Conditions Directive and Article 27, par. 8 Dublin Regulation go below the standards of the Return Directive, since these provisions do not stipulate the speed with which judicial determination of the lawfulness of detention must take place. According to Article 5, par. 4 ECHR, such judicial review must take place 'speedily'. In accordance with this ECHR-provision Article 15, par. 2, sub a and b Returns Directive stipulates a speedy judicial review of the lawfulness of the detention.

Detention conditions (Article 10 Reception Conditions Directive)

Because detention of asylum seekers is ordinarily an administrative measure, the Committee fully endorses the provision stipulating that asylum seekers shall not be detained in prisons but in specialized facilities (Article 10, par. 1), though it may be superfluous as this has already been provided in Article 16, par. 1 Returns Directive. The provision is in line with the judgment of the European Court of Human Rights in *Saadi v United Kingdom* (29 January 2008, appl. 13229/03), where the Court held that 'the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country' (par. 74). The proposal does however, apart from rights of contact and visitation and the right to obtain information (paragraphs 2 and 3), not stipulate what the minimum standards of detention conditions must amount to. In *Saadi v United Kingdom*, the European Court of Human Rights found it of particular importance 'that various facilities, for recreation, religious observance, medical care and, importantly, legal assistance, were provided' (par. 78). The Meijers Committee considers it opportune that the Reception Conditions Directive would contain more concrete standards on detention conditions and facilities to be provided to asylum seekers, reflecting the notion that detention of asylum seekers is not primarily aiming at the facilitation of removal like the cases covered by the Returns Directive.

Detention of minors (Article 11 Reception Conditions Directive and Article 27, par. 10 Dublin Regulation)

To the extent that it is still necessary in the light of Article 17 Returns Directive, the Committee welcomes the reference in Article 11 Reception Conditions Directive to the best interests of the child in deciding upon the detention of minors (also see Article 27, par. 10 Dublin Regulation). The Committee recommends however, that the directive would not only specify that a child's best interests are taken into account when deciding upon the child's detention, but also with regard to the decision on the detention of his or her parents. Before making a decision to detain a parent, consideration should be given to the effect detention has on the family, rather than deciding to detain the parent and then deciding whether it is in the best interests of the child to remain alone on the outside, or to be detained with the parent. This approach would bring the directive in line with Article 3 UN Convention on the Rights of the Child, which specifies that all actions concerning the child must take full account of his or her best interests.

Maximum duration of detention (Article 27, par. 7 Dublin Regulation)

As detention of asylum seekers is not primarily intended to facilitate removal, specific criteria must be given in the Reception Conditions Directive and the Dublin Regulation as to the maximum duration of the detention. Contrary to the proposed Article 9 paragraphs 3 and 4 Reception Conditions Directive, proposed Article 27, par. 7 Dublin Regulation does not oblige detention orders to specify the maximum duration of detention, but speaks instead of 'the intended duration of detention'. The Meijers Committee would like to recall that the European Court of Human Rights has on multiple occasions underlined, in cases involving the deportation or extradition of persons under Article 5 par. 1, sub f

ECHR, the importance of the existence in domestic law of time-limits on detention (ECtHR 11 October 2007, *Nasrulloev v Russia*, appl. 656/06, paras 73-77; ECtHR 24 April 2008, *Ismoilov v Russia*, 2947/06, par 140; ECtHR 11 December 2008, *Muminov v Russia*, appl. 42502/06, par 122). The Committee is concerned, in particular, about the cumulative duration of various detention measures which may be imposed on (refused) asylum seekers in accordance with EC legislation. Apart from detention of asylum seekers pursuant to proposed Article 8 Reception Conditions Directive and detention of refused asylum seekers pursuant to the recently adopted Returns Directive, proposed Article 27 Dublin Regulation introduces yet another ground and phase within the asylum procedure under which it is allowed to detain asylum seekers. Given the rather long period within which transfers of asylum seekers under the Dublin Regulation must be carried out (six months or longer if judicial appeal with suspensive effect is pending, see proposed Article 28), and given that detention for the purposes of effecting a transfer is linked to that period (Article 27, par. 4), the Committee would prefer the regulation to specify that detention orders and/or the domestic laws of the Member States provide a clear guarantee – in the form of a time-limit – which ensures adherence to the principle referred to in Article 27, par. 5 Dublin Regulation that detention is allowed only for the shortest possible period. The Returns Directive contains a duration limit of six months, which may in exceptional cases be extended with a further twelve months. The maximum duration of detention for the sole implementation of a transfer under the Dublin Regulation should minimally conform to the limits set by the Returns Directive.

Risk of absconding (Articles 2, par. 1 and 27, par. 2 Dublin regulation)

In recitals 16 Reception Conditions Directive and 18 Dublin Regulation, it is underlined that detention of asylum seekers should only be possible under very clearly defined exceptional circumstances. According to Article 27, par. 2 Dublin Regulation, detention of an asylum seeker or another person subject to transfer to another Member State is possible only if there is a ‘significant risk of him/her absconding’. This risk of absconding is not defined in the regulation; Article 2, par. 1 merely stipulates that it must be based on objective criteria defined by law. Under the current Dublin Regulation, some Member States consider all Dublin transferees to pose a risk of absconding, simply because it has already transpired that they have previously left another Member State which was responsible for examining their application or without awaiting a decision on which Member State is responsible. Such generous interpretation of the risk of absconding could result in detention being imposed on all Dublin transferees, running counter to the notion that detention may only be applied as an exceptional measure, only when the risk is ‘significant’, and only on the basis of an individual assessment of each case (Article 27, par. 2). The Committee suggests therefore, that a provision is added stipulating that Member States shall not hold a person in detention for the sole reason that he/she is subject to transfer to another Member State.