

# Compatibility of the *refoulement* practice under the German-Greek “Seehofer Agreement” with Union-law requirements for effective legal remedies

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Expert opinion commissioned by PRO ASYL

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*This is an English translation of the expert opinion submitted to the Munich Administrative Court. The original language is German.*

## 1. Preliminary comment

PRO ASYL asked the author for a legal opinion on issues under European law in the context of a *refoulement* case under the German-Greek Administrative Arrangement<sup>1</sup> on refugees refused entry at the German-Austrian border. The case is currently pending at the Munich Administrative Court.

The asylum seeker was picked up in the course of border controls conducted in the Bavarian-Austrian border area and taken into custody. A Eurodac entry for Greece was recorded. The next day, the German federal police handed him a notice of refusal of entry. He was to be returned to Greece. Five days after entering Germany – delayed due to a first, abortive attempt to return him – he was returned to Greece straight from detention, via Munich airport. The person concerned is represented by a lawyer.

The case raises many legal questions about German and European law, e.g. on the admissibility of internal border checks, the limits to entry refusals and detentions for asylum seekers, the modifiability of Dublin procedures, dealing with asylum seekers who are recognisable as especially vulnerable, and legal remedy.<sup>2</sup> In consultation with PRO ASYL this legal opinion relates to questions of Union law from the viewpoint of effective remedies against removal to Greece. If legal remedy requirements under Union law were violated during the removal to Greece, European law takes priority over Germany's asylum and alien law, which must be interpreted in line with international and European law.<sup>3</sup>

## 2. Violation of legal remedy requirements under Union law

The Dublin III Regulation<sup>4</sup> in Article 26 describes the delivery of the decision and notification of legal remedies on the basis of which asylum seekers in the Common European Legal System can be transferred to another Member State by a government that disclaims responsibility for them; Article 27 gives details on the right to an effective remedy to appeal against this transfer. In the following it is examined, first, whether these provisions serving the fundamental right to an effective remedy of the persons

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<sup>1</sup> Administrative Arrangement between the Ministry of Migration Police of the Hellenic Republic and the Federal Ministry of the Interior, Building and Community of the Federal Republic of Germany on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border, available online at <https://rsaegean.org/en/the-administrative-arrangement-between-greece-and-germany/>

<sup>2</sup> On the legal categorisation of “Seehofer *refoulements*”, see [DIMR/Cremer](#), 14 June 2018; Hruschka, [verfblog](#) 2 Nov. 2018; idem, [verfblog](#) 23 June 2018; Thym, NJW 2018, 2353; Schmalz, [verfblog](#) 13 June 2018; Hong, [verfblog](#) 17 June 2018; Schmalz/Endres de Oliveira, [verfblog](#) 20 June 2018; [Papier](#), 26 June 2018; Poularakis, [EDAL-Journal](#), 5 Nov. 2018.

<sup>3</sup> [DIMR/Cremer](#), 14 June 2018, 4f with further evidence. Whether that can be disregarded in times of crisis was discussed in 2015/16, see [DIMR/Cremer](#), 30 Nov. 2015; [Deutscher Bundestag](#), 2015; [Oberwexer/Funk](#), 2016; Langenfeld, [verfblog](#) 27 Jan. 2016. CJEU stated the obligation to apply Dublin even in the 15/16 crisis, 26 July 2017, C-646/16 (*Jafari*), cf. Lübbe, EuR 2017, 639.

<sup>4</sup> Regulation (EU) No. 604/2013, OJ L 180, p. 31 (here “Dublin III”).

concerned (Article 47 Charter of Fundamental Rights of the European Union, CFR) had to be respected in the given matter of dispute (2.1.) and were respected (2.2.). Secondly, it is examined whether anything changes in the result found due to the Arrangement concluded with Greece (2.3.) or because the person concerned – unlike what usually happens with asylum applications outside the airport procedure – was refused entry (2.4.) or through a lack of a threat of violation of rights (2.5.).

## 2.1. Obligation to respect the legal remedy requirements of Dublin III

### 2.1.1. Applicability to applications at the border as well

Dublin law is applied to all asylum applications filed by third-state nationals or stateless persons in the territory of a Member State “including at the border or in the transit zones” (Article 3 Dublin III). It is therefore not a matter of whether the person was refused entry at the border, either an internal or external border - *de facto* or *de iure* (non-entry fiction). Dublin III takes effect with the refusal of entry, as happens in the airport procedure.

In this case, an asylum application was also filed. To do so, it is enough for the person to utter a desire for protection (Article 2 b Dublin III in connection with Article 2 h Qualifications Directive).<sup>5</sup> It is not necessary to take a certain form (Article 20 II 2 Dublin III). Article 20 II 1 Dublin III gives clarity on the point in time from which the Dublin deadlines begin.<sup>6</sup>

### 2.1.2. Obligation to conduct a Dublin procedure

#### *Also with second applications*

The asylum application triggers the obligation to conduct a Dublin procedure (Article 20 I Dublin III) even when the individual has already applied for asylum in another Member State. The CJEU has decided that it is not permitted for states where a second application is filed to return asylum seekers to the first-application state without conducting a Dublin take-back procedure as laid down in Chapter VI Dublin III. This even applies to those persons engaging in secondary migration *several times*.<sup>7</sup> Also Article 20 V Dublin III, which - under the preconditions mentioned there – allows the transfer to a Member State where the first application was made for the purpose of ending the Dublin procedure there, frees the second Member State at most from conducting its own examination of Dublin criteria, but not from the rest of the Dublin procedure; indeed, Article 20 refers explicitly to the transfer provisions of Article 23, 24, 25 and 29 Dublin III.

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<sup>5</sup> Qualifications Directive = Dir 2013/32/EU of 26.6.2013, OJ EU No. L 180, 60.

<sup>6</sup> CJEU, 26 July 2017, C-670/16 (*Mengesteab*).

<sup>7</sup> CJEU, 25 Jan. 2018, C-360/16 (*Hasan*); see also CJEU, 13 Nov. 2018, C-47/17, C-48/17 (*X and X*), para. 57. That a first applicant who has migrated to another Member State can only be returned via a Dublin procedure pursuant to the provisions of Chapter VI applies even when the person concerned has not filed another application in the destination state of the secondary migration, Article 24 Dublin III, cf. CJEU, 31 May 2018, C-647/16 (*Hassan*), para. 49.

### *Germany's obligation*

The Member State to which the application was made is responsible for the Dublin procedure. An application lodged with the authorities of one Member State but on the sovereign territory of another Member State counts as though it were lodged with that other Member State (Article 20 IV Dublin III). There can be no responsibility of Austria here for the Dublin procedure on the basis of this provision; the German border checks during which the person concerned was picked up took place on German territory and the person was then taken to a facility near the border. It is ultimately not a matter of the opinion which some people propound that German territory under international law could be Austrian territory pursuant to Article 20 IV Dublin III.<sup>8</sup> The provision could, with the right preconditions, result in a responsibility on the part of Austria for the Dublin procedure, but it does not authorise Germany to proceed with the case in such a way that it avoids the Dublin procedure and deports individuals to Greece.<sup>9</sup>

### *Return to a safe third country instead of Dublin allocation?*

Nor is the Dublin procedure made dispensable here by the option contained in Article 3 III Dublin III not to channel asylum applications into the Dublin allocation<sup>10</sup> if the person concerned has entered from a safe third country. The provision permits the use of the “safe third country” concept only in harmony with the provisions of the Asylum Procedures Directive (APD).<sup>11</sup> These provisions restrict the concept to destinations that are not Member States (Article 33 II c APD). For Greece as a destination state, this option is not relevant.

#### **2.1.3. Interim result**

The effective remedy requirements of Dublin III must be respected in the matter in dispute.

## **2.2. Respecting the legal remedy requirements of Dublin III**

### **2.2.1. Requirements of Article 26 f Dublin III**

What are the requirements in detail? The Dublin decision, by which persons concerned must be informed of the decision to return them to the responsible Dublin state and that their asylum application – if they have made one<sup>12</sup> – will not be examined for lack of responsibility, must be notified to them with information on legal remedies (Article 26 II subpara 1 Dublin III). Where applicable, attention must also be drawn to the opportunity to seek summary legal remedy through a request for suspensive effect of the implementation of the transfer decision. “Where applicable” relates to the Member

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<sup>8</sup> Cf. Peukert et al., ZAR 2016, 131; in agreement [Papier](#), 26 June 2018; on this justification attempt only affecting *refoulements* to Austria, see Lübke [verfblog](#) 4 March 2016.

<sup>9</sup> Likewise Thym, NJW 2018, 2353 (2354).

<sup>10</sup> The CJEU has ruled that this option can be applied *after* implementing the Dublin allocation, but also *instead of* implementation, CJEU, 7 March 2016, C-695/15 PPU (*Mirza*).

<sup>11</sup> Directive 2013/32/EU v. 26.6.2013, OJ EU No. L 180, 60 (APD).

<sup>12</sup> Therefore “where applicable”, cf. Filzwieser/Sprung, Dublin III-Verordnung, Kommentar, Stand 1.2.2014, Artikel 26, K2.

States having the choice under Article 27 III Dublin III as to whether they want to guarantee a summary legal remedy through an automatic suspension (Article 27 III a, b Dublin III), or through a request for suspension (Article 27 III c Dublin III). Only in the latter case is it necessary for the information on legal remedies to mention the possibility of making such a request. Information must then be given about the period of time within which this request must be lodged (Article 26 II subpara 1, Article 27 III c Dublin III). The person concerned cannot be transferred before the expiry of this period of time, which must be reasonable (Article 27 III c Dublin III).

### 2.2.2. Respecting requirements in the present matter of dispute

Were these requirements respected in the matter in dispute? The person concerned received a notice of refusal of entry with information on legal remedies but without information on a *summary* legal remedy. It is already hard to classify this notification as a Dublin notification pursuant to Article 26 Dublin III. First, the notice was served inadmissibly<sup>13</sup> *before* the coordination procedure with the destination state. Second, it does not – as required by Article 26 I 1 Dublin III – contain a (non-substantive) decision on the asylum application, although the person concerned had lodged one. Third, while the notice does refer to the fact that the person is to be returned to Greece, in contravention of Article 26 II subpara 1 Dublin III it contains no information on the manner of the transfer. In any case – since Germany did not decide to give summary legal remedy by means of automatic suspension – it lacks the necessary reference to the possibility of requesting suspensive effect within a reasonable period of time.<sup>14</sup>

### 2.2.3. Interim result

The legal remedy requirements of Dublin III were not respected in the matter in dispute.

## 2.3. Another result on the basis of the German-Greek Arrangement?

Can Germany free itself from the legal remedy requirements of Dublin law by arranging something different with Greece? Since Union law takes priority over bilateral agreements between Member States that could only be considered if Dublin III itself provided for such a possibility.

In fact, it does authorise Member States to conclude bilateral administrative arrangements (Article 36). But that only concerns the practical steps for implementing the Dublin procedure. There is no question of dispensing with the requirements of the Dublin Regulation serving the fundamental imperative of effective remedy (Article 47 CFR)<sup>15</sup> on the basis of such arrangements.<sup>16</sup> Moreover, the German-Greek arrangement, leaving aside its legal nature and compatibility with Article 36 III Dublin III, does not give grounds for any obligations on the German side that would impede respect for Article 26 f Dublin III. In

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<sup>13</sup> CJEU, 31 May 2018, C-647/16 (*Hassan*).

<sup>14</sup> §34a II Asylum Law.

<sup>15</sup> EG 19 Dublin III.

<sup>16</sup> Cf. Hruschka/Maiani, in: Hailbronner/Thym, EU Immigration and Asylum Law. A Commentary, 2<sup>nd</sup> ed., Part D VI, Article 36, para 1.

particular, the German side is not *obliged* to return the persons concerned within 48 hours – a deadline that would not be “reasonable” pursuant to Article 27 III c) 1 Dublin III.<sup>17</sup>

## 2.4. Another result due to (fictitious) non-entry?

Can Germany in conformity with Union law circumvent respect for the legal remedy requirements of Dublin III by (fictitiously) refusing entry to asylum seekers?

### 2.4.1. Deportation as in airport procedure?

It has already been noted that Dublin law is not rendered inapplicable by a refusal of entry at the Bavarian-Austrian border; nor is this the case in airport procedure where the Dublin procedure is still applicable but is carried out in transit. However, in airport procedures there is often no Dublin notification because no other Member State is responsible and Germany itself conducts the substantive asylum procedure.<sup>18</sup> If the asylum application is rejected by Germany and the result is a deportation from the transit area *to the country of origin*, it is not a Dublin transfer, which is why then, in fact, no Dublin notice needs to be issued, nor are the Dublin legal remedy requirements applicable.<sup>19</sup> By contrast, in the case of a transfer due to a lack of responsibility from the German (fictitious) transit area to the Dublin Member State considered to be responsible, as in the matter in dispute, it is a Dublin transfer; it is not the deportation of an asylum seeker who has been rejected for substantive reasons, which is why the Dublin legal remedy requirements are applicable.

### 2.4.2. Modification of summary legal remedy?

It is questionable as to whether the *form* of summary legal remedy may be changed due to (fictitious) non-entry. It could be argued that no opportunity to implement a summary *right to stay in Germany* was needed under summary legal remedy law, because the person concerned was (fictitiously) not in Germany at all. And, if necessary, the person could have resisted the notice of refusal of entry under §123 Code of Administrative Procedure (VwGO) with a request for summary legal remedy. This – daring – construal would, however, overlook the fact that it is not here (only) about legal remedies against the refusal of entry but (also) about legal remedies against deportation to Greece as an (assumed) responsible Dublin state, in other words, against a Dublin transfer. The fiction of non-entry does not make this transfer non-existent, i.e. the fact that the person concerned was flown to Greece from Munich. For Dublin transfers, Dublin law – as explained – stipulates the form of summary legal remedy. In particular, under the various eligible summary legal remedies against transfer notices in Article 27 III Dublin III none are

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<sup>17</sup> Part I 3 i of the Arrangement (see footnote 1 above): “The return *should* be initiated no more than 48 hours...” (A.L.’s emphasis).

<sup>18</sup> The German responsibility is given regularly from the (last-ranking, see Article 7 I Dublin III) criterion of Article 15 Dublin III.

<sup>19</sup> There too effective legal remedy must be granted, particularly to avoid *refoulement* offences cf. CJEU, 19 June 2018, C-181/16 (*Gnandi*).

foreseen to which the individual (who has fictitiously not entered) could be referred and restricted to lodging a request for summary granting of entry. For good reason: such a variant would not effectively protect *against the announced transfer to the Dublin destination state*.

## 2.5. Another result for lack of a threat of violation of rights?

Is it possible to refrain from judicial summary legal remedy against Dublin transfers under the Arrangement because there is no threat of violation of rights? This is a question raised by Daniel Thym.<sup>20</sup>

With Article 26 f Dublin III the legislator *assumed* that there *might* be a threat of violations of rights with Dublin transfers.<sup>21</sup> The Member States are not permitted to *not* apply European law simply because they take the view that fewer legal remedies would do as well. It is true that the person concerned must, in the summary legal remedy procedure, make a substantive statement on the threat of violation of rights but such a procedure must be accessible in the first place. It is, of course, not a matter for the administration to weed out cases in which, in its viewpoint, there is no threat of violation of rights and then to withdraw them from summary legal remedy. In the matter in dispute, the viewpoint of the person concerned was not even asked in an orderly way, contrary to Articles 4 and 5 Dublin III. Effective remedy means that, on request, *a court* has to decide on the question and before that the person must not be returned - just as Article 27 Dublin III provides. Thus the legal remedy requirements of Dublin III must be respected apart from whether, in the individual case, there is a threat of a violation of rights or not.<sup>22</sup>

## 2.6. Interim result

Returning the person concerned to Greece without a possibility of summary legal remedy meeting the requirements of Dublin III was contrary to Union law.

## 3. Right of the person concerned to lay claim to violation of rights

Finally it is questionable whether the violation of effective remedy can be used as an argument in court against the transfer of persons concerned, independently of whether there was ultimately a violation of Article 4 CFR.<sup>23</sup>

The CJEU has, to some extent, restricted legal remedy against Dublin transfers to problems of the calibre of Article 4 CFR. The relevant CJEU case law, however, concerns the acceptability of the treatment of the person concerned *in the country of destination*.<sup>24</sup> Problems in that country only impact on the lawfulness of the transfer action of the sending

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<sup>20</sup> NJW 2018, 2353 (2356).

<sup>21</sup> On the fact that this suffices, also under Article 47 CFR, see sub 3.

<sup>22</sup> Ultimately, despite beating about the bush, it must be found that removals to Greece without the possibility of a summary legal remedy are inadmissible, also by Thym, NJW 2018, 2353 (2357). All other authors in footnote 1 come to this conclusion, inasmuch as they express a view on the matter.

<sup>23</sup> The legal representative argues that a violation of Article 4 CFR, Article 3 ECHR had, however, taken place here.

<sup>24</sup> Since CJEU, 21 Dez. 2011, C-411/10 (N.S.).

country if they are serious problems.<sup>25</sup> The transfer action by Germany may, however, be illegal due to circumstances that have nothing to do with the situation in the destination country. And then there is no visible reason to treat violations of rights below the threshold of Article 4 CFR as negligible, since the sending country is ultimately bound to the CFR as a whole.<sup>26</sup> Accordingly, the CJEU repeatedly finds admissible objections against Dublin transfers which are directly about the lawfulness of the action of the sending country and not about (a threat of) a violation of Article 4 CFR due to the way the country of destination would deal with the person concerned.

Case *K*<sup>27</sup>, for example, was about the divisibility of support-dependent, kinship connections with Germany; case *M.A.*<sup>28</sup> was about protecting a minor from the strain of changing his frame of reference. In the latter case, the CJEU expressly cited Article 24 CFR as a barrier to transfer. Furthermore, the CJEU decided that violations not only of fundamental rights but also of Dublin provisions can be raised in an appeal and independently of the argument of a violation of Article 4 CFR, e.g. respect for the Dublin criteria<sup>29</sup> and Dublin deadlines.<sup>30</sup> In the CJEU case *Hassan*<sup>31</sup> the person concerned successfully objected that the transfer notice had been issued before completion of the coordination procedure with the destination state. It should then be possible to criticise the violation of such fundamental, procedural provisions enabling an effective remedy (Article 47 CFR) as the summary legal remedy under Article 26 f Dublin III.

Article 47 CFR is – regardless of its character as an accessory right – not only affected when the violation of an individual right under Union law can be proven; it is enough to have an *arguable claim*.<sup>32</sup> The person concerned had that because, precisely in connection with vulnerable refugees<sup>33</sup> and Greece as a destination state,<sup>34</sup> a violation of Article 4 CFR is particularly likely. Moreover, the vulnerable person should have had the opportunity to put forward the argument of possible inability to travel due to illness.<sup>35</sup> Violations of the right to transfer to the responsible Dublin state are also particularly likely under the German-Greek Arrangement because it provides for deportation to Greece owing to only a Greek Eurodac hit.<sup>36</sup> Which Member State is responsible is not clear from such a hit. The

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<sup>25</sup> On this and the dogmatically necessary distinction between destination state-related and other transfer barriers, see Lübbe, NVwZ 2017, 674 (676 f); also, earlier, Lübbe, ZAR 2015, 125 (128).

<sup>26</sup> On this see Lübbe, NVwZ 2017, 674 (679 ff); nothing else follows from the CJEU decision *C.K.* (16 Feb. 2017, C-578/16 PPU), cf. Lübbe, [verfblog](#) 22 Feb. 2017.

<sup>27</sup> CJEU, C-245/11, 6 Nov. 2012 (*K*).

<sup>28</sup> CJEU, C-648/11, 7 Feb. 2012 (*M.A.*).

<sup>29</sup> CJEU, 7 June 2016, C-63/15 (*Ghezelbash*) and C-155/15 (*Karim*).

<sup>30</sup> CJEU, C-670/16, 26 July 2017 (*Mengesteab*).

<sup>31</sup> CJEU, C-647/16, 31 May 2018 (*Hassan*).

<sup>32</sup> Vedder/Heintschel von Heinegg/*Folz*, Europäisches Unionsrecht. Handkommentar, 2012, Article 47 CFR, para. 3; Jarras, Charta der Grundrechte. Kommentar, 2. Aufl. 2013, Article 47 para. 11; on Article 13 ECHR Grabenwarter, European Convention on Human Rights. Commentary, 2014, Article 13, para. 11 ff; Meyer-Ladewig, EMRK. Handkommentar, 3. Aufl. 2011, Article 13, para. 4f.

<sup>33</sup> Commission Recommendation of 8.12.2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013, [C\(2016\) 8525 final](#), II. (9); [BMI](#), Letter to BAMF re Dublin transfers to Greece, 15 March 2017, 1. In the matter in dispute there were strong indications of a special vulnerability, which is why an attempted deportation at first failed.

<sup>34</sup> ECtHR, 21 Jan. 2011, No. 30696/09 (*M.S.S.*); CJEU, 21 Dec. 2011, C-411/10 (*N.S.*); BVerfG, 8 May 2017, 2 BvR 157/17.

<sup>35</sup> CJEU, 16 Feb. 2017, C-578/16 PPU (*C.K.*).

<sup>36</sup> Part I 1 d Agreement (see footnote 1).

responsibility of the Member State of first entry according to Article 13 I 1 Dublin III is only one of a series of allocation criteria, which are mostly to be given priority before Article 13 Dublin III (Article 7 I VO Dublin III); furthermore, it depends on the point in time at which the person concerned entered and where he or she has been since then Article 13 I 2, II Dublin III). Deviating allocations from this may, moreover, arise from Article 16 f, 19 Dublin III.

#### **4. Result**

The returning of the person concerned to Greece without an opportunity for summary legal remedy pursuant to the provisions of the Regulation Dublin III was a contravention of Union law, and the rights of that person were thereby violated.

Stegen, 6 Dec. 2018



A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be 'Stegen'.