



EMN Ad-Hoc Query on Take charge/take back situation in case asylum application was not yet made

Requested by Laura SEIFFERT on 28th February 2018

Protection

Responses from Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovak Republic, Sweden, Norway (20 in total)

Disclaimer:

The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.

Background information:

A take back request is issued when the applicant has previously applied for asylum in a different Member State. A take charge request is issued when the applicant has not previously applied for asylum, but a different Member State is considered responsible based on the determined criteria (family unity, place of legal residence, place of entry, place of application).

The Dutch Administrative Jurisdiction Division of the Council of State (the highest general administrative court in the Netherlands) has recently ruled that, in the situation that a third-country national has not yet made an application for international protection in the Member State responsible, there is no application “under examination” in the responsible Member State. Therefore, there is no take back situation, but a take charge situation.




Example of the situation: a third country national has irregularly crossed the external border into Member State A and travelled onwards to Member State B where he applied for international protection. The authorities of Member State B send a take charge request to Member State A, which Member State A accepted on grounds of article 13 of the Dublin regulation. The responsibility of Member State A has therefore been established. Before the person concerned could be transferred to Member State A, he absconded in Member State B and travelled to the Member State C where he again applied for international protection. Member State C send a tack back request to Member State A. It is the view of the Administrative Jurisdiction Division in the Netherlands that the request of Member State C should have been a take charge request and not a take back request.



Since the judgement of the Administrative Jurisdiction Division deviates from the line of reasoning the Netherlands has been following until now, the Netherlands would like to ask the following questions.




Questions



1. In a situation as described above when the Member State responsible has already been determined, is it your policy, being Member State C, to send a take back request or a take charge request to Member State A? And could you explain the reasons or basis for this policy?
2. Which form do you use for the described situation? Is this Annex II “Standard form for requests for taking back” or Annex I “standard form for determining the member state responsible for examining an application for international protection”, in which the drop down menu only gives the options for a request under articles 8-13 of regulation (EU) No 604/2013.





Responses




	Country	Wider Dissemination	Response
	Austria	Yes	<p>1. According to the view of the law of the Federal Office for Immigration and Asylum, a take back request to MS A should be made in the present case. Reason: According to Art. 3 para 1 sentence 2, there should be only one responsible MS to examine the application for international protection (one-chance-only-principle). In accordance with Art. 7 para 1 of the Dublin III Regulation, the criteria for determining the responsible member state must be applied in accordance with the specified ranking. In the case constellation, Art. 13 Dublin III Regulation has already been applied between MS A and MS B and the responsibility has already been established and also recognized by MS A (an approval already exists). A renewed application and examination of the ranking of the criteria in the form of an additional take charge request is therefore contrary to the system. --- Source: Ministry of the Interior</p> <p>2. Since the Federal Office for Immigration and Asylum assumes a take back request in the concrete constellation, Annex III "uniform form for take back requests" is used. --- Source: Ministry of the Interior</p>
	Belgium	Yes	<p>1. In a situation as described above, Belgium always refers to Article 18.1.a of the Regulation. However, this Article cannot be ticked in the Annex I form, nor in the Annex II form. Both forms are used. In case a take back request is sent, a notification is made that it concerns a request based on Article 18.1.a of the Regulation and that the time limits of a take charge request are applicable.</p> <p>2. Both forms (Annex I and Annex II) can be used in this situation, but always with a reference to Article 18.1.a</p>
	Bulgaria	Yes	<p>1. According to us, a take charge request is to be sent from Member State C to Member State A, as the applicant is registered only under category 2 - illegal crossing of an external border, regulated in Article 13 of Regulation (EU) No 604/2013. Where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it should, within two months from receiving the positive result in Eurodac (category 2 hit), request the other Member State to "take charge" of the asylum seeker. i.e. there is no application</p>



			<p>for protection in order for Article 18, p. 1, letter (b) of the Regulation for taking back of an applicant whose application is under examination and who made an application in another Member State, to be applicable.</p> <p>2. The form of the request to Member State A should be for taking charge - Annex I “Standard form for determining the member state responsible for examining an application for international protection” of the Commission Implementing Regulation (EU) No. 118/2014.</p>
	Croatia	Yes	<p>1. 1. Croatian authority as the Member State C send take back request to the Member State A based on Article 18(1) b. Requests are based on EURODAC search result. This means that we do not know if the person already made an application for international protection or there is no application “under examination” in the Member State responsible. But when we are in the opposite situation, we accept take back request of Member State C and our decision is based on Article 20 (5) of the Dublin regulation (EU) No 604/2013, in conjunction with Article 28 of the Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013, and the Croatian authority takes in this situation a decision to discontinue the examination in the cases when the person has not yet made an application and left the territory of Croatia during procedure “under examination”.</p> <p>2. 2. The Croatian authority uses in the described situation the Annex II “Standard form for requests for taking back”.</p>
	Cyprus	Yes	<p>1. please see below</p> <p>2. A take charge should be sent to MSA from MSC because of article 7 par. 2 of the Regulation No. 604/2013, which states that: “2. The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State” When the applicant first lodged his or her application in MSB, a take charge request was sent to MSA because the applicant had not proceed with an application for asylum in MSA. In that respect, a take charge request is sent again using Annex I of the Regulation No 118/2014 “standard form for determining</p>

			the member state responsible for examining an application for international protection”.
	Czech Republic	Yes	<p>1. The position of the Czech Republic is as followed: In situation described above, the Czech Republic sends take back request to MS A. In our point of view the responsible MS - MS A - has already been determined and criteria for determining responsible MS have already been used. There is no reason to use criteria for determining responsible MS of chapter III again. In some cases criteria could not be used because conditions of these articles cannot be established. For example, the Czech Republic acknowledged itself to be responsible pursuant to article 12 par. 4 (expired visa - less than 6 months). Transfer cannot be executed because the person concerned absconded from MS B to MS C. There is no space to use TCH request and article 12 par. 4 no more due to the fact that the conditions of this article cannot be fulfilled – especially 6 months period lapsed. Anyway, if MS has already been established, TB request can be used, article 18 par. 1 letter b) is applicable - already determined responsible MS is obliged to examine his/her application, by acknowledgment of its responsibility the procedure of examination of application for international protections starts. Another reason why we prefer TB request is to accelerate the whole Dublin procedure. In TB situation the time limits are shorter than in TCH situation.</p> <p>2. The Czech Republic uses Annex II – Standard form for request for taking back. In comments we describe the whole situation, all circumstances etc.</p>
	Estonia	Yes	<p>1. When the responsible MS has already been established, the first priority would be to submit a take back request to the MS A. If the unlawful entry has taken place less than 12 months ago, then it could be argued that Article 13 paragraph 1 applies and a take charge request can be made.</p> <p>2. If it would be more appropriate to use a readmission request as described above, then the respective form of the request Annex I and article 18 (B) would be chosen.</p>
	Finland	No	

	Germany	Yes	<p>1. It is our policy to submit a take back request and not a take charge request in the described situation in the query. The legal basis for our proceedings is Article 23 (2) subpara 2 of the Dublin III Regulation. We read the wording „evidence other than data obtained from the Eurodac system" in this case as i.e. a stated acceptance by the responsible Member State and proceed in the line of a take back request. In this case the responsibility complies with the provisions laid down in Article 18 (a) because the application for international protection was lodged in another but not in the responsible Member State. Following the example Member State A has already accepted the request of Member State B. Therefore, Member State C can submit a take back request towards Member State A as the proceedings to determine the Member State’s responsibility is concluded.</p> <p>2. Consequently, as we have the policy to submit a take back request in the described situation we use the Annex III standard form although the form considers only the constellations of Article 18 (1) (b) to (d). The use of this form is in this respect wrong as the special constellation described above is not incorporated into the form’s drop down options. We tick the option box of Article 18 (1) (b) instead and clarify our opinion in section „Other usual information“ clearly: The take back request however is based on Article 18 (1)(a).</p>
	Greece	Yes	<p>1. In the situation described, responsibility of MS A has been established in respect to art 13.1 of Reg 604/2013 following a take charge request from MS B to MS A. However, in the event that the person absconds prior to his/her transfer to MS A and lodges a new application in MS C there is no legal basis for a take back procedure to MS A under art 18.1.b, since there is “no application under examination”. The responsibility of in MS A is established and that responsibility ceases only on the grounds of art.19. Therefore, MS C should initiate communication with MS B in the form of an info request or a take back request in order to clarify which MS has been established responsible and then ask that MS, in the example MS A, to take charge of the person under art. 18 (a).</p> <p>2. Since, the drop down menu of the standard take charge form does not include art. 18 (a), we would indicate art. 13.1, which in this case is the legal provision on which MS A has already been established as the responsible MS.</p>

	Hungary	No	
	Latvia	Yes	<p>1. The opinion of Latvian authorities is in line with the Dutch Administrative Jurisdiction Division of the Council of State, that is, take charge request should be sent by MS C (and following MS) until there is no application lodged by applicant in MS A.</p> <p>2. Annex I of the Regulation No 118/2014 “Standard form for determining the Member State responsible for examining an application for international protection” should be applied.</p>
	Lithuania	Yes	<p>1. If the responsibility of this Member State has already been determined, LT considered it as a take back situation. As this was practice of the most MS and in line with the EASO, LT adopted this approach.</p> <p>2. LT would use the Annex II “Standard form for requests for taking back”.</p>
	Luxembourg	Yes	<p>1. MS - Member State SAC - Schengen Associated Countries If there is sufficient information at our disposal that responsibility of MS A has already been established by a take charge procedure, Luxembourg would proceed with a take back request. In deed Luxembourg considers a take charge procedure to be a one-time process and that a declaration of responsibility is given towards not only the requesting MS but to all. This would mean that if MS A has accepted responsibility of processing the asylum case of the applicant, this responsibility is written towards the requesting MS and implicit towards the other MS & SAC. Nonetheless, this exact matter has already been pointed out to the Commission and discussed in the Dublin Contact Committee in Brussels on the 15th of June 2017 (see the Annex containing the position of the Commission on this issue (point 10 of the Catalogue of issues on the interpretation and application of the Dublin III Regulation)). A <-----B (take charge) A <-----C (take charge) (take charge if no transfer has taken place from B to A) (take back if transfer from B to A has taken place – implying data input EURODAC by the responsible MS upon arrival) The Commission underlines also that in case of a take charge request from MS C to A, this request cannot be denied because of expired time limits for a take charge request, since the responsibility already had been established following the request from MS B to A and can only cease on the</p>

			<p>grounds of article 19. As this is the position of the Commission, Luxembourg proceeds in this way, in order to achieve a harmonious application of the Regulation between the MS & SAC. Lastly, it must be taken into consideration that in practical terms and from an operational point of view, it is often very unclear, due to lack of information (Eurodac, police information, interview) as to ascertain what has happened so far between MS A and B. And even if a transfer has been carried out from MS B to A, that the EURODAC update (registration of Hit Category ‘1’ AND ‘date of responsibility’ upon arrival) is not done with the necessary care.</p> <p>2. For a take charge or take back request, Luxembourg uses the Annex I or Annex II standard forms. The limitation of the articles available in the drop down menu is not an obstacle to the explanations Luxembourg gives in the commentary section, where Luxembourg writes out its argumentation for the specific case and articles applying to it, even though not available in the drop down box.</p>
	Malta	Yes	<p>1. In the situation described above, it is our policy that a take charge request is sent to Member State A. This is in view of the interpretation given by the European Commission in the ‘Catalogue of issues of the interpretation and application of the Dublin III Regulation’ published on 15.05.2017 (Ref. Ares [2017] 2455029).</p> <p>2. For such request, Article 13 of Annex I is selected for the take charge request to Member State A by Member State C.</p>
	Netherlands	Yes	<p>1. The Dutch authorities believe that the situation as described constitutes a take back situation, as the responsibility of this Member State has already been determined. This is also in line with the EASO Dublin course. Due to the decision of the court however the Dutch authorities are now obliged to change this policy and will be sending a take charge request under article 18(1)a.</p> <p>2. As of present the Dutch authorities will be using the Annex I form, and specifying under the other useful information, that this is a take charge request under article. 18.(1).a.</p>
	Poland	No	

	Slovak Republic	Yes	<p>1. According to SK opinion in this situation, SK usually sends the take back request, because the responsible state has been already determined. Once the MS A has accepted responsibility it is considered hypothetically as the applicant lodged application on the territory of the MS A. The take charge request is possible to be sent by MS C only if the responsibility has not been accepted by the MS A yet. The expiration of time limit for taking charge of the applicant under the Dublin Regulation may cause the MS C to become the responsible Member State.</p> <p>2. SK used to send Annex II according to Article 18 (1)(b). In this situation it is possible to send the take back request according to Article 18 (1)(a), but there is no option in the Standard form Annex II to choose Article 18 (1)(a) which is connected to the statistics.</p>
	Sweden	Yes	<p>1. We do not have any ruling from the national courts in this matter, and we have not seen any appeals either from the applicant in this matter. However, the Director of Legal Affairs of the Swedish Migration Agency has very shortly stated the following in a judicial position (which the officials at the Swedish Migration Agency are obliged to follow). The grounds for responsibility can not change over time. This means that if there is a situation as described below Sweden will always see it as a take charge, even if the MS responsible has already been determined. We are aware that we are one of few, or maybe the only MS, which has this view but in practice this has not caused us any problems, probably, because it doesn't affect the time limits "negatively" for the MS which receives the request. Also, if we for instance send a take charge request to a MS which is of the opinion that it should be a take back request instead that MS will in most cases accept the request on a take back ground.</p> <p>2. NA</p>
	Norway	Yes	<p>1. It is the policy of the Norwegian Dublin Unit to send a take back request in these situations. We are aware of the fact that this issue has been a bone of contention for a long time in the Member States. Some Member States argue that an asylum application can not be processed when the applicant is not present in their State. It is also an issue which is discussed at the Contact Committees in Brussels and the Commission has worked out proposals for a possible solution. Furthermore, the teaching EASO put together by the EAC Expert Team argues that this is a take back situation. Our</p>

			<p>reasons for applying the take back, is that an application for asylum has been launched on the territory of the Member States and - as in this case - there is an acceptance from Member State A and responsibility has thus been established. At that point, a take charge and a time limit of two months to reply to the request would seem irrelevant. Moreover, the irrelevance of a take charge request in this situation is very well demonstrated when a third country national does not apply for asylum in Member State C. Article 24 of the Dublin III Regulation only deals with take back situations when there is an asylum application launched in another Member State. Despite the fact that an asylum application has been launched on the territory and responsibility established, Member State C would then be cut off from applying Article 24.</p> <p>2. As a consequence of the above, we use the form for taking back: AnnexII "Standard form for requests for taking back"</p>
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