

Summary of an EMN Ad-Hoc Query No. 2018.1277

NL EMN AHQ Take charge/take back situation in case asylum application was not yet made

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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)

Note: the answers of Finland, Hungary and Poland are not for wider dissemination, hence their answers are not included in this summary

1. BACKGROUND AND CONTEXT

A take back request is issued when the applicant in a Member State 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. This responsibility is determined based on the criteria that are set out in the Dublin Regulation (chapter III, articles 7-15). These criteria include for example family unity, place of legal residence, issue of previous residence document or visa, and place of irregular entry into the EU.

Different time limits to issue a take back or take charge request

There are different time limits for Member States to issue a take charge or take back request. A take back request must be made within two or three months from the date that a Member State becomes aware that another Member State may be responsible for the application. This time limit depends on the evidence that is used to identify whether

someone already applied for international protection in another Member State.¹ A take charge request must be made within three months from the date of the application for international protection.²

Different time limits to give a decision on a take charge or take back request

In case of a take back request, the requested Member State is obliged to give a decision no later than 2 weeks or one month from the date of the request. This time limit also depends on the evidence that is used to identify whether someone already applied for international protection in another Member State.³ If the

¹ In case of an Eurodac hit (this system identifies whether someone already applied for international protection in another Member State) the time limit is two months. In case of other evidence, the time limit is three months. See article 23(2) of the Dublin III Regulation (604/2013).

² See article 21(1) of the Dublin III Regulation (604/2013).

³ If the request is based on data obtained from the Eurodac system, the one-month time limit is reduced to two weeks. See article 25(1) of the Dublin III Regulation (604/2013).

requested Member State fails to give a decision within the appropriate time limit, the request is considered to be accepted.⁴ In case of a take charge request, the requested Member State must give a decision no later than 2 months from the date on which it received the request.⁵ If the requested Member State fails to do so, the request is considered to be accepted.⁶ Consequently, in general, Member States have less time to respond to a take back request than to a take charge request that is issued by another Member State.

Ruling of the Dutch Administrative Jurisdiction Division of the Council of State

The Dutch Administrative Jurisdiction Division of the Council of State (the highest general administrative court in the Netherlands) has recently ruled that, if 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. Not even in case an application has been made in a third Member State in the mean time and the responsibility has already been determined by the second 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 sent 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 sent a take back request to Member State A. It is the view of the

⁴ See article 25(2) of the Dublin Regulation III (604/2013).

⁵ In case of a request for an ‘urgent reply’ the time limit differs. See article 22(6) of the Dublin Regulation III (604/2013).

⁶ See article 22(7) of the Dublin Regulation III (604/2013).

Dutch Administrative Jurisdiction Division 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 other Member States questions about their reasoning in this scenario.

2. 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 III “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.

3. MAIN FINDINGS/CONCLUSIONS

Take back request or take charge request?

Nine of the seventeen responding Member States⁷ state that they, being Member State C in the scenario, will send a take charge request to Member State A when the responsible Member State has already been determined. See the table below for the answers of each Member State individually.

Eight of the seventeen responding Member States mention that they, being Member State

⁷ As mentioned before, FI, HU and PL also provided answers to this ad-hoc query, but their answers are not included in this summary.

C in the scenario, will send a take back request to Member State A when the responsible Member State has already been determined.

Is it your policy, being Member State C, to send a take charge or take back request in the described situation?

Take charge request	Take back request
BE, BG, CY, EL, LV, LU, MT, NL, SE	AT, CZ, HR, EE⁸, DE, LT, SK, NO

The following reasons are given to send a **take charge request**:

- There is no application for international protection ‘under examination’ in the responsible state, so article 18(1)(b) of the Regulation is not applicable and there is consequently no legal basis for a take back request (**BG, EL**)
- A take charge request should be sent, since there has not been a transfer from Member State B to Member State A. This is in line with the Commission’s view, expressed during the Dublin Contact Committee in Brussels (June 2017) (**LU, MT**).
- The grounds for responsibility cannot change over time, so even if the responsible Member State has already been established a take charge request should be sent (**SE**).

The following reasons are given to send a **take back request**:

- The responsible Member State has already been established between Member State A & B. This should only be done once and a take back request should therefore be sent. A take charge request can only be sent if the responsible Member State is not yet established or has not accepted its responsibility (**AT, CZ, EE, DE, SK, NO**).
- A take back request accelerates the Dublin procedure, because the time

limits are shorter than in take charge situations (**CZ**).

- **LT** and **NO** emphasize that sending a take back request in this scenario is in line with the reasoning of EASO.
- **DE** explains that it uses article 23(2) of the Regulation as the legal basis for a take back request in this scenario. **DE** reads the wording ‘evidence other than data obtained from the Eurodac system’⁹ in this case as i.e. a stated acceptance by the responsible Member State.

Annex I or Annex III?

The second question relates to whether Member States use Annex I (“standard form for determining the member state responsible for examining an application for international protection”) or Annex III (“Standard form for requests for taking back”) in this particular scenario. The answers to this question nearly all correspond to the answers that were given to the first question. If a Member State would send a take charge request in the described situation, it consequently uses Annex I. Contrarily, if a Member State would send a take back request, it uses Annex III.

The only Member States that do not follow this reasoning are **BE, EE** and **LU**. Although **EE** would send a take back request in the described situation, it would contrarily use Annex I to issue the request. Furthermore, **BE** and **LU** are the only Member States that indicate that they could use both Annexes I and III in the described situation.

See the table below for the answers of each Member State individually.

Which form do you use in the described situation?

Annex I	Annex III	Both
BG, CY, EE, EL, LV, MT, NL, SE	AT, HR, CZ, DE, LT, SK, NO	BE, LU

⁸ **EE** noted that if the unlawful entry has taken place less than 12 months ago, article 13(1) possibly applies and a take charge request can be made.

⁹ See article 23(3) of the Dublin III Regulation.

In addition to indicating which Annex is being used in the described situation, some Member States (**BE, DE, HR, EL, LU, NL**) elaborated on how they would fill in the relevant Annex:

- **BE, NL** refer to article 18(1)(a) in the request form Annex I.
- **HR, DE** use the box of article 18(1)(b) in Annex III to request a take back. However, **DE** clarifies in the form that the take back request is based on article 18(1)(a).
- **EL** uses article 13(1) of Annex I, since this form does not include article 18(1)(a).
- **LU** provides an explanation in the commentary section to clarify the applied articles and its argumentation. Because of this explanation, the lack of some articles in the drop down box is not a problem.