Analysing the Application of Article 17(2) of the Dublin Regulation Across EU Member States

1. Introduction

1.1. Background and Overview of the Dublin Regulation

The Dublin Regulation is a cornerstone of the European Union´s asylum system, playing a crucial role in determining which Member State (hereinafter MS) is responsible for processing asylum applications. It originated from the Dublin Convention of 1990, which later evolved into the Dublin II and Dubin III regulations. Its aim was to streamline and standardize asylum processes in the European Union (EU), and to prevent 'asylum shopping'[1], by ensuring that each asylum application is processed by one MS, most often the country of entry. Thus, this framework aims to achieve an efficient asylum system by avoiding multiple applications across MS[2].

Key principles of the Dublin System include ensuring family unity, safeguarding the best interests of children and efficiently determining the responsibilities of MS. By design, the system designates responsibility to the MS of entry or the country of residence of the applicant's family. While the regulation is effective in preventing overlapping claims, it has also faced strong criticisms, particularly regarding the strain it places on EU border states like Italy, Greece or Cyprus, which bear the brunt of incoming asylum seekers due to their geographic location.[3]

1.2. Introduction to Article 17

Article 17 of the Dublin III Regulation contains two discretionary clauses. These permit MSs to take over the responsibility for examining an asylum application for international protection irrespective of the hierarchy established under Chapter III of the Regulation. Thus, differing from other take charge request articles in the Regulation, requests under Article 17(2) do not fall under the scope of Article 22(7), due to its discretionary nature, as this MS who

---

[1] Phenomenon where a third-country national applies for international protection in multiple Member States. Commission of the European Communities, Commission Staff Working Document: Policy Plan on Asylum, An Integrated Approach to Protection Across the EU COM (2008) 360, 9.

[2] Susan Fratzke, *Not Adding Up: The Fading Promise of Europe´s Dublin System* (MPI Europe, 2015) 6.

[3] Ibid 7.

accepts responsibility is not otherwise responsible to examine the relevant asylum claim. In this way, although in general, the purpose of the Dublin III Regulation is to allocate responsibility to a single MS based on specific criteria (such as family ties, the country of first entry, or visa issuance), Article 17 introduces a significant level of flexibility within its otherwise structured framework.

While Article 17(1) enables an MS to examine an asylum request which under Dublin III does not fall within its formal scope of responsibility, Article 17(2) enables the responsible MS to request another MS to take charge of an asylum applicant in order to "bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations".[4] Article 17(1) is applied based on broader policy consideration while 17(2) is assessed based on the individuals circumstances of the applicant. Overall, Article 17 provides MSs the option to consider humanitarian, political or logistical factors beyond the Regulation's mandatory criteria when deciding to take charge of an asylum application.

2. Article 17(2) within the Dublin III Regulation System

2.1. Analysis of Article 17

Material Scope

Article 17(2) establishes that a MS can request another MS to take charge of an applicant for family reunification based on humanitarian grounds based in particular on family or cultural considerations, even when the second MS is not responsible for the asylum claim based on Articles 8 or 11-16.

The take charge request must contain all information that the requestion MD has to allow the requested MS to examine the case. The individuals concerned need to express their consent in writing.

The requested MS can carry any necessary checks to examine the humanitarian grounds cited. If the request is rejected, said rejection must state the reasons for refusal. If the requested MS accepts, the responsibility to examine the application is transferred.

[4] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Article 17(2).

Personal Scope

The concepts of 'family member' and 'relative' are not defined in the Regulation, therefore the reference to family considerations enables MS to exercise their discretion to bring together individuals who are member of a family unit or group recognized in other cultures. This applies even where the second MS is not responsible under the criteria of Articles 8-11 and 16.

Temporal Scope

This request can be made at any point prior to a decision regarding the asylum claim of the individual concerned.

The requested MS must reply within 2 months upon the receipt of the request.

On acceptance, the transfer of the individual concerned must take place as soon as possible, and at the latest within 6 months of acceptance or the request, as per Article 29(1).

2.2. Relevance of Article 17(2)

The broader significance of Article 17(2) lies in its potential to mitigate some of the perceived imbalances in the Dublin system, such as overburdening specific MS or to uphold the rights of asylum seekers caught in a bureaucratic limbo. Furthermore, it provides an avenue for applicants to achieve family reunification or relocation to another MS when the usual avenue of Chapter III has failed and the applicant meets the discretionary requirements of Article 17(2). However, in general, studies have reported that these clauses and their predecessors under Dublin II are rarely applied and that their practice is restrictive.[5]

For asylum seekers, Article 17(2) represents both an opportunity and a source of uncertainty. On one hand, it allows individual in vulnerable situations or who have specific needs, to be transferred to an MS that can better address their specific needs and circumstances. On the other hand, the non-compulsory nature of Article 17(2) entails that there is no guarantee of uniform application, and thus uncertainty is inherent, as each MS has their own standards, requirements and procedures.

[5] UNHCR, *Left in Limbo, UNHCR Study on the Implementation of the Dublin III Regulation* (UNHCR, 2017) 116.

In this context, this research aims to shed some light on the existing statistics and data regarding the application of Article 17(2) across MS.

3. Legal Framework and Case Law

3.1. Court of Justice of the European Union (CJEU)

The CJEU determined in C.K., H.F., A.S. v Republika Slovenija that the application of Article 17 of the Dublin III Regulation concerns the interpretation of EU law, specifically, it falls within the scope of Article 267 TFEU[6]. Thus, this discretionary clause does not solely pertain to national law and the interpretation of its courts, but should also be interpreted according to the jurisprudence of the CJEU. Nevertheless, this judgement also states that an MS cannot be obligated to apply this Article as it remains discretionary. [7]

In line with existing case law, the Regulation must be applied and interpreted in accordance with the Charter of Fundamental Rights of the European Union.[8] Therefore, both provisions in Article 17 must be interpreted in accordance with the fundamental right to family life of Article 7 of the Charter and Article 8 ECHR. This is also enshrined in the recitals of the Dublin III regulation.[9]

4. Practical application of Article 17(2)

Findings from the 2017 UNHCR Report on the application of Dublin III

Take charge requests based on humanitarian grounds under Article 17(2) represent a miniscule percentage of all take charge requests. UNHCR in its 2017 report on the practical application of the Dublin III Regulation, reiterated the need for a more liberal and flexible application of these clauses.[10]

UNHCR findings in 2017 show that there is limited or no transparency in some MS and their assessment of humanitarian grounds. Factors identified which influence the application of discretionary clauses included:

- Conditions in the receiving Member State based on country information, jurisprudence of national courts and judgements from the ECtHR and CJEU.
- Health needs of the applicant.

---

[6] Case C-578/16 PPU C. K., H. F., A. S. v Republika Slovenija [2017] ECLI:EU:C:2017:127, paras 53 – 54.
[7] Ibid, paras 88 and 97.
[8] Ibid, para 59
[9] Dublin Regulation (ibid 4), Recital 14.
[10] UNHCR, (ibid 5) 132.

- Vulnerability factors
- Presence of extended family members[11]

Regarding vulnerability and health issues, out of the case files audited by UNHCR, 6 out of 14 files were successful.[12]

According to UNHCR the provision of relevant information and support by legal advisors or NGOs is often key.

Specifically for the application of the humanitarian clause, this provision was been found to have applied:

- For family reunification cases when applications do not fall into the scope of Article 8-1 because of the nature of the familial relationship (Family definitions:: Articles 2(g) and (h) of the Regulation)
- For family reunification for applicants falling outside of the scope of Article 16 because the dependency relationship was not sufficiently proven
- In cases outside of the scope of Articles 8-10 because the time litis have elapsed
- Where the spouse of an applicant is citizen of an MS.[13]

The humanitarian clause is also used in cases where there are multiple re-examination requests and/or disputes on the requirements and interpretation of the Chapter III criteria.

Cultural considerations are not accepted at all by some MS (Denmark, UK, Italy and Poland), and extremely rarely for the other MS, with Germany being the most accepting, although also with minimal acceptance rates.

Regarding the time frame, UNHCR found that "it takes on average over three months from the time of lodging an application to the submission of a take charge request under Article 17(2)" "and over two months for the other Member State, to accept the take charge request. From the time of the acceptance of the request to the actual transfer of the applicant it takes another three months and one week on average."[14]

---

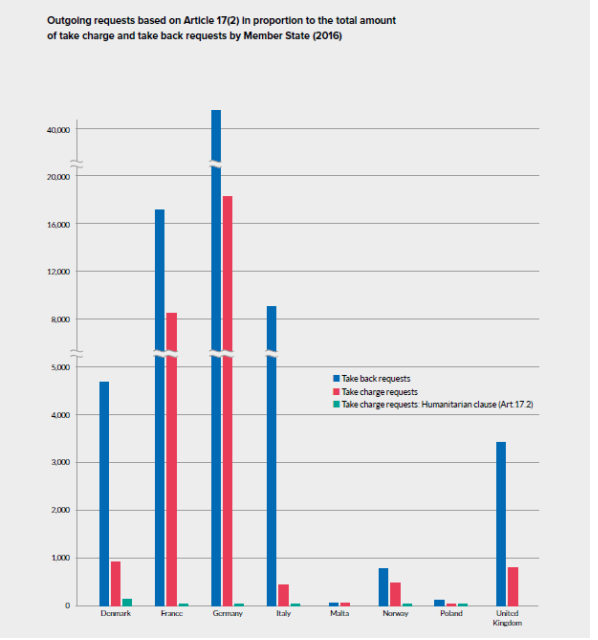
[11] Ibid, 121
[12] Ibid, 130.
[13] Ibid, 129.
[14] Ibid, 130.

Of all examined MS by UNHCR, Germany was found to have the most positive practices and rates of acceptance based on humanitarian grounds.[15] ECRE highlights good practices in Belgium.[16]

Other available statistics

MSs do not frequently report their assessment of Article 17(2) to Eurostat. According to the available data reported in 2022, Eurostat ascertained that the humanitarian clause is seldom used by most reporting countries. Humanitarian transfer requests accounted for 0.72% of transfer requests. Humanitarian transfer requests were under 1% for 23 out of 31 reporting countries. Cyprus is an outlier in this trend, as humanitarian requests represent 40% out of the total requests, followed by Greece with 32%.[17]

The acceptance rate based on humanitarian grounds stand at 45% for all Dublin MS. The most accepting countries are Luxembourg, Switzerland, France, Austria, Estonia and Spain, as they have accepted half of the total requests.[18]



Source: UNHCR (ibid 5), 117.

[15] Ibid, 129.
[16] AIDA and ECRE, "The Implementation of the Dublin III Regulation in 2022" (2023) 18.
[17] Ibid, 18.
[18] Ibid, 18.

5. Available statistics and case law from relevant MS's[19]

In 2016, the Migration and Home Affairs department of the Dublin III Regulation already pointed out the challenges associated with the humanitarian provision: the lack of information on the criteria used by MS, the differing procedures and interpretation of the provision and the tendency for the narrow interpretation of take charge requests.[20]

Bulgaria, Romania, Sweden: Reported that Article 17(2) requests are almost always accepted.

Greece and Czech Republic: Highlighted challenges, with requests rarely accepted due to disagreements on what qualifies as a humanitarian need. Greek authorities also noted that some Member States demand evidence of dependency, which is not required under Article 17(2). The Czech Republic reported that other states have denied their requests, claiming the humanitarian grounds were not serious enough.

- Netherlands: Accepts Article 17(2) requests only in exceptional circumstances and when clear evidence of substantial impact on the applicant is provided.
- Poland: Limits acceptance to cases based on family unity, excluding considerations such as cultural links.
- Norway: Rarely accepts Article 17(2) requests, citing a desire to avoid encouraging applicants to bypass regular migration procedures.
- Germany: Expressed skepticism, viewing the clause as potentially being used politically by states that apply it more frequently.
- Ireland: Requires strong proof, such as marriage certificates for family connections, which are often not provided, complicating acceptance of requests.[21]

[19] Note that the criteria for the selection of 'relevant' MS's for the purpose of this research are the individual cases handled by Hope for Children in recent years, and the destination MS to which a take charge request based on Article 17(2) was submitted or was considered to be submitted. These are: Belgium, Germany and Sweden.

[20] European Commission "Evaluation of the Implementation of the Dublin III Regulation, DG Migration and Home Affairs" (2016, European Commission) 43.

[21] Ibid.

Belgium

There is no available statistics for this MS, other than reports that it sticks to a narrow interpretation of Article 17(2). Belgium reported in 2016 that most requests on humanitarian grounds have been successful.[22]

Germany

Has been identified by UNHCR as one of the countries to have adopted good practices in regard to humanitarian transfer applications. Germany is one of the MS that significantly submits a higher amount of take charge requests based on humanitarian grounds (second only to Greece). It sent 34 requests in 2014 and 48 requests in 2016.[23] According to UNHCR it is unclear whether Germany has internal instructions for the assessment of the discretionary clauses. [24] The deciding body is the BAMF (Federal Office for Migration and Refugees).

UNHCR has found that "the BAMF applies the humanitarian clause where core family members or unaccompanied children are concerned if the case falls outside the scope of the criteria or if time limits have elapsed in order to ensure family unity.", in contrast to the limited application of this clause by other MS.[25] However, significantly, Germany has considerably decrease its intakes, mostly on the basis of formal considerations which have resulted in a notable rejection rate increase.

In 2022, the overwhelming majority of incoming transfers came from Greece based on family unity provisions (208 out of 212).[26]

---

[22] Ibid.
[23] UNHCR (ibid n5) 116.
[24] Ibid, 120.
[25] Ibid, 131.
[26] AIDA, "Dublin, Germany" (2023) < https://asylumineurope.org/reports/country/germany/asylum-procedure/procedures/dublin/> accessed 2 May 2024.

Incoming Dublin transfers from Greece: 2021	
Criterion	Number of transfers
Unaccompanied children with family members or relatives: Article 8	135
Family members of beneficiaries of international protection: Article 9	17
Family members of asylum seekers: Article 10	8
Dependent persons: Article 16	2
Family reunification based on the humanitarian clause: Article 17(2)	46
Total	208

Source: Federal Government, *Response to parliamentary question by The Left, 20/5868*, 28 February 2023, available in German at: https://bit.ly/3TFefdY, 38.

There is no specific statistics available on the assessment of the discretionary clauses.

Summary of Relevant Case Law

- *Munich Administrative Court, M9 S 17.50332, 28 March 2017* Established that transfers to another MS should be suspended if as a result of the transfer the family unit would be dissolved. Analysis of Article 10's applicability necessary.
- *Administrative Court Hannover, Case no 1 B 5946/15, 7 March 2016* Establishes that MS may derogate from the binding criteria of Article 3(1) of the Dublin Regulation based on humanitarian or compassionate grounds in order to bring together family members, relatives or persons that are related in any other way. It reaffirms that recitals 13 and 14 state that the primary considerations in the application of the Regulation are the best interest of the child and the respect for family life and that the former includes the possibility of family reunification.

Sweden

The body in charge of decision making regarding take charge requests based on Article 17(2) is the Swedish Migration Agency and the appeals go to the Migration Court. In 2023 Sweden received 3,579 requests under the Dublin

Regulation and sent 1,671.[27] In 2023, Sweden made 3 requests based on Article 17(2) based on the dependent person's clause of Article 16. It received 41 and 2 incoming requests on these grounds, respectively.[28]

In general, Sweden has a strict interpretation of the Dublin Regulation, and it does not disclose the assessment process for the requests based on humanitarian grounds.

Incoming Dublin requests by criterion: 2023		
Dublin III Regulation criterion	Requests received	Requests accepted
"Take charge": Articles 8-15	**316**	**234**
Article 8 (minors)	49	20
Article 9 (family members granted protection)	8	2
Article 10 (family members pending determination)	3	0
Article 11 (family procedure)	14	1
Article 12 (visas and residence permits)	105	209
Article 13 (entry and/or remain)	5	2
Article 14 (visa free entry)	–	–
"Take charge": Article 16	2	1
"Take charge" humanitarian clause: Article 17(2)	41	11
"Take back": Articles 18 and 20(5)	**2,620**	**1,869**
Article 18 (1) (b)	2,144	1,496
Article 18 (1) (c)	3	2
Article 18 (1) (d)	470	370
Article 20(5)	3	1

Source: Information provided by the Migration Agency's statistics unit.

Source: AIDA, "Dublin, Sweden" (2023) < https://asylumineurope.org/reports/country/sweden/asylum-procedure/procedures/dublin/> accessed 2 May 2024.

Relevant case law for other MS

[27] Ibid.

[28] AIDA, "Dublin, Sweden" (2023) < https://asylumineurope.org/reports/country/sweden/asylum-procedure/procedures/dublin/> accessed 2 May 2024.

Austria

- *Austrian Federal Administrative Court, W232 2140127-1, 11 January 2017.* On investigative duties and the necessity of transparency and complete investigation for the application of Article 17(2). Actions cannot result in the disproportionate interference with the family life of the family unit under Article 8 ECHR.
- *Austrian Federal Administrative Court, W105 2135499, 21 November 2016*. The purpose of the humanitarian clause of Article 17 is to prevent the separation of family members. It seeks to prevent the infringement of Article 8 of the ECHR.

6. Indicators for the pursual of an Article 17(2) take charge request in the case of unaccompanied minors in Cyprus

Cypriot authorities have identified the following vulnerability indicators that need to be included on a Best Interests Assessment (BIA) to confirm whether family reunification is in a minor's best interest and whether Article 17(2) should be pursued

i) "Serious illness
ii) Disability
iii) Pregnancy
iv) Whether the minor is a possible victim of human trafficking
v) Whether the minor has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence i.e. victims of FGM
vi) Whether the minor is a single parent
vii) Other special needs"[29]

This assessment must be done on a case-by-case basis.

[29] Asylum Service, EUAA *Information for Guardians of Unaccompanied Minors Seeking International Protection in Cyprus in accordance with Article 4 of Regulation (EU) No 604/2013,* (2023) 8.