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Provisional text

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 20 June 2017(1)

Case C-670/16

Tsegezab Mengesteab

v

Bundesrepublik Deutschland

(Request for a preliminary ruling from the Verwaltungsgericht Minden (Administrative Court, Minden, Germany)

(Area of Freedom, Security and Justice – Interpretation of Regulation (EU) No 604/2013 – Article 21(1) take charge requests – Time limits for making a take charge request – Point at which an application for international protection is lodged under Article 20(2) –

Point at which the time limit in Article 21(1) starts to run – Whether failures to comply with the time limits laid down in Article 21(1) are within the scope of the right to appeal or review of a transfer decision under Article 27(1))

1. In this reference the Verwaltungsgericht Minden (Administrative Court, Minden, Germany) seeks detailed guidance as to the interpretation of various aspects of the Dublin III Regulation (2) and certain EU acts which underpin the procedures established by that regulation. (3) First, in circumstances where a third-county national lodges an application for international protection in Member State 'A', but that State requests Member State 'B' to take charge of the examination of his application and Member State 'B' becomes the Member State responsible under the rules in the Dublin III Regulation, does the person concerned have the right to challenge the transfer decision of Member State 'A' under Article 27(1) of that regulation on the basis that the take charge request was made after the time limit laid down in the Dublin III Regulation had expired? Second, what precisely is the event that marks the beginning of the period in which Member State 'A' (the requesting Member State) must make a take charge request? A number of sub-questions arise in that respect, such as: does the period begin when the third-country national presents himself to a Member State's authorities and makes his initial request for international protection? Or when a Member State's authorities issue a document confirming that the person concerned has the right to remain within that Member State pending the determination of his application for international protection and that he is entitled to certain assistance during that period including housing and social security benefits? Or when the application for international protection is lodged with the competent authorities (and, if so, what constitutes the 'lodging' of such an application)?

EU legal framework

The Charter

2. Article 18 of the Charter of Fundamental Rights of the European Union (4) guarantees the right to asylum with due respect for the rules of the Geneva Convention of 28 July 1951 relating to the status of refugees (5) and in accordance with the Treaties.

3. The first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal. (6)

4. In accordance with Article 52(3) of the Charter, the meaning and scope of rights guaranteed by the Charter which correspond to rights under the ECHR shall be the same.

The Dublin system – an overview

5. The origins of the Dublin system can be traced to the inter-State mechanism in the Convention implementing the Schengen Agreement. (7) The Dublin system makes provision for criteria and mechanisms to establish the Member State responsible for determining applications for international protection. Those provisions were incorporated into the Dublin Convention (8) which was brought within the EU *acquis* by the Treaty of Amsterdam in 1997 and was subsequently replaced by Council Regulation (EC) No 343/2003. (9)

The Dublin III Regulation

6. The following statements are made in the recitals:

– The method for determining the Member State responsible should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection. (10)

– The Procedures Directive (11) should apply in addition and without prejudice to the provisions concerning the procedural safeguards regulated under the Dublin III Regulation, subject to the limitations in the application of that directive. (12)

– In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of the Dublin III Regulation and of the legal and factual situation in the Member State to which the applicant is transferred. (13)

– With respect to the treatment of persons falling within the scope of the Dublin III Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights. (14) The Dublin III Regulation respects fundamental rights and observes the principles which are acknowledged, in particular, in the Charter, and should therefore be applied accordingly. (15)

7. Article 2 sets out the following definitions:

‘(a) “third-country national” means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not national of a State which participates in [the Dublin III Regulation] by virtue of an agreement with the European Union;

(b) “application for international protection” means an application for international protection as defined in Article 2(h) of [the Qualification Directive (16)];

(c) “applicant” means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

...’

8. The general principle enshrined in Article 3(1) of the Dublin III Regulation is that Member States must ‘examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible’. Pursuant to Article 3(2), where no Member State responsible can be designated on the basis of the Chapter III criteria, the first Member State in which the application for international protection was lodged is to be responsible for examining it. The second subparagraph of Article 3(2) codifies the Court’s judgment in *N.S. and Others*. (17) It states:

‘Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of [the Charter], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.’

9. Article 4(1) states, ‘as soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State, its competent authorities shall inform the applicant of the application of this Regulation …’. (18) Member States are also required to interview applicants pursuant to Article 5(1). (19)

10. Chapter III comprises Articles 7 to 15. Article 7(1) states that the Chapter III criteria are to be applied in accordance with the hierarchy set out in that chapter. The Member State responsible is to be determined on the basis of the situation obtaining when the applicant first lodged his application for international protection with a Member State (Article 7(2)).

11. At the top of the hierarchy are those criteria relating to minors (Article 8) and family members (Articles 9, 10 and 11). The referring court has not indicated that they are at issue in the main proceedings.

12. Article 13(1) states:

‘Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of [the Dublin III Regulation], including the data referred to in [the Eurodac Regulation], that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place.’

13. Pursuant to Article 17(1), ‘by way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in [the Dublin III Regulation]’.

14. In accordance with Article 18(1)(a), the Member State responsible is obliged to take charge of an applicant who has lodged an application in a different Member State. In such cases, Article 18(2) states that the Member State responsible must examine or complete the examination of the application for international protection made by the applicant.

15. The rules governing the procedures for ‘taking charge’ and ‘taking back’ are set out in Chapter VI. Article 20 provides:

‘1. The process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State.

2. An application for international protection shall be deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible.

…’

16. Article 21(1) states:

‘Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.

Notwithstanding the first subparagraph, in the case of a Eurodac hit with data recorded pursuant to Article 14 of [the Eurodac Regulation], the request shall be sent within two months of receiving that hit pursuant to Article 15(2) of that Regulation.

Where the request to take charge of an applicant is not made within the periods laid down in the first and second subparagraphs, responsibility for examining the application for international protection shall lie with the Member State in which the application was lodged.'

17. Pursuant to Article 22(1), the requested Member State must make the necessary checks and is required to give a decision on the take charge request within two months of receipt of such a request. By virtue of Article 22(2), certain elements of proof and circumstantial evidence are to be used. Article 22(7) provides that if of the requested Member State fails to act within the two-month period specified in Article 22(1), that is tantamount to accepting the take charge request in the procedure for determining the Member State responsible in relation to a take charge request.

18. The procedures for take back requests are set out in Articles 23 to 25. Where a Member State with which an applicant has lodged a new application for international protection considers that another Member State is responsible, it may make a take back request (Article 23(1)). That request must be made as quickly as possible and in any event within two months of receiving a positive Eurodac hit. Where the take back request is based on evidence other than data obtained from the Eurodac system, the Member State has three months from the date on which the application for international protection was lodged to make its request (Article 23(2)). Failure to make a take back request within the periods laid down results in responsibility for examining the application for international protection remaining with the Member State where the new application was lodged (Article 23(3)).

19. There is a time limit of two months for making a take back request under Article 24(2) in cases where there is a positive Eurodac hit, no new application is lodged in the requesting Member State and the third-country national concerned is staying within that State's territory without a residence document. In the absence of evidence obtained from the Eurodac system, the period is three months from the date when the requesting Member State becomes aware that it may be responsible for the person concerned. If the take back request is not made within the periods laid down in Article 24(2), the requesting Member State must allow the person concerned an opportunity to make a new application. (20)

20. Under Article 26, where the requested Member State agrees to take charge of (or take back) an applicant, the requesting Member State must notify the person concerned of the decision to transfer him to the Member State responsible. That decision must contain information about the legal remedies available.

21. Article 27(1) provides that applicants have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal. In accordance with Article 27(3), Member States must provide under national law that appeals against or reviews of transfer decisions suspend such decisions allowing the person concerned to remain in the territory of the Member States pending the outcome of the challenge.

22. Article 29 concerns the arrangements and time limits relating to transfers. Article 29(1) states that the transfer 'from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge [of] or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3)'.

23. Article 35(1) provides, 'each Member State shall notify the Commission without delay of the specific authorities responsible for fulfilling the obligations arising under this Regulation, and any amendments thereto. The Member States shall ensure that those authorities have the necessary resources for carrying out their tasks and in particular for replying within the prescribed time limits to requests for information, requests to take charge of and requests to take back applicants'.

The Eurodac Regulation

24. The purpose of the system put in place by the Eurodac Regulation is to assist in determining which Member State is responsible pursuant to the Dublin III Regulation for examining an application for international protection lodged by a third-country national and otherwise to facilitate the application of the latter regulation. (21) A 'hit' is defined as 'the existence of a match or matches established by the Central System by comparison between fingerprint data recorded in the computerised central database and those transmitted by a Member State with regard to a person …'. (22)

25. Pursuant to Article 9, each Member State must promptly take the fingerprints of all fingers of every applicant for international protection who is at least 14 years of age and, as soon as possible and no later than 72 hours after the lodging of the application for international protection as defined in Article 20(2) of the Dublin III Regulation, transmit them together with certain other data to the Central System. (23) The data are stored for a period of 10 years. The obligation to collect and transmit fingerprint data also applies in respect of third-country nationals apprehended in connection with the irregular crossing of an external border (Article 14(1) and (2)). The data collected are recorded in the Central System. Without prejudice to the obligation to draw up statistics, the data so recorded are to be used solely for the purposes of comparison with data on applicants for international protection. (24)

The Dublin Implementing Regulation

26. The Dublin Implementing Regulation sets out the specific arrangements made to facilitate cooperation between the Member States' authorities responsible for applying the Dublin III Regulation in relation to the transmission and processing of requests for taking charge of, and taking back, applicants for international protection. (25) A standard form for take charge requests is annexed to the Implementing Regulation. The request must include, inter alia, a copy of all the proof and circumstantial evidence showing that the

requested Member State is responsible for examining the application for international protection and the data relating to a positive Eurodac hit. (26)

27. Annex II of the Dublin Implementing Regulation comprises a 'List A' and a 'List B', which indicate the means of proof for determining the Member State responsible for the purposes of the Dublin III Regulation. List A refers to formal proof which determines responsibility as long as it is not refuted by proof to the contrary. The first indent of point 7 of that list mentions a positive match by Eurodac from a comparison of the applicant's fingerprints with fingerprints taken pursuant to Article 14 of the Eurodac Regulation.

The Qualification Directive

28. The Qualification Directive lays down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. (27) The following definitions are included in those listed in Article 2:

'(a) "international protection" means refugee status and subsidiary protection status

…

(h) "application for international protection" means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately

…'

The Procedures Directive

29. The Procedures Directive establishes common procedures for granting and withdrawing international protection. (28) The directive applies to applications for international protection made within EU territory. (29) Member States must designate a determining authority which is responsible for examining applications under all relevant procedures. Member States have a discretion as to whether the determining authority is also responsible for processing cases under the Dublin III Regulation. (30)

30. Under Article 6(1), when a person makes an application for international protection to an authority competent under national law for registering such applications, the registration must take place no later than three working days after the application is made. If the application for international protection is made to other authorities which are not competent to register the person concerned under national law, the registration must nonetheless take place no later than six working days after the application is made. Those authorities must inform applicants as to where and how applications for international

protection may be lodged. In accordance with Article 6(2), Member States must ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. (31) Without prejudice to Article 6(2), Member States may require that applications for international protection should be lodged in person and/or at a designated place (Article 6(3)). Article 6(4) states, 'notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned'.

31. An applicant for international protection is entitled to remain in the Member State concerned for the sole purpose of the procedure for examining his application. (32)

The Reception Directive

32. Directive 2013/33/EU laying down standards for the reception of applicants for international protection, (33) as defined in Article 2(h) of the Qualification Directive, provides that Member States must inform applicants within a period of 15 days after they have 'lodged' an application of benefits to which they are entitled and of any obligations with which they must comply relating to reception conditions (Article 5(1)). Member States must ensure that within three days of the lodging of an application, an applicant is issued with a document which certifies his status as an applicant for international protection, or testifies that he is allowed to stay within the territory of the Member State concerned while his application is pending or being examined (Article 6(1)).

National law

33. It appears from the referring court's explanation in the order for reference that where a third-country national applies for international protection in Germany, the national system distinguishes between, on the one hand, an informal request made to authorities (such as those responsible for border control, the police, immigration officials, or a reception centre for people seeking asylum) and, on the other hand, the lodging of a formal application for international protection with the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees: 'the BAMF'), which is the body designated under national law to decide on asylum applications and competent to take decisions under the law relating to foreign nationals.

34. The third-country national is initially referred to the relevant reception centre which must inform the BAMF. The German authorities must issue the third-country national with a certificate of registration as an asylum seeker ('the attestation'). From that point he is permitted to reside in Germany until the conclusion of the procedure relating to his application for asylum. The third-country national will be given an appointment and is required to appear in person at the local BAMF office in order to lodge his application for international protection.

Facts, procedure and questions referred

35. Tsegezab Mengesteab ('the applicant') is an Eritrean national. He stated that he first entered EU territory in Italy on 4 September 2015, by crossing the Mediterranean Sea from Libya. He arrived in Germany on 12 September 2015 having travelled overland from Italy. On 14 September 2015, the German authorities first provided him with an attestation which was issued by the regional government of Upper Bavaria in response to his informal request for asylum. On 8 October 2015, the Central Immigration Authority for Bielefeld issued him with a second attestation. On 14 January 2016 Mr Mengesteab sent the second attestation to the BAMF and he re-sent it on 6 February 2016. On 22 July 2016, Mr Mengesteab lodged a formal application for international protection with the BAMF.

36. On 19 August 2016 a check on the Eurodac database showed that Mr Mengesteab's fingerprints had been taken in Italy (Eurodac hit IT2LE01HRQ) but that he had not made an application for international protection there. The German authorities made a take charge request to their Italian counterparts on the same day. The Italian authorities have not responded to that request.

37. By decision of 10 November 2016, which was served on Mr Mengesteab on 16 November 2016, the BAMF stated that his request for international protection was inadmissible and therefore refused his application for asylum and ordered his deportation to Italy. The BAMF took the view that Italy rather than Germany was the Member State responsible for examining his application, on the basis that he had irregularly crossed the EU external border when he travelled to Italy from Libya and that his circumstances therefore fell within the scope of Article 13(1) of the Dublin III Regulation.

38. On 17 November 2016, Mr Mengesteab challenged that decision before the referring court and applied for suspension of the transfer decision. The court granted suspension of the deportation order on 22 December 2016.

39. Mr Mengesteab argues that Germany is responsible for examining his application, because the take charge request was made after the expiry of the three-month period laid down in the first subparagraph of Article 21(1) of the Dublin III Regulation. In his view, time for making the take charge request started to run once he had made his informal request for asylum on 14 September 2015. That remains the position where there is a positive Eurodac hit, as the shorter two-month period in the second subparagraph of Article 21 is meant to speed up the take charge procedure.

40. The BAMF counters first, that the rules on time limits in the Dublin III Regulation are not amenable to appeal or review by applicants as they do not establish individual rights. Second, it considers that the time limits laid down do not start to run until a formal application for asylum is made.

41. The referring court wishes to ascertain whether Mr Mengesteab can challenge the operation of the time limits laid down in Article 21(1) of the Dublin III Regulation in proceedings based upon Article 27(1) of that regulation. If that is the case, the referring

court requests guidance in particular as to what constitutes the lodging of an application for international protection under the Dublin III Regulation.

42. Accordingly, the referring court asks:

‘(1) May an asylum applicant claim a transfer of responsibility to the requesting Member State by reason of the expiry of the period for making the take charge request (third subparagraph of Article 21(1) of [the Dublin III Regulation])?

(2) If Question 1 is to be answered in the affirmative: may an asylum applicant claim a transfer of responsibility even if the requested Member State is still willing to take charge of him?

(3) If Question 2 is to be answered in the negative: can it be inferred from the express consent or the deemed consent (Article 22(7) of [the Dublin III Regulation]) of the requested Member State that the requested Member State is still willing to take charge of the asylum applicant?

(4) Can the two-month period provided for in the second subparagraph of Article 21(1) of [the Dublin III Regulation] end after the expiry of the three-month period provided for in the first subparagraph of Article 21(1) of [the Dublin III Regulation] if the requesting Member State allows more than one month to pass after the beginning of the three-month period before it makes a request to the Eurodac database?

(5) Is an application for international protection deemed to have been lodged for the purposes of Article 20(2) of [the Dublin III Regulation] when a certificate of registration as an asylum seeker is first issued or only when a formal asylum application is recorded? In particular:

(a) Is the certificate of registration as an asylum seeker a form or a report within the meaning of Article 20(2) of [the Dublin III Regulation]?

(b) Is the competent authority within the meaning of Article 20(2) of [the Dublin III Regulation] the authority responsible for receiving the form or for preparing the report or the authority responsible for the decision on the asylum application?

(c) Has a report prepared by the authorities reached the competent authority even if that authority was informed of the main content of the form or the report, or must the original or a copy of the report be communicated to it for that purpose?

(6) Can delays between the first request for asylum or the first issue of a certificate of registration as an asylum seeker and the submission of a take charge request lead to a transfer of responsibility to the requesting Member State by analogous application of the third subparagraph of Article 21(1) of [the Dublin III Regulation] or require the requesting Member State to exercise its right to assume responsibility pursuant to the first subparagraph of Article 17(1) of [the Dublin III Regulation]?

(7) If Question 6 is to be answered in the affirmative in respect of either alternative: from what time can there be considered to be an unreasonable delay in submitting a take charge request?

(8) Does a take charge request in which the requesting Member State indicates only the date of entry into the requesting Member State and the date of submission of the formal asylum application, but not also the date of the first request for asylum or the date of first issue of a certificate of registration as an asylum seeker, comply with the time limit provided for in the first subparagraph of Article 21(1) of [the Dublin III Regulation], or is such a request "ineffective"?'

43. Written observations were submitted by Germany, Hungary and the European Commission. At the hearing on 25 April 2017 those three parties made oral observations, as did Mr Mengesteab and the United Kingdom.

Assessment

Preliminary remarks

44. The referring court states in its order for reference that Mr Mengesteab entered EU territory by travelling from Libya to Italy across the Mediterranean. As an Eritrean national he would have been required to possess a visa when crossing the external borders of the EU Member States. (34) Presumably that was not the case and his entry into EU territory was irregular in so far as he did not comply with the conditions in Article 5(1) of the Schengen Borders Code. (35) Against that background, the referring court's questions take as their starting point that Mr Mengesteab falls within Article 13(1) of the Dublin III Regulation and that Italy is the Member State responsible under that regulation.

45. Is the referring court's premiss, that Mr Mengesteab's entry into Italy was irregular within the meaning of that provision, well founded?

46. The interpretation of Article 13(1) of the Dublin III Regulation is not raised expressly in the present proceedings. A similar issue concerning the crossing of land borders by third-country nationals travelling through the Western Balkans between the autumn of 2015 and the spring of 2016 is currently before the Court in *A.S.* (36) and *Jafari*. (37) The Court is asked in those cases for guidance as to the meaning of the expression 'irregularly crossed the border into a Member State' in Article 13(1) of the Dublin III Regulation in conjunction with the interpretation of Article 5(4)(c) of the Schengen Borders Code, which allows a Member State to derogate from one or more of the conditions in Article 5(1) of that act (such as possession of a valid visa) on humanitarian grounds or because of its international obligations, by authorising the third-country national concerned to enter its territory.

47. Was that issue considered in relation to Mr Mengesteab's case? If not, should an examination of that nature be carried out?

48. This is both a difficult and sensitive issue, fraught with unspoken political questions and rendered acutely uncomfortable by the tragic stories of people dying in attempts to cross the Mediterranean. Although the referring court has not raised the question, it is nonetheless relevant to determining how the Dublin III Regulation applies to this particular case. If Article 13(1) is not the appropriate Chapter III criterion, the actual questions posed may no longer require answers.

49. By way of background, I recall that in April 2015 the European Parliament urged the European Union and Member States to do everything possible to minimise the loss of life at sea. (38) In consequence, a large number of coordinated search-and-rescue ('SAR') operations, or border control operations which also have such responsibilities, were undertaken by the EU and coastal Member States such as Italy, often in conjunction with Frontex (the European Border and Coast Guard Agency). (39)

50. There appears to be an unspoken assumption that would-be applicants for international protection who arrive in the territory of a Member State having effected a sea crossing must necessarily have crossed that Member State's external border 'irregularly' for the purposes of Article 13(1) of the Dublin III Regulation. It seems to me that that assumption will not necessarily hold good in every case.

51. Where someone disembarks safely and undetected after a sea crossing and then, at some later stage, presents himself to the authorities of that Member State or another Member State to claim international protection, the assumption that he must have crossed the border of the first Member State 'irregularly' is a fair one: it is, indeed, almost certainly correct. Where someone is rescued on the high seas from an overcrowded, sinking inflatable boat, the legal position is significantly more complicated. The position may be further nuanced if a person is rescued within a Member State's territorial waters.

52. The duty to render assistance to persons in distress at sea constitutes 'one of the most ancient and fundamental features of the law of the sea'. (40) Article 98(1)(b) of the United Nations Convention on the Law of the Sea (UNCLOS) states that every State must require the master of a ship flying its flag, in so far as he can do so without causing serious danger to the ship, the crew or the passengers, inter alia, to proceed with all possible speed to the rescue of persons in distress. Article 98(2) of UNCLOS provides that every coastal State must promote the establishment, operation and maintenance of an adequate search and rescue service regarding safety on and over the sea. (41)

53. A 'place of safety' is a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination. (42) However, there is no specific concomitant obligation on a coastal State (or on the flag State of the vessel, or the State organising the SAR operation) to allow those rescued to disembark on its territory. (43) In principle (and subject obviously to the principle of non-refoulement), third-country nationals rescued by a vessel wearing the flag of an EU Member State or within the territorial waters of a

Member State can be disembarked in a non-EU country. (44) Ten years ago, in 2007, the Commission noted the problems linked with identifying the most appropriate port for disembarkation. (45) The International Maritime Organisation Facilitation Committee proposed in 2009 that the government responsible for the SAR area should accept disembarkation of rescued persons if no other place of safety could be found, but that proposal was later rejected. (46) After a 2010 initiative by the Council, (47) which was annulled on procedural grounds by the Court, (48) the Frontex Regulation established the following default rule in the case of SAR operations: the host and participating Member States are to cooperate with the coordination unit to find a place of safety, but if this is not possible 'as soon as reasonably practicable', the rescued persons may be disembarked in the Member State hosting the operation. (49) However, the Frontex Regulation does not apply in the territorial seas of third countries; (50) and the regulation has been criticised for failing to provide 'clear legal requirements for disembarkation in the case of [SAR] situations'. (51)

54. From the brief overview that I have provided, it is clear that the intersection of international law of the sea, international humanitarian law (in the shape of the 1951 Geneva Convention) and EU law does not provide a ready and evident answer to the question of whether those rescued during a Mediterranean crossing and disembarked in a coastal EU Member State (typically, but not exclusively, Greece or Italy) should be regarded as having crossed the border of that Member State 'irregularly' for the purposes of Article 13(1) of the Dublin III Regulation.

55. That said, the Court is not well-placed to provide the referring court with the necessary guidance here. As the issue was not raised in the order for reference, the Dublin States (52) were not put on notice of the question. They were not therefore in a position to make an informed decision as to whether to submit written observations addressing this point.

56. So far as the actual facts underlying the order for reference are concerned, the Court does not know whether Mr Mengesteab was rescued from the sea (and, if so, by whom), or whether he was indeed authorised to enter Italy on humanitarian grounds or pursuant to its obligations under international law. It may be that, on the contrary, his movements were entirely clandestine. In that case, it is more than likely that Article 13(1) of the Dublin III Regulation would unequivocally apply to his circumstances.

57. For those reasons, although I considered it to be incumbent upon me to highlight the problem, it seems to me that the proper interpretation of Article 13(1) of the Dublin III Regulation in the context of a sea crossing terminating in arrival on the territory of a coastal Member State is a question that must await determination in another case where it is raised directly by a national court. I therefore now turn to the questions put by the referring court.

Questions 1, 2 and 3

58. Questions 1 to 3 are closely linked. They essentially seek to establish whether Mr Mengesteab can challenge the decision to transfer him from Germany to Italy as the Member State responsible for examining his application.

Question 1: General remarks

59. By Question 1 the referring court seeks to ascertain whether Article 27(1) of the Dublin III Regulation allows an applicant for international protection to challenge a transfer decision where the requesting Member State (here, Germany) fails to comply with the three-month time limit for making such a request laid down in Article 21(1).

60. Germany and the United Kingdom submit that the answer to Question 1 should be 'no'. Mr Mengesteab and Hungary take the opposite view. The Commission argued in its written observations that an applicant could challenge a transfer decision on that ground. At the hearing the Commission changed its position. It submitted that an applicant's right to appeal or review under Article 27(1) of the Dublin III Regulation does not cover the provisions of that regulation which establish the time limits within which Member States must make a take charge request.

61. It seems to me that two general issues are raised by Question 1, namely the interpretation of Article 21(1) of the Dublin III Regulation and the scope of the right to an effective remedy in Article 27(1). In essence, the question is whether Member States' actions, in particular a failure to act within the prescribed time limits laid down in the regulation, should be subject to judicial scrutiny through an action brought before a national court by an applicant for international protection challenging a transfer decision.

62. In examining those issues it seems to me essential to take account of certain general principles in the Court's case-law which are affirmed in the preamble to the Dublin III Regulation. (53) Thus, the European Union is based on the rule of law inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the Charter or the Treaties, which establish a complete system of legal remedies and procedures designed to allow for judicial review of the legality of acts which fall within the scope of EU law. In addition, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and in particular from the ECHR which has special significance in that regard. (54)

63. The specific fundamental rights at issue are, inter alia, respect for the rights of the defence and the right to effective judicial protection which are guaranteed by Article 47 of the Charter. The former is part of the procedural rights covered by the right to be heard. The latter includes a requirement that the relevant authority makes it possible for the person concerned to defend his rights and to have access to an effective remedy for all breaches of rights guaranteed by EU law. (55) In that respect, Article 47 has a wider scope of application than the corresponding rights in Articles 6 and 13 of the ECHR. (56)

64. Taking those general principles into account in interpreting Articles 21(1) and 27(1) of the Dublin III Regulation, I consider that the reply to Question 1 should be 'yes', for the reasons that I shall go on to explain. The practical implications for Mr Mengesteab's case will turn on the answer to Question 5, which deals with the issue of when the application for international protection is considered to be 'lodged'. That step marks the beginning of the three-month period laid down in the first subparagraph of Article 21(1). (57)

Article 21(1) of the Dublin III Regulation

65. Whilst it is true that there is no express wording to the effect that the time limits laid down in Article 21(1) of the Dublin III Regulation are subject to appeal or review under Article 27(1), such an interpretation is not contrary to the text nor is it incompatible with the legislation's aims. (58)

66. The tension between individual rights and the inter-State mechanisms established by the procedures governed by the Dublin system has been acknowledged since its inception. (59) Given that the Dublin system was originally conceived to provide a mechanism for Member States to determine quickly the State responsible for dealing with an asylum application, the existence of that tension is perhaps unsurprising. (60)

67. However, how that tension is properly to be resolved has changed over time. First, fundamental rights enshrined in the Charter as primary law must now be taken into account. (61) Second, the legislative history shows that the EU legislature, in introducing the Dublin III Regulation, wished to ensure that its provisions were fully compatible with fundamental rights as general principles of EU law as well as with international law. In that respect, 'particular emphasis was put on the need to strengthen the legal and procedural safeguards for persons subject to the Dublin procedure and to enable them to better defend their rights …'. (62) That emphasis on fundamental rights is apparent in the scheme and context of the Dublin III Regulation. Together these form the background against which Article 21(1) must be construed. (63)

68. It is clear from the regulation's scheme that the overriding objective is to determine the Member State responsible for examining an application for international protection which has been lodged in one of the Member States as quickly as possible. (64) The determination is to be made by the competent authorities designated for that purpose under Article 35(1). In carrying out their functions the competent authorities must respect the time limits specified in the Dublin III Regulation.

69. In accordance with Article 3(1), the application must be examined by a single Member State, which is the one which the criteria set out in Chapter III indicate is responsible. The general principle is that responsibility for examining an asylum application lies with the Member State that played the greatest part in the applicant's entry or residence within EU territory. It is the Chapter III criteria concerning irregular entry into EU territory (that is, Article 13(1)) that are applied most often in order to determine responsibility for assessing an application for international protection, whilst

the criteria set out in Articles 8 to 11 of Chapter III concerning minors and family unity are used less frequently. (65) The Dublin system is designed to ensure that an applicant is not shuttled between Member States or left in orbit without any Member State willing to examine his request for international protection. The words 'a single Member State' indicate that applicants are not entitled to make multiple applications in a number of Member States ('forum shopping' (66)).

70. The process of determining the Member State responsible must start as soon as an application for international protection is lodged with a Member State (Article 20(1) and (2) of the Dublin III Regulation). Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may request that other Member State to take charge of the applicant. Take charge requests must be made as quickly as possible or at the latest within three months of the date on which the application was lodged within the meaning of Article 20(2). The Member State where the application is lodged is not obliged to do this, as the take charge procedure is discretionary. If it does not make such a request it remains the Member State responsible.

71. Furthermore, the legislative history shows that when the Dublin II Regulation replaced the Dublin Convention, the time limit for take charge requests was reduced from six to three months. (67) The revised time limits in the Dublin II Regulation (which are reflected in the Dublin III Regulation) were linked to the admissibility procedures in the (then) proposed Procedures Directive. (68) The Commission stated in its Explanatory Memorandum at the time that the mechanism for determining the Member State responsible could not function unless, inter alia, applications were processed within the agreed time limits. (69)

72. If a Member State does decide to make a take charge request, the time limits laid down in Article 21(1) are obligatory and they are strict. There is no provision for Member States to extend them and the legislature has not provided for Member States to derogate from the specified time limits in exceptional circumstances.

73. The Member State in which an application is lodged may of course make a successful take charge request to another Member State. If so, it will cease to bear responsibility for examining the substantive application for asylum. However, it may also: (i) decide not to make a take charge request; (ii) make a request within the period of three months laid down in Article 21(1) of the Dublin III Regulation which is legitimately rejected by the requested Member State (for lack of proof); or (iii) make such a request after the three-month period has expired. In any of those circumstances it becomes the Member State responsible for examining the application for international protection. (70) That naturally has a substantive consequence for the applicant himself. He is not transferred from Member State 'A' to Member State 'B'. He stays in the first Member State while his request for international protection is processed and determined. The substantive impact on the applicant will vary according to the circumstances of the case. In instances where the Dublin procedure progresses quickly the effects of that process on the general progress of the applicant's request for international protection is likely to be

less than it would be in cases where an application is subject to delays, in particular at the preliminary phase of determining the Member State responsible. (71) In that respect the time limits laid down, including those in Article 21(1), provide a degree of certainty to applicants as well as to the Member State concerned. The various time limits set out are central to the operation of the Dublin system in general.

74. That view is corroborated by the provisions that were introduced to provide or enhance individual rights, such as the right to information referred to in Article 4(1) and the right to notification of the transfer decision set out in Article 26(1) and (2) of the Dublin III Regulation.

75. I add that it follows from the wording of Article 29(3) that the legislative scheme contemplates that a person may be transferred erroneously and that transfers can be overturned on appeal or review. (72)

76. I therefore conclude that the wording and aims together with the legislative scheme of the Dublin III Regulation indicate that in cases where Member States fail to comply with the time limits relating to take charge requests, applicants should be able to challenge transfer decisions, in particular where the failure to meet those time limits has an impact on the progress of the application for international protection of the individual concerned.

Article 27(1) of the Dublin III Regulation

77. The referring court seeks guidance as to whether the Court's ruling in *Abdullahi* (73) should apply to Mr Mengesteab's case. *Abdullahi* concerned a Somali national who had first entered EU territory in Greece. Ms Abdullahi then continued through Hungary to Austria, where she claimed asylum. The Austrian authorities took the view that pursuant to the relevant Chapter III criterion Hungary was the responsible Member State. (74) The Hungarian authorities agreed to examine her application. Ms Abdullahi argued that, on the contrary, Greece was the Member State responsible as that was where she had first entered EU territory. (75) This Court ruled that the right to appeal or review in Article 19(2) of the Dublin II Regulation must be interpreted as meaning that, in circumstances where a Member State has agreed to take charge of an applicant for asylum on the basis that it was indeed the Member State of first entry into the European Union, the only way in which the applicant could call that into question was by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

78. It seems to me that the ruling in *Abdullahi* is limited to the particular circumstances of that case. Mr Mengesteab's position is different.

79. First, Mr Mengesteab is not challenging the application of the relevant Chapter III criterion (Article 13(1) of the Dublin III Regulation). Second, the interpretation of the

Dublin II Regulation in *Abdullahi* has been largely superseded by the changes introduced in the next iteration of the Dublin Regulation. (76) The objectives and the general scheme of the regulation have evolved. As a result, the right of appeal or review is less restricted than it was under Article 19(2) of the Dublin II Regulation. The provisions in the Dublin III Regulation relating to the safeguards for applicants concerning the information that Member States must make available to them and the obligation to conduct a personal interview were likewise not included in the earlier regulation. (77) The changes to the legislative scheme are confirmed by the stated aims of improving the protection granted to applicants in the Dublin system and introducing an effective remedy which covers both the examination of the application of the Dublin III Regulation and of the legal and factual situation in the Member State to which the applicant is transferred. (78)

80. Article 27(1) of the Dublin III Regulation, which states that applicants must have the right to an effective remedy in the form of an appeal or review against a transfer decision, was examined recently by the Court in *Ghezelbash* (79) and *Karim*. (80)

81. In each of those cases, an applicant for international protection sought to challenge the decision of the competent authorities in the Member State where he was located to transfer him to another State which had agreed with the first Member State to take responsibility for examining his application. In *Ghezelbash*, the Court ruled (in relation to an alleged wrongful application of the Chapter III criterion concerning visas (Article 12 of the Dublin III Regulation)) that, in order to ensure compliance with international law, the effective remedy introduced by the Dublin III Regulation in respect of transfer decisions should cover (i) the examination of the application of that regulation and (ii) the examination of the legal and factual situation in the Member State to which the asylum seeker was to be transferred. (81) In *Karim* the Court held that the wrongful application of Article 19(2) (which is not one of the Chapter III criteria but is part of Chapter V of the Dublin III Regulation) was amenable to appeal or review under Article 27(1) of that regulation, stating that: '… the application of [the Dublin III Regulation] is based essentially on that process that is conducted to establish the Member State responsible, designated on the basis of the criteria set out in Chapter III of that regulation …'. (82)

82. Mr Mengesteab and Hungary submit that *Ghezelbash* and *Karim* apply here. Germany, the United Kingdom and the Commission take the view that those cases apply only in limited circumstances, namely where an applicant for international protection claims that the Chapter III criteria have been applied erroneously or when the provision at issue is closely linked to the application of those criteria. The Commission further invites the Court to clarify its rulings in *Ghezelbash* and *Karim* and to indicate clearly the limits to an applicant's rights under Article 27(1) of the Dublin III Regulation.

83. It seems to me that whilst *Ghezelbash* and *Karim* did not expressly cover the question whether an applicant for asylum might challenge a failure to comply with the time limits laid down in Article 21(1) of the Dublin III Regulation, the principles established in those cases nonetheless apply equally here. (83)

84. Let me at once address the objections that are advanced to allowing applicants in the position of Mr Mengesteab to rely on Article 21(1) in proceedings to review or appeal against transfer decisions.

85. The first argument put forward by Germany, the United Kingdom and the Commission (the latter at the hearing) is that an applicant cannot invoke a failure to comply with the time limits laid down in Article 21(1) because the periods there laid down govern inter-State relations between the requesting Member State and the requested Member State. It follows that such relations should not be the subject of challenge by an individual.

86. I am not persuaded by that view, because the Dublin system is no longer a purely inter-State mechanism. That ceased to be the position once the Dublin system was incorporated into the EU *acquis* as the Dublin II Regulation, as the preparatory material for that act shows. (84) The position became even clearer with the introduction of the Dublin III Regulation. (85)

87. The second objection, raised principally by the United Kingdom, is that the time limits laid down are procedural matters. The United Kingdom invites the Court to draw a distinction between issues which give rise to substantive rights (such as a wrongful application of the Chapter III criteria) and those that are concerned (it claims) solely with procedure.

88. In my view the position is not as straightforward as the United Kingdom suggests. It seems to me that drawing a distinction in that way could lead to an artificial application of the regulation and may not, indeed, comply with the Charter.

89. It is true that the establishment of time limits is widely considered to be a procedural matter. However, the operation of the time limit in Articles 21(1) of the Dublin III Regulation has substantive implications for both applicants and the Member States concerned. (86)

90. It is generally acknowledged in EU law regarding acts adopted by the EU institutions that infringement of an essential procedural requirement vitiates an exercise of power, where the exercise of power is capable of affecting the outcome of the procedure. In that respect both the principle of effective judicial protection and the right to be heard have been held to be such an essential procedural requirement. (87) In relation to a take charge request, once the time limit laid down in the first subparagraph of Article 21(1) has been overrun, the consequences provided in the third subparagraph are triggered – namely, that the requesting Member State remains responsible for examining the application for international protection.

91. The Court has held, in relation to challenges to the validity of listing decisions, that judicial review extends to whether, inter alia, rules of procedure have been observed and that the EU Courts are competent to adjudicate as to whether the EU authority has

complied with the relevant procedural safeguards. (88) In my view those principles apply equally here.

92. The operation of the time limits laid down in Article 21(1) of the Dublin III Regulation, which go to the lawfulness of a take charge request and a subsequent transfer decision based on that request, relates to matters of fact and law concerning the application of that regulation over which national courts should be able to exercise judicial scrutiny pursuant to Article 27(1) of the Dublin III Regulation.

93. I stress that a decision by this Court to that effect will never pre-empt the process at national level. Article 27(1) of the Dublin III Regulation enshrines the right of access to a remedy. It does not follow that every challenge brought will succeed on the merits. However, in order for the right to an effective remedy in Article 27(1) to be exercised in a meaningful way, national courts must be able to establish whether a transfer decision based on an agreement to take charge under Article 21(1) of the Dublin III Regulation was taken in compliance with the procedures laid down in that provision and the basic guarantees set out in that regulation. (89)

94. For that right to be effective in circumstances where an applicant challenges a transfer decision on the ground that the requesting Member State failed to comply with the period laid down in Article 21(1) for making a take charge request, the national court needs to examine, inter alia, the application of the Dublin III Regulation in accordance with its wording, scheme and the legislature's aims. I have already stated that the time limits laid down in Article 21(1) contain no element of flexibility. (90) Allowing an applicant access to the courts where a time limit has been breached permits judicial scrutiny to ensure that, where the circumstances so warrant, that applicant does indeed have an effective remedy.

95. The United Kingdom and the Commission are correct in stating that Article 21(1) is not framed in terms of conferring individual rights. However, it does not follow that the legislature therefore intended not to allow individuals to invoke a failure to comply with the period of time laid down in the Dublin III Regulation. Binding time limits were first introduced in the Dublin II Regulation to provide Member States with incentives to determine the Member State responsible for examining an asylum application as quickly as possible and to avoid the situation of leaving applicants for international protection 'in orbit' for long periods of time. (91) Thus, an applicant has an interest in the Dublin system operating effectively so that the Member State responsible is determined swiftly and his case is moved on to the phase where his substantive application is assessed. Avoiding delays between first, establishing the Member State responsible and next, examining and determining a request for international protection also has advantages for Member States. A swift and efficient process reduces the likelihood of secondary movements towards States perceived to process Dublin applications more expeditiously.

96. Would a take charge request that is made one day in excess of the three-month time limit in Article 21(1) of the Dublin III Regulation be sufficient to render any

subsequent transfer ineffective, or should transfers be prohibited only in cases of egregious non-compliance, such as a year or more?

97. Here, I note that Article 31(3) of the Procedures Directive specifies six months as the period within which the examination of the substantive request for international protection should be concluded. It seems to me that the period for making a take charge request cannot in normal circumstances exceed that for conducting the substantive assessment. (92) Therefore, a period in excess of six months (that is, more than twice the time limit specified by the legislature) would tend to indicate that the aims of the Dublin III Regulation were being undermined. The determination of the Member State responsible would not have proceeded 'swiftly' and the applicant would indeed be 'in orbit' pending resolution of this preliminary phase prior to the assessment of his substantive application. That said, it would obviously be for the national court to determine any individual case in the light of all the circumstances.

98. I add that since challenges under Article 27(1) have suspensive effect, the position of the requested Member State is not necessarily prejudiced where a transfer decision is contested. Applicants who make successful challenges are not 'rewarded' as such. A successful challenge means simply that the default position set out in the Dublin III Regulation then applies and the requesting Member State remains responsible for examining the application for international protection.

99. A third objection, put forward both by the United Kingdom and by the Commission, is that a right of appeal or review of a failure to comply with time limits would encourage forum shopping.

100. I am not convinced by that argument.

101. There is no indication that Mr Mengesteab is suspected of having engaged in such activity. Therefore, that particular concern does not arise here. It should also be borne in mind that the Dublin III Regulation contains specific provisions to counter that phenomenon, notably the arrangements for take back requests in Articles 23 to 25. (93) Challenging a transfer decision under Article 21(1) on the ground that the three-month time limit has passed is a different issue from forum shopping.

102. If an applicant has submitted two applications in two different Member States that would indeed fall within the definition of forum shopping. In such a case the time limits in Article 23 would apply and the competent authorities would be subject to the three-month period laid down. If the time limits are not met, responsibility will then lie with the Member State where the new application is made. However, that consequence flows from the legislative scheme itself, not from the right to appeal or review. (94)

103. The fourth objection is made by the Commission alone. It asks the Court to restrict the right to review or appeal under Article 27(1) by linking it exclusively to those provisions where the applicant's fundamental rights are at issue. (95) I understand the argument to be based on the premiss that the right to asylum is guaranteed in so far as the

principle of non-refoulement will naturally be respected. Thus, the Commission argues there should be a right to appeal or review only where the right to family life or the rights of the child are in issue or where there are systemic deficiencies in the asylum system of the State to which the applicant is to be transferred. (96)

104. It is not part of the Court's function in these proceedings to review the content of the Commission's proposal for a 'Dublin IV Regulation'. That said, I do not myself read the words 'the right to an effective remedy' in that way. Those words must be construed by reference to Articles 41 and 47 of the Charter, (97) as the Court has done in *Ghezelbash* and *Karim*. (98)

105. The Commission's reading would also create an arbitrary distinction as regards the application of the Chapter III criteria, inasmuch as cases concerning wrongful application of the criteria relating to minors or where there is a family tie (Articles 8 to 11) would be subject to Article 27(1), but cases of erroneous application of the criteria in Articles 12 to 15 (visas and entry requirements) generally would not.

106. It is not at all clear to me that such a position would comply with the requirements of the Charter.

107. An examination of the right to an effective remedy under Article 27(1) of the Dublin III Regulation requires that provision to be read together with Article 26(1). The latter imposes an obligation on Member States to notify an applicant of a transfer decision made against him. Article 27(1) both guarantees the right to be heard, which is a right of the defence, and exists in order to provide an effective remedy against erroneous transfer decisions. (99) In the absence of the notification requirements in Article 26(1), Article 27(1) would be unable to fulfil those functions. It follows from the plain wording of Article 27(1) – 'an appeal or a review, in fact and in law' – that the operation of time limits is covered by that provision. Such a reading is consistent with the rights of the defence and the principle of effective judicial protection which are linked as explained by the Court in *Kadi II*. (100)

108. In the absence of an express exclusion in Article 27(1) as regards the time limits set out in Article 21(1), I consider that it would be contrary to the wording, aims and scheme of the Dublin III Regulation to restrict the right to an effective remedy and access to judicial protection in the way suggested.

109. It is clear that the refugee crisis at the end of 2015 and the beginning of 2016 created an exceptional situation that placed Member States in a difficult, position and strained available resources. (101) However, I do not accept that as a justification for cutting back on the judicial protection afforded by the rules laid down in the Dublin III Regulation.

110. I therefore conclude that Article 27(1) of the Dublin III Regulation, read in the light of recital 19 of that regulation, should be interpreted as meaning that an applicant for international protection is entitled to bring an appeal or review against a transfer decision made as the result of a take charge request where the requesting Member State did not

comply with the time limit laid down in Article 21(1) of that regulation when submitting such a request.

Question 2

111. The referring court asks whether an asylum seeker can challenge a transfer decision even if the requested Member State agrees to take charge and become the Member State responsible for examining his application for international protection.

112. In Mr Mengesteab's case, Italy did not respond to Germany's take charge request. It is designated as the Member State responsible by virtue of Article 22(7) of the Dublin III Regulation, because the Italian authorities failed to act within the two-month period laid down in Article 22(1) of that regulation.

113. It seems to me that an applicant's right to an effective remedy enshrined in Article 27(1) is not contingent on the reaction (or the failure to react) of the requested Member State. The wording of Article 27(1) indicates that the remedy it makes available relates to the transfer decision issued by the requesting Member State. Its purpose is to ensure judicial supervision of whether that decision was reached on a proper basis in fact and in law. It is those elements that will be subject to scrutiny on appeal or review, rather than the actions of the requested Member State which must make certain checks within two months of receipt of the take charge request (Article 22(1)).

114. Thus, if an applicant challenges a transfer decision based on a failure to comply with the time limits laid down in Article 21(1) of the Dublin III Regulation, whether the requested Member State agrees to the take charge request is irrelevant. The position remains the same where the requested Member State becomes the Member State responsible for examining the application for international protection by virtue of Article 22(7).

115. In the light of the replies that I propose to Questions 1 and 2, there is no need to answer Question 3.

Question 4

116. The second subparagraph of Article 21(1) of the Dublin III Regulation provides that, in the case of a positive Eurodac hit in respect of a third-country national who is apprehended by a Member State's authorities in relation to an irregular border crossing within the meaning of Article 14(1) of the Eurodac Regulation, a take charge request must be sent within two months of receiving that hit.

117. By Question 4 the referring court seeks to ascertain whether that two-month period begins after the expiry of the three-month time limit laid down in the first subparagraph of Article 21(1) of the Dublin III Regulation, thus allowing the requesting Member State a total period of five months in which to make a take charge request. In the alternative,

does the second subparagraph of Article 21(1) provide for a shorter time limit in cases of a positive Eurodac hit? (102)

118. Hungary and the Commission submit that the period of two months is self-standing and does not begin at the end of the three-month time limit in the first subparagraph of Article 21(1) of the Dublin III Regulation. The United Kingdom disagrees with that view. It considers that it is consistent with the wording of that regulation to interpret the second subparagraph of Article 21(1) as meaning that the period of two months is in addition to the three-month time limit.

119. The wording of the first subparagraph of Article 21(1) of the Dublin III Regulation indicates that the general time limit for making a take charge request is three months. The word 'notwithstanding' at the beginning of the second subparagraph means that, in spite of the general rule, particular provision is made for those cases where there is a positive Eurodac hit. As I read it, a time limit of two months is substituted as an alternative to the general three-month period, rather than in addition to it, for the following reasons.

120. First, a positive Eurodac hit obtained from a comparison of an applicant's fingerprints with prints taken under Article 14(1) of the Eurodac Regulation will constitute probative evidence of an irregular entry at an external border of the EU Member States. (103) Such evidence is an element of formal proof which determines whether a Member State is indeed the Member State responsible for the purposes of the Dublin III Regulation. (104) A positive Eurodac hit enables that process to take place more expeditiously than in cases where there is no evidence of that nature. (105) Thus, the requesting State should require less time to establish whether it should make a take charge request.

121. Second, the view that a positive Eurodac hit facilitates the rapid determination of the Dublin III procedures is echoed in the provisions dealing with take back requests. (106) In such cases, a take back request must be made as quickly as possible and in any event within two months of receiving a positive Eurodac hit, in accordance with the first subparagraph of Article 23(2) of the Dublin III Regulation. Where the take back request is based on evidence other than a positive Eurodac hit, that period is three months from the date on which the application for international protection was lodged by virtue of the second subparagraph of Article 23(2).

122. Likewise, in cases that fall within the scope of Article 24 of the Dublin III Regulation (concerning take back requests relating to persons staying within a Member State's territory without a residence document who have not lodged a new application for international protection), a distinction is drawn between instances where there is a positive Eurodac hit and circumstances where there is no such evidence. The first subparagraph of Article 24(2) provides for a two-month period where there is a positive Eurodac hit. The second subparagraph of that provision lays down a time limit of three months where there is no such evidence. Under Article 25(1) the requested Member State must reply to a take back request as quickly as possible and in any event no later than one

month after the request was made. However, it has only two weeks to reply in cases where the take back request is based on a positive Eurodac hit.

123. Third, the time limits in the first and second subparagraphs of Article 21(1) are triggered by different events. For the first, it is the lodging of the application for international protection that is relevant. For the second, it is receipt of information from the Eurodac central system of a positive hit. In order to arrive at a period of five months, it would be necessary to treat the two months mentioned in the second subparagraph of Article 21(1) of the Dublin III Regulation as only beginning at the end of the three-month period *irrespective* of when the information relating to the positive hit becomes available. Such a reading, is however, contrary to the express wording of the text.

124. The United Kingdom expressed the concern that Member States sometimes experience difficulties in applying the Eurodac Regulation. It explained that there are cases where people have deliberately injured themselves in order to make it difficult for the competent authorities to obtain prints. There are also instances where it has been difficult to obtain prints because a person's fingertips have been damaged over time by manual labour.

125. Whilst I do not doubt the legitimacy of the United Kingdom's concerns, I do not believe that the problems which it has identified can be remedied by interpreting the second subparagraph of Article 21(1) of the Dublin III Regulation as it suggests.

126. It is Article 9(1) of the Eurodac Regulation that introduces an obligation to take fingerprints. (107) Under that regulation fingerprints should be taken promptly, as soon as possible after an application for international protection is lodged and in any event no later than 72 hours thereafter. (108) The time limit set out in the second subparagraph of Article 21(1) of the Dublin III Regulation is concerned solely with the Member States' obligations relating to take charge requests. It does not specify the period during which a third-country national's fingerprints should be taken after his application for international protection is lodged. In order to have a positive Eurodac hit, the fingerprints must by definition already have been recorded in the Eurodac central system (because, for example, they were taken and transmitted in connection with an irregular border crossing into another Member State (under Article 14(1) of the Eurodac Regulation)). That stage in the process precedes the take charge request. It therefore seems to me that in so far as the United Kingdom is concerned that Member States might be prejudiced by a shorter period of two months under the second subparagraph of that provision, its view is based on a misreading of Article 21(1) of the Dublin III Regulation. The two-month time limit cannot be triggered in cases where no fingerprints are taken under Article 9 of the Eurodac Regulation for comparison with prints that already exist in the Eurodac central system, or where (for whatever reason) no matching fingerprints are to be found in that system. In such cases, it is the general period of three months that would apply.

127. It is true that whether the period of two months laid down in the second subparagraph of Article 21(1) overlaps with the general time limit of three months or

whether that period starts after the general three-month time limit has expired is (arguably) unclear from the text of the provision.

128. However, a principal aim of the Dublin procedure is that the Member State responsible should be determined swiftly. It would be incompatible with that objective if the two-month period were construed as beginning after the three-month time limit laid down in the first subparagraph of Article 21(1) has expired (generating a period of five months). (109) Thus, in cases where there is a positive Eurodac hit the period for submitting a take charge request begins when information confirming that the fingerprints have been matched in the Eurodac central system is received by the requesting Member State. Such a positive Eurodac hit is probative evidence of an irregular entry at an external border of the EU Member States. Accordingly, the period for submitting a take charge request in those circumstances should be shorter than the general time limit of three months.

129. I therefore conclude that the period of three months referred to in the first subparagraph of Article 21(1) of the Dublin III Regulation provides the general time limit within which take charge requests must be made. The shorter period of two months laid down in the second subparagraph of Article 21(1) applies in those cases where a comparison of fingerprints obtained pursuant to Article 9(1) of the Eurodac Regulation reveals a positive hit within the meaning of Articles 2(d) and 14(1) of that regulation. That period of two months is not in addition to the general time limit of three months and therefore cannot start after the period laid down in the first subparagraph of Article 21(1) the Dublin III Regulation has expired. In cases where the competent authorities receive a positive hit, the time limit of two months starts from that point and it has the effect of reducing the general period of three months provided in the first subparagraph of Article 21(1).

Question 5

130. By Question 5, the referring court seeks to establish the meaning of the words ‘an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities has reached the competent authorities of the Member State concerned’ in Article 20(2) of the Dublin III Regulation. It explains that under the German system an attestation stating that the third-country national concerned is an asylum seeker is first issued in response to an initial informal request for asylum. Once that request is registered, the third-country national must then make a formal application for international protection to the BAMF, the competent authority designated under Article 35(1) of the Dublin III Regulation. Does the attestation issued by the authorities after the informal request has been made constitute the ‘lodging’ of an application for international protection under the Dublin III Regulation, or is the application lodged only when a formal application is recorded as having been submitted to the competent authorities?

131. Germany, the United Kingdom and the Commission submit that an application is lodged only once the formal application is made and has reached the competent

authorities. Mr Mengesteab and Hungary disagree with that view. Mr Mengesteab argues that submission of the informal request for asylum constitutes the lodging of the application for international protection for the purposes of Article 20(2) of the Dublin III Regulation and that that event triggers the start of the period of three months laid down in the first subparagraph of Article 21(1). Hungary is of the view that the attestation issued following an informal request for asylum represents the 'report' sent by the authorities within the meaning of Article 20(2) of the Dublin III Regulation.

132. The referring court considers that an application for international protection is deemed to have been lodged when the national authorities issue an attestation to an applicant indicating that he is entitled to reside in the Member State concerned until the asylum procedure is concluded and to receive assistance, such as accommodation and certain social security benefits.

133. In my opinion the view of Germany, the United Kingdom and the Commission reflects the better interpretation of Article 20(2) of the Dublin III Regulation.

134. According to settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording, but also the context in which it occurs and the objective pursued by the rules of which it is part. (110)

135. An application for international protection is defined in Article 2(h) of the Qualification Directive as meaning 'a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately'. (111) That wording is sufficiently broad to encompass both an informal request for international protection made to a Member State's authorities (such as the police, border guards, immigration authorities or the personnel of a reception centre) and a formal application lodged with the competent authorities designated under Article 35(1) of the Dublin III Regulation.

136. The Dublin III Regulation does not itself define what constitutes 'lodging' an application for international protection. In relation to procedural issues concerning the granting of international protection, the Procedures Directive is evidently closely linked to the rules in the Dublin III Regulation. (112)

137. Article 6 of the Procedures Directive distinguishes between two stages in relation to the application process: first, when a person makes an application for international protection and, second, when that person has an opportunity to lodge such an application. (113) In relation to the first stage, Article 6(1) states that the application must be registered within three working days after it has been made. (114) Regarding the second stage (which is not covered by the time limits in Article 6(1)), Article 6(2) states that a person who has made an application must have an opportunity to lodge it 'as soon as possible'. (115) Article 6(4) of the Procedures Directive echoes Article 20(2) of the Dublin III Regulation, stating that 'an application for international protection shall be

deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned'. The Procedures Directive, like the Dublin III Regulation, does not define what constitutes 'lodging' an application for international protection and there are no specific procedural rules laid down. Those matters therefore remain subject to national rules.

138. The words 'have been lodged' in Article 20(2) of the Dublin III Regulation suggest a formal procedure relating to the submission of an application for international protection. (116) That application is made either by the completion of a form or by someone preparing an official report on the applicant's behalf. There is no standard form for applications for international protection annexed to the Procedures Directive or the Qualification Directive. It is therefore for each Member State to determine the exact content of the form and the report. It may be that applicants would normally be responsible for completing the forms themselves, perhaps with assistance from non-governmental organisations or the competent authorities of a Member State. Certain applicants may be unable to complete a form, however; and there is therefore provision for a report to be completed by a third party which can be used instead of an application form. That view seems to be borne out by Article 20(2) which states that 'where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible'. So far as I can tell, the attestation issued by the authorities responsible for receiving applicants is not a form or report for the purposes of that provision. The purpose of the attestation is simply to confirm the applicant's status pending an assessment of his application and to ensure that the requirements of the Reception Directive are met. (117) It is not to record the kind of detailed information about an applicant that would be needed to enable the competent authorities to process his substantive application for asylum.

139. A further requirement of Article 20(2) is that the form or report must have reached the competent authorities in order for the application to be considered to be lodged. Within the context of the Dublin III Regulation, the competent authorities must be those designated under Article 35(1), rather than a national authority that has general duties in a Member State's system regarding the reception of applicants for international protection. That is because the act of lodging the application for international protection triggers certain events within the scheme of the Dublin procedure. It marks the start of: (i) the process of determining the Member State responsible for examining an application (Article 1); (ii) the obligation to provide the applicant with information about the Dublin procedure (Article 4(1)); (iii) a Member State's ability to decide whether to exercise its discretion to become the Member State responsible as an exception to responsibility being determined by application of the Chapter III criteria (Article 17(1)); and (iv) the time limits relating to take charge or take back requests (pursuant to, respectively, the first subparagraph of Article 21 and the second subparagraph of Article 23). (118)

140. Thus, in order to fall within Article 20(2) of the Dublin III Regulation, the application for international protection must be made on a form or in a report in accordance with national procedural rules and must have reached the competent authority

designated pursuant to Article 35(1) of the Dublin III Regulation. That authority is responsible for, inter alia, taking receipt of the application. Whether it is also the same authority that assists applicants in preparing the application is a matter that is governed by the Procedures Directive.

141. The referring court states that under the German system a third-country national who makes *a request for international protection* (the first stage) to national authorities, such as those responsible for border control, the police or immigration, must be referred to a reception centre for registration. It is the reception centre which must then notify the BAMF (the competent authority designated pursuant to Article 35(1) of the Dublin III Regulation) of the request for international protection. The person concerned must be issued with an attestation. Those steps are to be carried out before *an application for international protection* (the second stage) is lodged with the BAMF.

142. It thus appears that the document which is relevant to the informal request for international protection (the first stage) is not lodged with the BAMF. Also, there is nothing to indicate that the informal request is made on a form pursuant to Article 20(2). (119) The informal request is not a report for the purposes of that provision because it is not prepared by the national authorities. Rather, it is generated by the applicant himself.

143. It also seems to me that the attestation issued in response to the informal request is likewise not a report within the meaning of Article 20(2) of the Dublin III Regulation. That is because the attestation is not a request for international protection made by a third-country national within the meaning of Article 2(h) of the Qualification Directive. Rather, it is an official reply to the applicant's informal request. It records the provisional status of the person concerned pending the determination of his application for international protection and confirms that he is entitled to the assistance which must be afforded pursuant to the Reception Directive. (120) It appears likely that it is, in fact, the document under national law issued in accordance with Article 6(1) of the Reception Directive certifying the applicant's status and confirming that he is allowed to stay in the Member State concerned pending determination of his application for international protection.

144. The referring court's contrary interpretation of Article 20(2) is based upon the procedural particularities of the German system. However, those may not be reflected elsewhere in the European Union. Other Member States may not necessarily issue a formal attestation in response to an informal request for international protection. It therefore seems to me that the date when the attestation is issued cannot constitute the point when the application is lodged.

145. Hungary submits that, if the application for international protection were deemed to be lodged when it reaches the competent authorities, that would afford Member States too much leeway. Specifically, it would allow them to control how much time elapsed between the point when a third-country national makes a first request for international protection and when he eventually lodges his application so as to ensure that applications

are only lodged at a point when the national administration can guarantee that it can meet the time limits for making take charge or take back requests. That could lead to arbitrary treatment of individual cases which would undermine the operation of the Dublin procedures, particularly as regards the requirement that the Member State responsible be determined rapidly. The referring court expresses similar concerns.

146. It is true that the Dublin III Regulation contains no rules governing the period between the informal request and the lodging of a formal application for international protection. There is nothing that requires Member States to act within a certain time limit, save for Article 6(2) of the Procedures Directive, which obliges Member States to ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. The result is that it is indeed open to a Member State to 'manage' the speed at which it allows asylum applications to be lodged.

147. The possible disadvantages for individuals resulting from that flexibility have to be assessed against the problems that would ensue in the Dublin procedure if Articles 20(2) and 35(1) were to be ignored and informal requests made to national authorities other than those designated under the latter provision were considered to be equivalent to the lodging of an application. In my view, the latter interpretation would arguably be more likely to disrupt the Dublin procedure and would introduce an element of uncertainty as to when an application is actually lodged. It would, moreover, render the calculation of time limits inoperable.

148. Thus, in my view the better interpretation of Article 20(2) is that which gives full weight to the wording of that provision read together with Article 35(1).

149. It seems to me that the legislature has left it to national procedural rules to establish when the form or report within the meaning of Article 20(2) has reached the competent authorities of the Member State concerned. In cases where Member States apply Article 6(3) of the Procedures Directive, there will be less scope for confusion in relation to this aspect of the procedure, since the application must be made in person (as is the case in Germany) or lodged at a designated place. (121) That is when the report has 'reached' the competent authorities within the meaning of Article 20(2).

150. It follows that Mr Mengesteab's informal requests for international protection and the attestations issued by the national authorities on 14 September 2015 and 8 October 2015 did not constitute the lodging of an application for international protection within the meaning of Article 20(2) of the Dublin III Regulation, nor did those attestations constitute a report within the meaning of that provision. Accordingly, the period of time within which the competent authorities were obliged to make the take charge request did not start on either of those dates. It started on 22 July 2016 when Mr Mengesteab lodged his formal application for international protection with the BAMF. The take charge request that was made on 19 August 2016 thus complied with the time limit laid down in the second subparagraph of Article 21(1).

151. I therefore conclude that an application for international protection is deemed to have been lodged within the meaning of Article 20(2) of the Dublin III Regulation when a form or report reaches the competent authorities designated for the purposes of fulfilling a Member State's obligations under Article 35(1) of that regulation. In that respect: (i) a certificate of registration as an asylum seeker is not a form or report; (ii) the competent authority so designated is that which is responsible for receiving an application for international protection which is lodged in the Member State concerned; and (iii) the application is deemed to have reached the competent authority in accordance with the national rules which give effect to the Procedures Directive.

Questions 6 and 7

152. In the light of my reply to Question 5 and while the matter is ultimately one for the referring court, it seems to me that the take charge request in Mr Mengesteab's case was not ineffective and that responsibility for examining his application for international protection will not therefore automatically revert to Germany under the third subparagraph of Article 21(1) of the Dublin III Regulation. Against that background, the referring court seeks to ascertain whether the 10-month delay between 8 October 2015 (when the second attestation was issued) and 19 August 2016 (being the date of the take charge request) means that Germany is obliged to examine Mr Mengesteab's application pursuant to Article 17(1) of the Dublin III Regulation (Question 6). If that is indeed the case, the referring court asks what period of time between the issuing of an attestation and the making of a take charge request constitutes an unreasonable delay in submitting such a request (Question 7).

153. The short answer is that Member States cannot be required to exercise their discretion under Article 17(1) of the Dublin III Regulation to examine an application for international protection on humanitarian grounds. In those circumstances it is not strictly necessary to examine Question 7. (122)

154. The interpretation of Article 17(1) is clearly a matter of EU law. (123) It follows from the wording that the provision is an exception to the general rule in Article 3(1) that the Member State responsible for examining an application for international protection is to be determined by reference to the Chapter III criteria. The words 'each Member State may decide to examine an application for international protection …' indicate that the application of Article 17(1) is at the Member State's discretion. There is no mechanism within the Dublin III Regulation that compels a Member State to invoke that provision. Thus, the premiss behind the referring court's question that a delay between the attestation and the take charge request could result in a Member State being required to apply Article 17(1) is flawed. (124) There is likewise no legal basis in the Dublin III Regulation for ruling that a specific period of time is unreasonable.

155. In my opinion, a delay between the issue of a certificate registering an individual as an applicant for international protection and the submission of a take charge request cannot result in the requesting Member State being required to exercise its discretion

under Article 17(1) of the Dublin III Regulation. In the light of that response there is no need to answer Question 7.

Question 8

156. By Question 8, the referring court asks for guidance as to the information that needs to be contained in the take charge request in order for such a request to be effective. It wishes to know in particular whether it suffices to provide details of the date of entry into the requesting Member State and the date when the applicant lodged the formal application for international protection, or whether it is also necessary to include the date of the informal request for protection and the date that the attestation was issued.

157. Annex I to the Dublin Implementing Regulation sets out a standard form for determining the Member State responsible for examining an application for international protection which is to be completed when a take charge request is made. That form does not include details relating to the first informal request for asylum or the date of the attestation. Furthermore, there are no requirements of that nature in Article 21.

158. All of the eight questions posed by the referring court are linked. Taking that into account and given the views I have expressed, in particular in answer to Questions 1 to 5, it follows that I consider that there is no requirement for a take charge request to include details of the informal request for international protection and the date of the attestation.

159. I therefore conclude that, whilst a take charge request pursuant to Article 21(1) of the Dublin III Regulation should be made on a form such as that set out in Annex I to the Dublin Implementing Regulation, it is not necessary for Member States to include the date of the first informal request for international protection or the date when the certificate of registration as an applicant for international protection was issued.

Conclusion

160. In the light of all the above considerations I am of the opinion that the court should answer the questions raised by the Verwaltungsgericht Minden (Administrative Court, Minden, Germany) as follows:

(1) Article 27(1) of 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, read in the light of recital 19 of that regulation, should be interpreted as meaning that an applicant for international protection is entitled to bring an appeal or review against a transfer decision made as the result of a take charge request where the requesting Member State did not comply with the time limit laid down in Article 21(1) of that regulation when submitting such a request.

(2) In those circumstances, the question whether the requested Member State agrees to the take charge request is irrelevant. The position remains the same where the requested Member State becomes the Member State responsible for examining the application for international protection by virtue of Article 22(7) of Regulation No 604/2013.

(3) There is no need to answer Question 3.

(4) The period of three months referred to in the first subparagraph of Article 21(1) of Regulation No 604/2013 provides the general time limit within which take charge requests must be made. The shorter period of two months laid down in the second subparagraph of Article 21(1) applies in those cases where a comparison of fingerprints obtained pursuant to Article 9(1) of the Eurodac Regulation reveals a positive hit within the meaning of Articles 2(d) and 14(1) of that regulation. That period of two months is not in addition to the general time limit of three months and therefore cannot start after the period laid down in the first subparagraph of Article 21(1) of Regulation No 604/2013 has expired.

(5) An application for international protection is deemed to have been lodged within the meaning of Article 20(2) of Regulation No 604/2013 when a form or report reaches the competent authorities designated for the purposes of fulfilling a Member State's obligations under Article 35(1) of that regulation. In that respect: (i) a certificate of registration as an asylum seeker is not a form or report; (ii) the competent authority so designated is that which is responsible for receiving an application for international protection which is lodged in the Member State concerned; and (iii) the application is deemed to have reached the competent authority in accordance with the national rules which give effect to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

(6) A delay between the issue of a certificate registering an individual as an applicant for international protection and the submission of a take charge request cannot result in the requesting Member State being required to exercise its discretion under Article 17(1) of Regulation No 604/2013.

(7) There is no need to answer Question 7.

(8) Whilst a take charge request pursuant to Article 21(1) of Regulation No 604/2013 should be made on a form such as that set out in Annex I to Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, it is not necessary for the requesting Member State to include in that form the date of the first informal request for international protection or the date when the certificate of registration as an applicant for international protection was issued.

1 Original language: English.

2 – 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 (OJ 2013 L 180, p. 31; 'the Dublin III Regulation').

3 – See in particular Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation No 604/2013 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, p. 1; 'the Eurodac Regulation') and Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 222, p. 3), as amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 (OJ 2014 L 39, p. 1) ('the Dublin Implementing Regulation').

4 – OJ 2010 C 83, p. 389 ('the Charter').

5 – Signed at Geneva on 28 July 1951 and which entered into force on 22 April 1954 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)), as supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967.

6 – The corresponding rights to those contained in Article 47 of the Charter are set out in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

7 – The Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; 'the CISA'). The rules relating to determining responsibility for processing applications for asylum were contained in Articles 28 to 38. Those rules have been replaced by the Dublin system.

8 – OJ 1997 C 254, p. 1.

9 – Regulation of 18 February 2003 (OJ 2003 L 50, p. 1; 'the Dublin II Regulation' – that regulation was in turn replaced by the Dublin III Regulation). The criteria applied in order to determine the Member State responsible for examining an application for international protection are now laid down in Chapter III of the Dublin III Regulation ('the Chapter III criteria').

10 – Recital 5.

11 – Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 6; 'the Procedures Directive').

12 – Recital 12.

13 – Recital 19.

14 – Recital 32.

15 – Recital 39.

16 – Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9; 'the Qualification Directive').

17 – Judgment of 21 December 2011, C-411/10 and C-493/10, EU:C:2011:865.

18 – The information provided to applicants must include material concerning the possibility to challenge a transfer decision (Article 4(1)(d)).

19 – The personal interview may be omitted if the applicant concerned absconds or if he has already provided the information necessary to determine the Member State responsible (Article 5(2)).

20 – The requested Member State has one month from the date that a take back request is received to reach a decision. When such requests are based on data obtained from the Eurodac system, that time limit is reduced to two weeks (Article 25(1)). Failure to act within the periods mentioned in Article 25(1) is construed as acceptance to take back the person concerned (Article 25(2)).

21 – Article 1.

22 – Article 2(d). The system consists of a computerised central fingerprint database ('the Central System') (Article 3(1)).

23 – The data are listed in Article 11 of the Eurodac Regulation. They include the following: the sex of the applicant; the reference number used by the Member State of origin; the date on which fingerprints were taken; the date on which the data were transmitted to the Central System; and the operator user ID.

24 – Article 15.

25 – Recital 3.

26 – Article 1.

27 – Article 1.

28 – Article 1.

29 – Article 3(1).

30 – Article 4(1) and (2). The ‘determining authority’ is defined in Article 2(f) as meaning ‘any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases’.

31 – Where an applicant does not lodge the application, Member States may apply Article 28 which provides for the application of the procedure in the event of implicit withdrawal or abandonment of an application.

32 – Article 9(1).

33 – Directive of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 180, p. 96) (‘the Reception Directive’).

34 – See Article 1 of and Annex I to Council Regulation (EC) No 539/2001 of 15 March 2001, which lists the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1).

35 – Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1). That regulation has since been repealed and replaced by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (OJ 2016 L 77, p. 1), also entitled the Schengen Borders Code. At the material time when Mr Mengesteab crossed the EU external border into Italy (that is, on 12 September 2015) it was the earlier version of the Schengen Borders Code that was in force, as amended by Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 (OJ 2013 L 295 p. 1). I shall refer to that version of the Schengen Borders Code in this Opinion.

36 – Case C-490/16, judgment pending.

37 – Case C-646/16, judgment pending.

38 – European Parliament, Resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies, 2015/2660(RSP), paragraph 1.

39 – The operations in question are governed by Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2014 L 189, p. 93; ‘the Frontex Regulation’).

40 – De Vattel, E., *The Law of Nations* (1834), p. 170, cited by Moreno-Lax, V., 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea', 23(2) *International Journal of Refugee Law* (2011), pp. 174 to 220, at p. 194).

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41 – The 1974 International Convention for the Safety of Life at Sea (SOLAS), as amended, applies to all vessels, whether state-owned or commercial; see also Regulation 33(1), Ch. V, Annex to SOLAS Convention, and Paragraphs 2.1.10, 1.3.2, of the Annex to the 1979 International Convention on Maritime Search and Rescue (SAR), 1405 UNTS 109.

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42 – The term is not defined in the SOLAS or SAR Conventions, but in the International Maritime Organization (IMO) Guidelines on the Treatment of Persons Rescued at Sea, Resolution MSC.167(78), adopted on 20 May 2004. The EU legislature adopted a definition in nearly identical terms in Article 2(12) of the Frontex Regulation. A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.

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43 – See Moreno-Lax, V., cited in footnote 40 above, p. 175.

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44 – See Moreno-Lax, V., cited in footnote 40 above, p. 196. On agreements with third countries, see Butler, G., and Ratcovich M., '*Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea*', 85(3) Nordic Journal of International Law (2016), pp. 235 to 259, at p. 249.

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45 – See Commission Staff Working Document, Study on the international law instruments in relation to illegal immigration by sea, SEC (2007) 691.

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46 – IMO, Principles Relating To Administrative Procedures For Disembarking Persons Rescued At Sea (2009), FAL.3/Circ.194.

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47 – See Part II of the Annex to Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2010 L 111, p. 20). The proposed arrangement was that for joint operations under the auspices of Frontex, disembarkation should occur in the third country from which the ship carrying the persons departed and, if that were not possible, priority should be given to the Member State hosting the operation (at paragraph 2.1).

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48 – Judgment of 5 September 2012, *Parliament* v *Council*, C-355/10, EU:C:2012:516. The Court held that the Council was not empowered to adopt the contested measures alone.

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49 – Article 10(1)(c) of the Frontex Regulation.

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50 – European Parliament, 'Migrants in the Mediterranean: Protecting Human Rights', p. 43.

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51 – See Klein, N., 'A Maritime Security Framework for the Legal Dimensions of Irregular Migration by Sea', in Moreno-Lax, V., and Papastravridis, E., *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill/Nijhoff, Leiden/Boston: 2017), pp. 35 to 59, at p. 49.

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52 – For a detailed description of which States apply the Dublin III Regulation, see point 23 and footnote 32 of my Opinion in *A.S. and Jafari*, C-490/16 and C-676/16, EU:C:2017:443.

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53 – See, in particular, recitals 32 and 39 of the Dublin III Regulation.

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54 – Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 283 and the case-law cited.

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55 – Judgment of 18 July 2013, *Commission and Others* v *Kadi* (‘*Kadi II*’), C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 99 and 100, and see my Opinion in *Ghezelbash*, C-63/15, EU:C:2016:186, points 82 and 83.

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56 – See the Explanations relating to the Charter of Fundamental Rights in relation to Article 47 (OJ 2007 C 303, p. 2).

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57 – See point 130 et seq. below concerning Question 5.

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58 – See recital 5 of the Dublin III Regulation.

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59 – See the Explanatory Memorandum to Commission Proposal COM(2001) 447 final of 26 July 2001 for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2001 C 304E, p. 192).

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60 – See point 6above.

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61 – The CISA and the Dublin Convention pre-date the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1) solemnly proclaimed by the Commission, European Parliament and the Council which received approval by the Member States at the Nice European Council. The Dublin II Regulation was enacted before the Charter attained Treaty status in 2009.

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62 – See the Explanatory Memorandum to the Commission's proposal COM(2008) 820 final, p. 11, and recital 19 of the Dublin III Regulation.

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63 – Judgment of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, paragraph 59.

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64 – Judgment of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, paragraph 57.

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65 – See the Explanatory Memorandum to the Commission's proposal COM(2016) 270 final for a 'Dublin IV Regulation'.

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66 – I understand the concept of 'forum shopping' to refer to the abuse of asylum procedures in the form of multiple applications for asylum submitted by the same person in several Member States with the sole aim of extending his stay in the Member States, see (COM(2008) 820 final) dated 3 December 2008, p. 4. The term is also used in a wider sense to cover third-country nationals who wish to lodge their application for international protection in a particular Member State. I shall use the term in the first sense only in this Opinion particularly as a principal aim of the rules of the Dublin system is to prevent such multiple applications. Use of the expression 'forum shopping' has been criticised as being misleading and inappropriate, see '*The reform of the Dublin III Regulation*' (study for the LIBE Committee commissioned by the European Parliament's Policy department for citizens' rights and constitutional affairs), p. 21.

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67 – The Commission is proposing in the draft Dublin IV Regulation that that period should be reduced further to one month.

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68 – Those procedures are now set out in Article 34 of the Procedures Directive.

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69 – See point 3.3, p. 4, of the Explanatory Memorandum to COM(2001) 447 final.

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70 – The third subparagraph of Article 21(1). See also points 18 and 19 above concerning take back requests. In relation to the interpretation of Articles 23 and 24 of the Dublin III Regulation and the operation of time limits, see Case C-360/16 *Hasan*, pending.

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71 – See points 96 and 97 below.

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72 – The interpretation of Article 29 is at issue in Case C-201/16 *Shiri*, currently pending.

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73 – Judgment of 10 December 2013, C-394/12, EU:C:2013:813.

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74 – Article 10(1) of Dublin II was the equivalent of Article 13(1) of Dublin III.

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75 – At that time, the return of applicants for asylum to Greece had been suspended. That would therefore have allowed Ms Abdullahi to seek to have her application examined in Austria.

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76 – The Commission amended the text of the provisions concerning an applicant's right to seek an appeal or review of a transfer decision in its proposal COM(2008) 820 final, see in particular the proposed recital 17 and Article 26 entitled 'Remedies'. That text was then amended during the course of the co-decision procedure. The text relating to remedies in what are now recitals 9 and 19 and Article 27(1) was inserted by the legislature. The Council adopted its position at first reading based on a compromise that it reached with the European Parliament which provided, in particular, for strengthened legal safeguards and rights for applicants for international protection; see interinstitutional file 2008/243/COD.

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77 – See, in particular, Articles 4(1)(d), 5 and 26 of the Dublin III Regulation.

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78 – Recitals 9 and 19 of the Dublin III Regulation.

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79 – Judgment of 7 June 2016, C-63/15, EU:C:2016:409.

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80 – Judgment of 7 June 2016, C-155/15, EU:C:2016:410.

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81 – Paragraphs 38 and 39.

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82 – Paragraph 23.

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83 – Judgment of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraphs 44 to 46 and 51 to 53, and see point 62 above.

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84 – See, for example, COM(2001) 447 final, p. 3.

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85 – See, for example, point 74 above and recital 19 of the Dublin III Regulation.

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86 – See point 73 above.

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87 – Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 326 and 338.

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88 – Judgment of 18 July 2013, *Kadi II*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 117 and 118.

89 – See, by analogy, judgment of 28 July 2011, *Samba Diouf*, C-69/10, EU:C:2011:524, paragraph 61. In relation to the procedural safeguards and guarantees, see in particular Articles 4, 5 and 26 of the Dublin III Regulation.

90 – See point 72 above.

91 – See the comments of the United Nations High Commissioner for Refugees on the Commission's Proposal for Dublin IV (COM(2016) 270, p. 21); the Explanatory Memorandum to the Commission's proposal for Dublin II (COM(2001) 447 final); and the Commission's proposal for Dublin III (COM(2008) 820 final).

92 – The information given to applicants laid down in Article 4 and set out in Annex X to the Dublin Implementing Regulation contains the following passage: 'If we decide that another country is responsible for your application, we will seek to send you to that country as soon as possible so that your application can be considered there. The entire duration of the Dublin procedure, until you are transferred to that country *may, under normal circumstances, take up to 11 months*.' The emphasis is not mine: it reflects the text of Annex X to the Dublin Implementing Regulation. That is almost twice as long as the six months allowed for examination of the substantive application and it suggests to me that the phase of determining the Member State responsible can sometimes take far too long. The substantive assessment can be delicate and complex and might involve more than one step, as some national systems first assess whether the applicant should be granted refugee status and if that is unsuccessful then consider whether he should be given subsidiary protection: see, for example, judgment of 8 May 2014, *N.*, C-604/12, EU:C:2014:302, paragraph 55 et seq. It is unclear to me why the preliminary stage (determining the Member State responsible) should require more time than the substantive assessment.

93 – See further Articles 3(1) and 20(4) and (5) of the Dublin III Regulation.

94 – The Commission suggests in its proposal for a Dublin IV Regulation that responsibility should not revert to the requesting Member State in relation to take back requests. However, it does not make the same suggestion regarding take charge requests

(Mr Mengesteab's case). See page 16 of the Explanatory Memorandum relating to COM(2016) 270 final.

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95 – It is also important to note that the limited right of appeal or review which the Commission proposes would mean that the right to a remedy could rarely be pursued successfully. First, Greece is the only Member State to which asylum seekers are not returned. Before the decision was taken in 2011 not to transfer applicants to Greece, there were a number of cases before the European Court of Human Rights condemning the reception conditions in Greece and there was substantial material compiled by non-governmental organisations to that effect. It would be a significant challenge for any individual to make out a similar case without similar support in relation to other Member States. Second, the family criteria in Chapter III are rarely relied upon by individual applicants and Member States have proved reluctant to accept such claims when they are made (see page 10 of the Explanatory Memorandum relating to the proposal for COM(2016) 270 final).

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96 – See the Explanatory Memorandum relating to the proposal for COM(2016) 270 final. Essentially, the Commission is proposing the solution that it advanced before the Court unsuccessfully in *Ghezelbash* and *Karim*.

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97 – Whilst Article 41 of the Charter is expressed in terms of the EU institutions, the Court's case-law indicates that Member States are subject to the principles of good administration when they act within the scope of EU law; see judgments of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraph 82, and of 8 May 2014, *N.*, C-604/12, EU:C:2014:302, paragraphs 49 and 50. In relation to the right to be heard and the right to an effective remedy, see points 62 and 63 above.

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98 – Judgments of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, and *Karim*, C-155/15, EU:C:2016:410.

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99 – See also Article 4(1)(d) of the Dublin III Regulation which requires Member States to inform applicants of the possibility to challenge a transfer decision. See further Case C-647/16 *Hassan* (pending before the Court).

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100 – Judgment of 18 July 2013, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 115 to 117.

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101 – At the hearing Germany indicated that over the period between 2007 and 2011 the average number of applicants for international protection was 39 000 per year. In 2012 that figure increased two-fold to 78 000; in 2013 the figure was 127 000; for 2014, 202 000; in 2015, 477 000; and 746 000 in 2016. No figures were cited for the first quarter of 2017.

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102 – It is quite possible to read the national court's fourth question (see point 42 above) as seeking to ascertain whether the two-month period can be used as a kind of flexible extension to the normal three-month period if the Member State is slow in making a request to the Eurodac database. However, during the hearing the question was treated, in particular by both the United Kingdom and the Commission – as being whether the relevant period was [3 + 2] months, rather than only two months, where a Eurodac request was made. Neither counsel for Mr Mengesteab nor counsel for Germany contradicted that approach. I too shall therefore approach the question in that way.

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103 – See the Dublin Implementing Regulation, Annex II, point 7, first indent. Such information is relevant to the arguments in law and in fact set out in the take charge request as set out in Article 3(1) of Regulation No 1560/2003.

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104 – Article 22(3)(a)(i) of the Dublin III Regulation.

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105 – Recital 30 of the Dublin III Regulation. See also the Dublin Implementing Regulation, Annex X, part B, setting out the information sent to applicants pursuant to Article 4 of the Dublin III Regulation.

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106 – See Articles 23 to 25 of the Dublin III Regulation and points 18 and 19 above.

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107 – See also Article 14(1) of the Eurodac Regulation.

108 – The same deadlines are to be found in Article 14(2) of the Eurodac Regulation. The Commission currently has two infringement procedures in progress against Italy and Greece for failure to comply with their obligations under the Eurodac Regulation.

109 – See recital 30 of the Dublin III Regulation and point 24 above.

110 – Judgment of 6 June 2013, *MA and Others*, C-648/11, EU:C:2013:367, paragraph 50.

111 – Article 4 of the Qualification Directive governs the assessment of applications for international protection. Pursuant to Article 4(1), applicants may be required to submit as soon as possible all the elements needed to substantiate the application.

112 – See recital 12 of the Dublin III Regulation and point 30 above.

113 – See respectively Article 6(1) and (2) of the Procedures Directive.

114 – That period is extended to six working days if the application is made to national authorities which are not designated for that purpose under national law, such as the police (see the second subparagraph of Article 6(1)). There is no distinction in the Reception Directive between making an informal request for international protection and lodging a formal application. The word ‘lodge’ is used in both instances.

115 – Member States are entitled to require that the application be lodged in person and/or at a designated place (Article 6(3) of the Procedures Directive).

116 – The word ‘lodge’ is defined in the *Oxford English Dictionary* as ‘to present (a complaint, appeal, claim etc.) formally to the proper authorities’. The translation of

'lodged' in Article 1 of the Dublin III Regulation in French is 'introduite'. However, as the word 'lodge' is not used consistently in the texts that together comprise the Common European Asylum system, I shall not rely on a purely linguistic argument with a view to clarifying its interpretation (see footnote 114 above).

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117 – See points 32 and 34 above.

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118 – I should add for the sake of good order that not all time limits under the Dublin III Regulation hinge on the lodging of the application for international protection. Under Article 13(1), where an applicant irregularly crosses the border of a Member State having come from a third country, that Member State's responsibility for examining the application for international protection ends 12 months after the date of the irregular border crossing. Responsibility is not linked to the lodging of an application for international protection.

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119 – It appears from Article 20(2) of the Dublin III Regulation that the formal application for international protection must be made on a form which is lodged with the competent authorities, unless the application is made by means of a report which is sent to those authorities; see point 15 above.

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120 – See, respectively, Article 9 of the Procedures Directive and Article 6(1) of the Reception Directive.

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121 – See points 33 and 34 above.

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122 – See further the second subparagraph of Article 3(2) of the Dublin III Regulation which applies where it is impossible to transfer an applicant because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State.

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123 – Judgment of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, paragraph 54.

124 – It is unlikely that a Member State that simply fails to act after it has issued an attestation could be deemed thereby to have invoked Article 17(1) of the Dublin III Regulation, unless the Member State concerned has made the appropriate notifications in the 'DubliNet' electronic communication network established under the Dublin Implementing Regulation and in Eurodac; see the second and third subparagraphs of Article 17(1). I expressly do not delve further into the question of whether (and if so, at what stages) continued inaction in dealing with an application for international protection will fix the inactive Member State with responsibility to conduct the substantive assessment, and within what time frame.