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4.2.7 Use of the discretionary clause

Discretionary clauses are defined in Article 17 of the Dublin III Regulation. Article 17(1) is also commonly referred to as the sovereignty clause. Article 17(2) is the basis for voluntary relocations from Greece, Italy and Malta to other Member States, which are described under Sections 2.3.3 and 2.3.4.

Article 17(1) was invoked just over 4,700 times in 2020. The use of this discretionary clause declined sharply, by almost one-third compared to 2019. It was applied most frequently by the Netherlands and considerably more than it did in 2019. In contrast, many EU+ countries evoked the Article 17(1) clause less often than in 2019, including Belgium, France, Germany and Switzerland.

Greece and Italy continued to be identified as the main partner countries to which a request could have been sent, even though the number of such requests declined for both countries. Other identified partners included Germany, Hungary and Spain, but in a significant number of cases the potential partner was not reported.

The discretionary clause was used mostly for nationals of Syria and Turkey, followed at some distance by Afghan nationals. However, in almost two-fifths of the cases the citizenship could not be ascertained.

As has been seen in previous years, courts were called upon to decide on many individual cases related to the use of discretionary clauses and provisions of the Dublin III Regulation, Article 17(1). The Irish Court of Appeal underlined that Ireland cannot use Article 17(1) to re-assume responsibility after the UK became responsible under the Dublin III Regulation, Article 29(2) because the British authorities did not carry out a transfer in time upon Ireland's acceptance of responsibility for the applicant's case. In addition, the Supreme Court clarified that the Minister of Justice can exercise discretion under the Dublin III Regulation, Article 17, and this function was not transferred to the International Protection Office or the International Protection Tribunal with the amendments of the International Protection Act 2015, which moved some of the Minister's responsibilities to these two organisations.

The Federal Administrative Court in Switzerland found no reason to apply the discretionary clause to an applicant being transferred to Spain when he claimed that he would not receive adequate treatment for his mental health issues. Similarly, the Court of The Hague concluded that the Netherlands should not make use of this clause for the transfer of an applicant to Poland when the lack of free legal aid in itself cannot be considered to be contrary to the ECHR, Article3 and the

applicant did not prove that identifying as an LGBTI person entailed any problems during his two-day stay in Poland.

The UN Committee on the Rights of the Child examined the best interests of children and their right to be heard during the Dublin procedure. It found that the Swiss authorities violated both rights when they rejected to examine a family's application under the discretionary clause and tried to transfer them to Italy, without hearing the children and taking into account their traumatic experiences. The examination of a child's best interests in the Dublin procedure was also at the core of a case in front of the Dutch Council of State, which noted that authorities cannot ask another Member State to take over responsibility without examining the child's best interests.

The Court of Cassation in Italy delivered a judgment related to the cessation of responsibilities under the Dublin III Regulation, Article 19 and underlined that, when an applicant has left the EU for at least 3 months, the subsequent application lodged must be considered a new one, which starts a new procedure to determine the state which is responsible.





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