

Meijers Committee

standing committee of experts on international immigration, refugee and criminal law

CM1609

Note on the proposed reforms of the Dublin Regulation (COM (2016) 197), the Eurodac recast proposal (COM (2016) 272 final), and the proposal for an EU Asylum Agency (COM(2016)271 final)

Comments on the Dublin recast proposal

1. General observations

The Meijers Committee would like to take this opportunity to comment on the proposed reform of the Dublin Regulation, as set forth in the 6 April 2016 EC communication to the EP and Council (COM (2016) 197) and the 4 May 2016 proposal for a regulation of the EP and Council 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 (recast) (COM (2016) 270). The latter proposal will be further referred to here as Dublin III recast.

On page 4 of the 6 April 2016 communication, the Commission succinctly lists the shortcomings of the Dublin regulation: “difficulties in obtaining and agreeing on evidence proving a Member State’s responsibility for examining the asylum application, leading therefore to an increase in the number of rejections of requests to accept the transfer of applicants. Even where Member States accept transfer requests, only about a quarter of such cases result in effective transfers, and, after completion of a transfer, there are frequent cases of secondary movements back to the transferring Member State. The effectiveness of the system is further undermined by the current rules which provide for a shift of responsibility between Member States after a given time. [...] A further impediment to the effective functioning of the Dublin system results from the difficulty in transferring applicants to Member States with systemic flaws in critical aspects of their asylum procedure or reception conditions. The effective suspension of Dublin transfers to Greece since 2011 has proved a particularly critical weakness in the system. [...] The Common European Asylum System is also characterised by differing treatments of asylum seekers, including in terms of the length of asylum procedures or reception conditions across Member States, a situation which in turn encourages secondary movements.”

The Meijers Committee wishes to add that Dublin’s ineffectiveness not only results from the difficulty of effectuating transfers but also from a general failure to initiate Dublin procedures, because asylum seekers have not been registered upon entering the EU. It is well known, not only that asylum seekers may seek to avoid registration, but that some Member States also disregard their obligation to register asylum seekers – some even on a large scale. It has been estimated, for example, that only half the persons entering Italy and applying for asylum somewhere in the EU were registered in that country.¹ In 2014, the proportion of physical Dublin transfers to the number of applicants for international protection in the EU was about 4 %, which suggests that Dublin is applied in far fewer cases than all

¹ See Guild et al., ‘Enhancing the CEAS and alternatives to Dublin’, Study for the LIBE Committee, July 2015, [www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU\(2015\)519234_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf), p. 54, 55, with further references.

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those to which it is in fact applicable.²

To remedy these shortcomings, the Commission proposes two options: 1. Supplementing the present system with a corrective fairness mechanism, or 2. A new system for allocating asylum applications in the EU based on a distribution key. Because the second option would be difficult to envisage in the short or medium term, the Commission has chosen to pursue the first one.

The Meijers Committee would first of all like to point out that none of the shortcomings listed by the Commission will be remedied by the first option, since it is essentially a continuation of the present Dublin system, which is demonstrably a failure. Why continue with a broken system instead of fixing the shortcomings, even though this may not produce significant results in the short term? Additionally, the Meijers Committee points to the fact that the Dublin regulation was only very recently recast (19 July 2013), so this recast has been undertaken within 3 years of the entry into force of the last recast regulation, while that recast came 10 years after the entry into force of the Dublin II regulation.

The Meijers Committee points out that at present there are two infringement procedures ongoing with regard to the Dublin regulation (in respect of Italy and Hungary), as well as four infringement procedures regarding the closely related Eurodac regulation (in respect of Croatia, Greece, Italy and Cyprus). Additionally, the Commission has recently sent a second supplementary letter to Greece expressing concerns over the persistence of serious deficiencies in the Greek asylum system, as well as a 10 February 2016 recommendation.

The belief that the Dublin system allocates responsibility unsustainably is widely held and is mentioned on page 3 of the explanatory memorandum to the Dublin III recast proposal. It is no coincidence that the infringement procedures mentioned above concern Member States on the EU's external borders. These Member States have for a long time complained that they cannot process the large numbers of asylum seekers entering the EU through their territories. While the suggested corrective fairness mechanism can go some way to remedy this situation, it will not change the fact that it is these Member States who will bear the brunt of new arrivals. The corrective fairness mechanism will not be triggered until a Member State has received 150% of the maximum allocated number of applications deemed fair on the basis of that State's GDP and population size. This only partly corrects disproportionate burden sharing, without addressing the fundamental shortcomings of the Dublin system, namely that this system wrongly presupposes that the asylum procedures are adequate and up to standard in all Member States. On the contrary, Member States still continue to display systemic deficiencies, which make Dublin transfers impossible. As has been accepted by the ECtHR in several recent judgments, there are significant national differences in the quality of reception and asylum systems, which continue to exist and which encourage secondary movements.³ Additionally, the Commission must take stock of the fact that its similar attempt of September 2015 at such a mechanism has so far not been successful: of the 160,000 asylum-seekers who should have been relocated, only 1,500 (909 from Greece and 591 from Italy) have been relocated.

² European Asylum Support Office: Annual report on the situation of Asylum in the European Union 2014, July 2015, p. 34.

³ As was the case in the 21 January 2011 *M.S.S. v Belgium and Greece* ECHR judgment (number 30696/09), which concerned Dublin transfers to Greece, and the 4 November 2014 *Tarakhel v Switzerland* ECHR Judgment (number 29217/12), which concerned Dublin transfers to Italy.

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The proposals under Dublin III recast do very little to address this unsustainable burden sharing, focusing instead on the risk of abuse of the rules laid down in the Dublin III regulation by individual asylum seekers, including their absconding.

2. Detailed observations

2.1. Effective remedies

The Meijers Committee welcomes the proposal to extend the right to an effective remedy to situations in which no transfer decision is taken, and where the applicant wishes to be reunited with family present in another Member State (Art. 28(5)).⁴ However, the Meijers committee is concerned by the fact that the proposal seeks to curtail in other respects an individual asylum seeker's right to an effective remedy, which was only introduced in the most recent recast of 2013.

Last week the EU Court of Justice (CJEU) gave its ruling in two cases regarding the scope of the right of an effective remedy: *Ghezelbash* and *Karim*.⁵ In its 10 December 2013 judgment in *Shamso Abdullahi*,⁶ the CJEU held that the Dublin regulation addressed Member States, not individual asylum seekers, so that they could not challenge a decision allocating responsibility to a particular Member State. Dublin III recast introduced a right to an effective remedy under article 27 of the current regulation. Both the Dutch (in *Ghezelbash*) and the Swedish (in *Karim*) judicial authorities asked the CJEU prejudicial questions with regard to the scope of article 27 of the Dublin III regulation. In its 7 June 2016 rulings the CJEU has reversed its previous position in *Shamso Abdullahi* and has held that an individual asylum seeker has the right to challenge both the facts and the legal aspects of a decision taken on the basis of the Dublin III regulation. This includes the right to challenge whether the criteria allocating responsibility have been applied correctly by Member States.

Furthermore, both the *Ghezelbash* and *Karim* cases suggest that it is not so much the individual asylum seekers who seek to abuse the Dublin system but the Member States who choose to withhold information from each other when sending "take back" requests, with the apparent aim that the sending Member State can thereby avoid responsibility. For instance, in the *Ghezelbash* case the Dutch authorities chose not to share with the French authorities indirect evidence suggesting the applicant had left the EU territory for over 3 months. This example demonstrates the difficulties in obtaining and agreeing on evidence proving a Member State's responsibility for examining the asylum application, cited by the Commission as a key shortcoming in the Dublin system in its 6 April 2016 Communication.

In light of the above, the Meijers Committee is concerned by the proposal to transform take-back requests into take-back notifications, without addressing the identified problems of an evidentiary nature. Furthermore, the Meijers Committee is concerned that, less than 3 years after introducing a right to an effective remedy and given the rulings in the *Ghezelbash* and *Karim* cases, the proposed recast seeks to remove an individual applicant's right to challenge whether a Member State is indeed

⁴ The Meijers Committee called for this extension earlier, see http://www.commissie-meijers.nl/sites/all/files/cm1415_note_on_the_proposal_of_the_european_commission_of_26_june_2014_to_amend_the_dublin_iii_regulation_0.pdf.

⁵ C-63/15 and C-155/15.

⁶ C-394/12.

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responsible for processing his or her request. The Meijers Committee questions this curtailing of an individual applicant's rights, without addressing the fundamental shortcomings of the Dublin system, namely that Member States have an incentive to withhold relevant information from each other and to allow systemic deficiencies to persist in order to exclude the possibility of accepting Dublin transfers at all.

The Commission proposes that remedies should be brought within 7 days after the notification of a transfer decision instead of the current 'reasonable period'. This may be problematic in light of the *Diouf* judgment (Case C-69/10), where the CJEU held that a 15-day time limit in general seemed to be sufficient, but that the period prescribed must always be sufficient in practical terms to enable the applicant to prepare and bring an effective action.⁷ Therefore, the national judge should be competent to determine whether, in an individual situation, the time limit is sufficient in view of the specific circumstances.⁸

2.2. Obligations of the applicant

The Meijers Committee is alarmed by the harsh sanctions which the proposal imposes on applicants who fail to claim asylum in the first Member State of entry, in particular that their application must be processed in an accelerated procedure and that they are not entitled to reception conditions except emergency health care if they are present in another Member State (Art. 4 and 5). In view of the current reality that very substantial numbers of asylum applicants do not claim asylum upon arrival in the EU, this could lead to curtailment of procedural rights and asylum seekers being forced to live on the streets on a massive scale. Although the idea underlying this proposal apparently is that it will encourage asylum seekers to apply for asylum immediately, or to cooperate with their transfer, another reasonable outcome can be that asylum seekers will prefer an irregular presence in another Member State than the one responsible. This is not only questionable from a public order perspective, it also disregards the fact that asylum seekers are a vulnerable group and on that basis entitled to shelter and decent living conditions.⁹ Legally questionable, further, is that no exception is made for persons who have not applied for asylum in a Member State where there are systematic flaws in the asylum procedure and reception conditions.

2.3. Cessation of responsibility and deleting the discretionary and sovereignty clauses

Further attempts to improve Dublin's effectiveness are: 1) the proposal that expiry of deadlines for submitting a take-back request or effectuating a transfer, as well as leaving the territory of the EU for more than 3 months, will no longer result in a shift of responsibility to the Member State where the asylum seeker is (or was) present; 2) the abolition of the time limit of 12 months for the applicability of the illegal entry criterion; and 3) the deletion of the sovereignty clause (current Art. 3(2) and limiting the discretionary clause to situations relating to family reasons (Art. 19). The combined effect will be that they will remove any possibility for the asylum seeker to have his/her claim examined by another Member State than the one that is initially responsible. As noted above, the assumption is that this will

⁷ *Idem*, para. 66.

⁸ *Idem*, para. 68.

⁹ 21 January 2011 *M.S.S. v Belgium and Greece* ECHR judgement (number 30696/09).

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foster proper application of Dublin, but in practice it may well result in very substantial numbers of asylum seekers being “in orbit”, possibly without entitlement to reception conditions. This is a return to the situation of the Dublin Convention. One of the express goals for providing binding time limits was to avoid leaving asylum seekers uncertain about the outcome of their application for too long.¹⁰

Further, the Meijers Committee questions the narrowing of the discretionary clause, given that the Commission points out on page 10 of the explanatory memorandum that the clause is “infrequently used, with the exception of only a small number of Member States”. Given the fact that Member States are already using the discretionary clause sparingly, the Meijers Committee questions which legitimate aim a further narrowing might seek to achieve. It is Member States that are best placed to decide whether the facts of a case should lead to application of the discretionary clause. Limiting the right of Member States to do so is a cause for concern, given that there appears to be no genuine need for such an intervention.

2.4. Unaccompanied minors

The Meijers Committee regrets that the proposal lays down the rule in respect of unaccompanied minors who have no family members present in the Union, that the responsibly Member State is the one where they first lodged their application, provided this is in the best interests of the minor (Art. 10 (5)). This is contrary to the Commission’s proposal of June 2014 (COM(2014) 382 final). It is also contrary to the CJEU judgment in *MA* (C- 648/11), where it is reasoned that Article 24(2) of the Charter requires that the child’s best interests must be a primary consideration in decisions concerning the transfer of unaccompanied minors, and that it is in the interest of unaccompanied minors ‘not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status’. Therefore, an unaccompanied minor who lodges an asylum claim in a Member State and is present there should not, according to the Court, as a rule be transferred to the Member State where he/she first lodged an asylum claim.

2.5. First country of asylum and safe third country

It is proposed that, before consideration of the Member State responsible, the first Member State where the application is brought should be obliged to examine whether it can apply the exceptions of first country of asylum and safe third country. This presumably refers to the agreement concluded between the EU and Turkey, as it would permit returns to a third country before a possible transfer to another Member State. Notwithstanding the fact that the agreement between the EU and Turkey currently appears to be the subject of judicial review in Greece, in individual cases this proposal may violate the right to family life, if the asylum seeker is seeking to be reunited with family elsewhere in the EU.

The Meijers Committee further observes that a person claiming asylum may be in possession of a valid visa or residence document issued by a Member State. In such a situation, the person is not staying illegally in the EU and may not be returned to a third country. The proposal does not explain why, in

¹⁰ Evaluation of the Dublin Convention, SEC(2001)756.

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such situations, a check must first be made whether return to a third country is possible on the basis of the exceptions of first country of asylum and safe third country .

Comments on the Eurodac recast proposal

1. General observations

The Meijers Committee is worried about the proposal to extend further the original purpose of Eurodac, only one year after the new Regulation 604/2013 entered into force by which law enforcement authorities gained access to this database. This extension runs contrary to the principle of purpose limitation, protected under Article 8 of the Charter of Fundamental Rights, the Directive 95/46, and the new Data Protection Regulation. As has been underlined several times by the Court of Justice of the EU, the use of personal data must be in accordance with the principle of necessity and proportionality (*Schwarz v Bochum*, *DRI v Ireland*), implying that the purpose of databases must be well-defined and limited to specific goals.

These requirements are specifically important when they concern the collection and storage of fingerprints of a particular vulnerable group such as asylum seekers, including children from the age of six years, who have no choice other than to provide their data in order to be registered as an asylum seeker in the EU.

The Meijers Committee is not convinced by the reason submitted for this new extension of purpose: the control of illegal immigration or secondary movements within the EU by identifying illegally staying third-country nationals.

First, the Meijers Committee notes that secondary movement of persons seeking international protection in the EU, should not be treated in the same way as irregular migration. As both the ECtHR and the CJEU have already concluded in 2011, not every Member State can be considered 'a safe state' (*MSS v. Greece and Belgium*, resp. *NS v SSHD*). A refugee may have valid reasons for travelling from a country that does not provide any protection to a Member State where she/he is safe. For that reason the purposes for which data stored on these persons in Eurodac will be used remains unclear.

Second, for the purpose of controlling irregular migration, the EU legislator has already developed other databases: the Visa Information System and the Schengen Information System (which includes data on third-country nationals who have been issued an entry ban). Furthermore, there is the proposal for an Entry Exit System which specifically entails the goal of identifying over-stayers. The fact that those databases do not contain information on irregular border crossing does not justify the extended use of Eurodac: first, an assessment must be made as to whether, also with regard to the use of the future entry-exit system, the data stored on irregular migrants actually will result in the prevention of irregular migration. Information about an alleged irregular stay, or irregular border crossing, does not automatically result in the return of the person involved. Only when a Member State has issued a return decision, with a subsequent entry ban to a third-country national, is it possible actually to execute a return to his or her home country. Therefore, this purpose -- ensuring the return of irregular migrants -- is better served by storage of entry bans in the Schengen Information System on the basis

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of the Returns Directive, as these rules provide clearer rules and criteria on who is to leave the EU territory, for all parties, including the executing authorities.

2. Detailed observations

2.1 Possible abuse of the stored information

The registration of irregular migrants in Eurodac may result in a different use or measures taken by the Member States (including return, detention or criminalization of asylum seekers). Furthermore, the proposed Article 13 ('every third-country national or stateless person of at least six years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country', underlining CM) does not provide a clear-cut definition of this category of persons, which may also lead to different implementation.

The Meijers Committee is also very worried about the proposal to allow the sharing of information on asylum seekers with third countries for return purposes. The conditions under which this might be possible cannot prevent information on individuals fleeing from persecution in their homeland becoming available to the authorities of the persecuting state. Furthermore, it should be noted that in some third states the fact of irregular migration is itself considered a crime, which would put asylum seekers at risk of being persecuted and detained under harsh conditions, when returned with the provision of their Eurodac information.

Comments on the proposal for a Regulation on the EU Asylum Agency

1. General Observations

The proposal for an EU Asylum Agency reinforces the competences of the current European Asylum Support Office, but falls short of creating an independent asylum agency with a clear protection mandate or decision-making power. However, its powers are significantly strengthened, introducing inter alia the task of monitoring Member States' preparedness and reception capacities. The Agency would become a center of expertise in its own right, and Member States are under an obligation to provide the Agency with information. Importantly, the Agency will establish the reference key for the application of the corrective mechanism under the proposed recast of the Dublin Regulation.

The Meijers Committee assesses positively the reinforcement of the Agency's powers in order to achieve greater convergence in the application of the rules of the CEAS, but would like to stress that convergence in itself should not come at the expense of the CEAS' objective of achieving a high level of protection, in accordance with international and European law and principles.

The Committee applauds the strengthened role for the Agency in providing operational and technical assistance, allowing it to play an enhanced leading role during times of exceptional pressure in the Member States. In particular, the possibility for the Commission to instruct the Agency to take emergency measures in the absence of a request from a Member State (Article 22) should permit the Agency to provide timely and effective relief. It does remain a point of concern that the Agency cannot itself provide material support and is limited to providing advice and coordinating assistance.

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It should be stressed that the asylum procedure remains fully in the hands of the national asylum authorities. Article 16 only allows assistance of national authorities, and second national experts of the asylum support teams should not be allowed to take over the decision-making role of the national authorities. Care should be taken that this does not happen in practice, as it would raise serious questions of judicial accountability.

Likewise, the Agency's power to process personal data should be strictly limited to what is necessary for it to fulfill its mandate. In this respect, the Meijers Committee notes that Article 30 of the proposal specifically prohibits the onward transfer to third countries or third parties. However, Article 32 does permit the onward transmission to other Union agencies, as well as Member States' authorities. The Meijers Committee would like to point out that the European Data Protection Supervisor in his Opinion of 18 March 2016 has expressed his concern about the data protection provisions of the Proposal for a European Border and Coast Guard and in particular the onward transmission of personal data to third countries and international organizations.¹¹

Much in line with the proposal for a European Border and Coast Guard, the European Asylum Agency will play an important role as part of the migration management support teams, including at hot spots. The Meijers Committee would like to express its concern over the unclear legal situation at hotspots, as well as the fact that neither this proposal, nor the proposal for a European Border and Coast Guard, codifies the hotspot approach in legislation. In addition, it regrets the apparent primacy of border management concerns over protection needs, as evidenced by the more prominent role attributed to the European Border and Coast Guard in the deployment of Migration Management Teams (Article 17, COM(2015) 671 final). It should be made clear that within their respective fields of competence, the European Border and Coast Guard and the European Asylum Agency are of equal standing, which should also be reflected in the Agency's staffing and financial resources.

2. Detailed observations

2.1. Ensuring greater convergence in decision making

One of the goals to be achieved through the transformation of the current EASO into an EU Asylum Agency is to ensure greater convergence in the assessment of protection needs across the Union. The Meijers Committee fully agrees with the Council's observation that there are still significant disparities between the Member States in recognition rates and the nature and quality of the protection granted.¹² Decision-making on the basis of common Country of Origin Information (COI) increases the chances of greater convergence.

The Commission's proposal consolidates the current task of EASO in coordinating COI activities through the establishment of COI networks (article 9 of the proposed Regulation), and introduces two new competences. The first new competence entails coordination of efforts among Member States to engage and develop a common analysis providing guidance on the situation in specific countries of origin (article 10). After endorsement of that 'common analysis', Member States shall be required to

¹¹ EDPS Opinion 02/2016, p. 10.

¹² Council Conclusions on convergence in asylum decision practices, 21 April 2016, 8210/16.

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take this common analysis' into account when deciding on individual cases. The common analysis must be reviewed regularly, which requires prior consultation of the Commission. Article 10 further includes an obligation on Member States to submit targeted information on the decisions taken in relation to countries covered by the common analysis

The second new task is to assist the Commission in regularly reviewing the situation in third countries that are included in the common EU list of safe countries of origin (article 11). Member States shall also inform the Agency of the third countries designated as safe countries of origin and safe third countries (paragraph 3). The Commission may request the Agency to carry out a review of the situation in any such third country with a view to assessing whether the conditions and criteria in the APD are respected.

The Meijers Committee is pleased to note that its previous recommendation has been accepted to provide a more formalised role for expert institutions, such as EASO (or the future the EU Asylum Agency), in the procedure to designate a certain country as a safe country, in the form of an explicit and public advice thereto.¹³ Furthermore, in light of the objective to achieve greater convergence, the enhanced role of the Agency in providing it with greater (indirect) influence on the decision-making practice, seems a logical step forward. However, the Meijers Committee would like to stress that the common COI guidance must be of high quality and in conformity with applicable rules and regulations.

Article 8(2) of the proposed Regulation stipulates the requirements for common COI guidance. Inter alia , the Agency shall (a) make use of all relevant sources of information, including NGO information; (b) manage and further develop a portal; and (c) develop a common format and methodology, including Terms of Reference, in line with the requirements of Union Law on asylum.

Article 10(3)(b) of recast Asylum Procedures Directive 2013/32/EU states that 'precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human right organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining application and taking decisions.' This article has been based on various COI standards, such as guidelines drawn up by the EU, the International Association of Refugee Law Judges, UNHCR and ACCORD.¹⁴ Criteria common to all these guidelines are that COI must be relevant; reliable; balanced; correct and of recent date; transparent; and traceable.

The Meijers Committee would like to point out that in order that the Agency will be enabled to fulfill this role and for the Union to uphold a high-level protection system, this working method should be improved in to bring it into conformity with the aforementioned standards.¹⁵

In this light, the Meijers Committee would like to make the following recommendations on the basis of

¹³ See CM1515, Note on an EU list of safe countries of origin. Recommendations and amendments, 5 October 2015.

¹⁴ See www.ecoi.net/blog/coi-standards.

¹⁵ See for previous critics on the EASO COI reports and methodology: Asylum Research Consultancy & Dutch Council for Refugees, *Comments on the EASO-COI-report-methodology*, November 2012 at <http://www.ecoi.net/blog/wp-content/uploads/2013/03/DCR-ARC-Comments-on-the-EASO-COI-report-methodology-201211.pdf>; Amnesty International, *opinion on the EASO COI report 'Afghanistan: Taliban Strategies-Recruitment'*, July 2012, at http://www.amnesty.eu/content/assets/EASO_COI_Report_.pdf.

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existing COI guidelines and standards as well as Union law:

- to achieve full transparency, including with respect to the principle of equality of arms, regarding the use of sources, by providing full access to the Common COI Portal in accordance with Regulation (EG) 1049/2001;
- to show accountability not only formally by requesting input from other sources than Member States, such as civil society organizations academics and other experts, but also making visible what has been done with the acquired information, how it has been used, and why;
- to fully acknowledge the supervisory authority of UNHCR under article 35 of the 1951 Refugee Convention by providing UNHCR guidance on the Agency's common analysis. Being represented in the Management Board, UNHCR should also be given the right to vote, in particular when it involves the Board's endorsement role (article 10 of the proposed Regulation).

About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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