Reports of Cases

OPINION OF ADVOCATE GENERAL
YVES BOT
delivered on 13 June 2018 [1]

Case C-213/17

X
v
Staatssecretaris van Veiligheid en Justitie

(Request for a preliminary ruling from
the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, the Netherlands))

(Reference for a preliminary ruling — Area of freedom, security and justice — Borders, asylum and immigration — Regulation (EU) No 604/2013 — Determining the Member State responsible for examining an application for international protection made in one of the Member States by a third-country national — Member State responsible on the basis of the criterion set out in Article 3(2) — Judicial decision with the force of *res judicata* rejecting the first application for international protection — Pending appeal proceedings concerning the decision rejecting the second application for international protection — Issue of a European arrest warrant for the purposes of prosecuting the applicant — Lodging of a new application for international protection in another Member State — Surrender of the person concerned under the European arrest warrant — Take-back procedure — Article 23(3) — Effects of the expiry of the time limits for making a request — Transfer of responsibility to the Member State where the new application for international protection was lodged — Article 24(1) — Detailed rules of application — Article 24(5) — Scope of the obligation to provide information — Article 17(1) — Scope of the discretionary clause — Directive 2013/32/EU — Articles 31 and 46 — Charter of Fundamental Rights of the European Union — Article 41 — Right to good administration — Article 47 — Right to an effective judicial remedy)

I. Introduction

1. By this request for a preliminary ruling concerning the interpretation of Article 17(1), Article 18(2), Article 23(3) and Article 24 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, [2] the referring court — the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, the Netherlands) — seeks, in essence, to determine the Member State responsible for examining the application for international protection lodged by X, a Pakistani national, in Italy.

1 Original language: French.

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

2. The factual and legal background to the present case is complex,[3] not only because the person concerned has lodged multiple applications for international protection in two different Member States, but also because of the existence — in parallel with the procedure for examining those applications — of criminal proceedings leading to the issue of a European arrest warrant against the asylum applicant.

3. The Netherlands is the Member State where the person concerned lodged his first, second and fourth applications for international protection. Under the substantive criterion set out in the Dublin III Regulation, that Member State was responsible for examining the first two applications. The first application for international protection[4] was rejected by a judicial decision with the force of *res judicata*. The second application for international protection[5] was rejected by a decision of the competent national authority, against which an appeal was brought before the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State, the Netherlands). The person concerned having in the meantime fled from the Netherlands to Italy, the Member State where he lodged his third application for international protection,[6] the Kingdom of the Netherlands issued a European arrest warrant against him for the purposes of prosecution, calling on the Italian Republic to surrender him. The Kingdom of the Netherlands subsequently requested the Italian authorities to take back the person concerned for the purposes of examining the third application.

4. Italy is therefore the Member State to which the person concerned travelled and where, after the issue of the European arrest warrant by the Kingdom of the Netherlands, he lodged the third application. In consequence, the Italian Republic wears 'two hats'. On the one hand, it is the Member State of execution of the European arrest warrant, having had to surrender the applicant to the Netherlands authorities for the purposes of prosecution. On the other, it is the Member State that was requested by those authorities to take back the applicant for the purposes of examining his asylum application. Although the Italian Republic was entitled, under Article 23(1) of the Dublin III Regulation, to request the Kingdom of the Netherlands to take back X, it nevertheless lost that right by failing to make its request within the periods laid down in paragraph 2 of that article. Based on Article 23(3) of the Dublin III Regulation — which the Court is called upon to interpret here — the Netherlands authorities therefore considered the Italian Republic to be the new Member State responsible by default for examining the third application. Consequently, those authorities decided to transfer the person concerned to the Italian authorities and also declared themselves not competent to examine the fourth application for international protection lodged with them.

5. It is in the light of the particular circumstances surrounding that legal and factual background that the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) asks whether, as the Netherlands authorities envisage, such a transfer of responsibility is possible. To that end, the referring court questions the Court of Justice as to the scope and detailed rules of application not only of the two procedural provisions of the Dublin III Regulation on which the Kingdom of the Netherlands relies in order to carry out that transfer, namely Articles 23 and 24 thereof, but also of the discretionary clause set out in Article 17(1) of that regulation.

6. The present case provides a good illustration of the structural weaknesses and shortcomings of the Dublin system which the European Commission rightly seeks to address by reforming the existing framework.[7]

3 See the legal and factual background appended to this Opinion.

4 'The first application'.

5 'The second application'.

6 'The third application'.

7 See the Proposal for a Regulation of the European Parliament and of the 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 (COM(2016) 270 final) ('the Proposal for a Regulation').

7. This case demonstrates that the Dublin system is in fact a system of national asylum systems rather than a common European asylum system and that the mechanism for the allocation of responsibilities established by the Dublin III Regulation is based on technical and administrative rules drawn up without regard to their attendant human consequences and material and financial costs, thus undermining the effectiveness of the Dublin system and contravening the aims of the Common European Asylum System.

8. This is harsh criticism, but it is, to my mind, commensurate with the almost absurd consequences likely to result from blindly applying the mechanism for transferring responsibility established by Article 23(3) of the Dublin III Regulation.

9. Therefore, the present case will primarily lead me to explain below the reasons why I consider it necessary to derogate, despite its clear wording, from Article 23(3) of the Dublin III Regulation, the application of which entails a transfer of responsibility triggered by the expiry of the periods prescribed for making a take back request.

10. In so far as that transfer takes place automatically, irrespective of its human and material toll, I consider that, in a situation such as that at issue, it deprives the procedure for determining the Member State responsible of the rationality, objectivity, fairness and expeditiousness pursued by the EU legislature within the framework of the Dublin III Regulation and is an impediment to the discharge of the duties of cooperation and solidarity that must underpin the Common European Asylum System.

II. Legal framework

A. The Dublin III Regulation

11. Recitals 4, 5 and 22 of the Dublin III Regulation state:

‘(4) The Tampere conclusions … stated that the [Common European Asylum System] should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(5) Such a method 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.

…

(22) ... Solidarity, which is a pivotal element in the [Common European Asylum System], goes hand in hand with mutual trust. ...’

12. In accordance with Article 1 thereof, the aim of the Dublin III Regulation is to lay down 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.[8] Those criteria are set out in Chapter III of that regulation, in Articles 8 to 15.

8 ‘The Member State responsible’.

13. Pursuant to Article 3(2) of the Dublin III Regulation, where no Member State responsible can be designated on the basis of the criteria listed in that regulation, the first Member State in which the application for international protection was lodged is to be responsible for examining it.

14. Chapter IV of the Dublin III Regulation identifies, first of all, the situations in which a Member State may be deemed responsible for examining an asylum application by way of derogation from those criteria. Article 17 of that regulation, entitled 'Discretionary clauses', thus provides in paragraph 1 thereof:

'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 this Regulation.

…'

15. Chapter V of the Dublin III Regulation goes on to set out the obligations of the Member State responsible.

16. In that chapter, Article 18(1)(b) provides that the Member State responsible is to be obliged to 'take back, under the conditions laid down in Articles 23, 24, 25 and 29 [of that regulation], an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document'.

17. In addition, Article 18(1)(d) of the Dublin III Regulation provides that the Member State responsible is to be obliged to 'take back, under the conditions laid down in Articles 23, 24, 25 and 29 [of that regulation], a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document'.

18. The Member State responsible is also, under the first subparagraph of Article 18(2) of that regulation, to examine or complete the examination of the application for international protection made by the applicant.

19. Lastly, Chapter VI of the Dublin III Regulation lays down the detailed rules applying to procedures for taking charge and taking back. The scope of the take-back procedure is defined in Articles 23 and 24 of that regulation.

20. Article 23, entitled 'Submitting a take back request when a new application has been lodged in the requesting Member State', provides, in paragraphs 1 to 3 thereof:

'1. Where a Member State with which a person as referred to in Article 18(1)(b), (c) or (d) has lodged a new application for international protection considers that another Member State is responsible in accordance with Article 20(5) and Article 18(1)(b), (c) or (d), it may request that other Member State to take back that person.

2. A take back request shall be made as quickly as possible and in any event within two months of receiving the Eurodac hit ….

If the take back request is based on evidence other than data obtained from the Eurodac system, it shall be sent to the requested Member State within three months of the date on which the application for international protection was lodged within the meaning of Article 20(2).

3. Where the take back request is not made within the periods laid down in paragraph 2, responsibility for examining the application for international protection shall lie with the Member State in which the new application was lodged.'

21. Article 24 of the Dublin III Regulation, entitled 'Submitting a take back request when no new application has been lodged in the requesting Member State', provides:

'1. Where a Member State on whose territory a person as referred to in Article 18(1)(b), (c) or (d) is staying without a residence document and with which no new application for international protection has been lodged considers that another Member State is responsible in accordance with Article 20(5) and Article 18(1)(b), (c) or (d), it may request that other Member State to take back that person.

…

4. Where a person as referred to in Article 18(1)(d) of this Regulation whose application for international protection has been rejected by a final decision in one Member State is on the territory of another Member State without a residence document, the latter Member State may either request the former Member State to take back the person concerned or carry out a return procedure ....

…

5. The request for the person referred to in Article 18(1)(b), (c) or (d) to be taken back shall be made using a standard form and shall include proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the person's statements, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

…'

B. Regulation (EC) No 1560/2003

22. Regulation No 1560/2003[9] lays down the detailed rules for the application of the Dublin III Regulation. Article 2 thereof defines the procedure for the preparation of requests for taking back.

III. Facts in the main proceedings

23. X is a Christian Pakistani national seeking international protection.

24. He lodged five applications for international protection between 2011 and 2015. Four were made in the Netherlands and one was lodged in Italy.

25. The first application was lodged in the Netherlands on 23 March 2011. The Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, the Netherlands) rejected that application as to the substance by decision of 5 September 2011. As X's representative stated at the hearing, the risks to which the person concerned would be exposed upon returning to his country of origin were not considered to be sufficiently serious to justify granting international protection. The

9 Commission Regulation of 2 September 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 (OJ 2014 L 39, p. 1) ('the Implementing Regulation').

appeal brought against that decision was declared unfounded by judgment of 31 May 2012 delivered by the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam), which was confirmed by the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) on 27 June 2013.

26. On 18 December 2013 X lodged a new application for international protection in the Netherlands, which he withdrew shortly thereafter, on 10 January 2014.[10]

27. X lodged another (the second) application for international protection in the Netherlands on 4 June 2014. It was rejected by the State Secretary for Security and Justice seven days later, on 11 June 2014. The appeal brought against that decision before the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) was declared unfounded by judgment of 7 July 2014, which was confirmed by the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) one year later, on 7 August 2015.

28. In the course of the year during which the appeal proceedings brought before that court were pending, a number of events took place relating to the personal and legal situation of the person concerned.

29. On 28 September 2014, while X was under suspicion of having committed a sexual offence in the Netherlands, he absconded and travelled to Italy.

30. On 2 October 2014 the Netherlands authorities issued a European arrest warrant for the purposes of prosecuting X, calling on the Italian authorities to surrender him. It was against that background that X was detained in Italy for two months prior to his surrender.[11]

31. On 23 October 2014 X lodged a new (the third) application for international protection, this time in Italy. The Italian Republic failed to send the Kingdom of the Netherlands a take back request under Article 18(1)(d) and Article 23(1) of the Dublin III Regulation within the periods laid down in Article 23(2) of that regulation.

32. On 30 January 2015 the Italian Republic executed the European arrest warrant and surrendered the person concerned to the Netherlands authorities.

33. He was immediately detained and remanded in custody pending trial. According to the order for reference, that detention period ran from 2 to 24 February 2015. By contrast, according to the observations submitted by the Netherlands Government, it ran from 30 January to 18 March 2015.

34. On 5 March 2015 the Kingdom of the Netherlands requested the Italian Republic to take back X, based on Article 18(1)(b) and Article 24(1) and (2) of the Dublin III Regulation, since he was on the territory of the Netherlands without a residence document and had not yet lodged a new application for international protection. The Netherlands authorities took the view that the Italian Republic had become the Member State responsible for examining the application for international protection lodged by X with the Italian authorities, in so far as Italy had not sent the Netherlands authorities a take back request within the two-month period laid down in Article 23(2) of that regulation. As is apparent from the order for reference, the Kingdom of the Netherlands stated in its request that, according to statements made by X, he had left Italy in January 2015 and had travelled directly to the Netherlands. However, the request contains no information concerning the criminal proceedings against X in the Netherlands.

10 I will not take that application into account in my analysis.

11 Information provided by the parties at the hearing.

35. The Italian Republic did not reply to that request within the two-week period laid down in Article 25(2) of the Dublin III Regulation. On 20 March 2015, the Kingdom of the Netherlands therefore came to the conclusion that the Italian Republic had agreed to the request to take back X by default.

36. On 25 March 2015 the State Secretary for Security and Justice thus decided to transfer X to the Italian authorities ('the transfer decision'), following their implicit acceptance.

37. On 30 March 2015, the Italian Republic agreed to the take back request.

38. On 1 April 2015 X brought an appeal before the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) against that decision and also applied for interim relief.

39. It is apparent from the documents appended to the national file before the Court that, by letter of 13 April 2015, the Ministerie van Veiligheid en Justitie (Ministry of Security and Justice, the Netherlands) informed the Ministero dell'Interno (Ministry of the Interior, Italy) that, by failing to reply to the take back request by 20 March 2015, the Italian Republic was deemed to have agreed to the request to take back the person concerned. The Ministry of Security and Justice also pointed out that it was not possible to transfer X to the Italian authorities within the prescribed period due to the fact that he had disappeared.

40. By decision of 21 April 2015, the voorzieningenrechter (judge hearing applications for interim relief, the Netherlands) of the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) granted the request for interim measures and ordered that the transfer be stayed.

41. On 19 May 2015 X lodged a new (the fourth) application for international protection in the Netherlands, together with an application for a temporary residence permit.

42. Two days later, on 21 May 2015, the State Secretary for Security and Justice stated that he would not examine that application because it had been established, on the basis of the Dublin III Regulation, that the Italian Republic was at that time the Member State responsible for examining X's application for international protection. On the same day, X brought an appeal against that decision before the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam).

43. As I have indicated above, on 7 August 2015 the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) confirmed the judgment delivered on 7 July 2014 concerning the rejection of the second application for international protection.

44. On 30 November 2015 X was informed that the criminal proceedings against him had been discontinued.

45. The appeals brought by X against the transfer decision and the decision whereby the State Secretary for Security and Justice declared that he was not competent to examine the fourth application for international protection were considered at a hearing on 10 December 2015. The Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) declared the case closed at the end of that hearing.

46. On 24 March 2016 the referring court reopened the examination of that case pending delivery of the judgment of 7 June 2016, *Ghezelbash*,[12] and, on 20 April 2017, submitted the reference for a preliminary ruling now before the Court.

IV. Questions referred

47. In those circumstance, the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 23(3) of [the Dublin III Regulation] be interpreted as meaning that Italy has become responsible for examining the application for international protection lodged by the applicant in that country on 23 October 2014, despite the fact that the Netherlands were the Member State primarily responsible on the basis of the applications for international protection, within the meaning of Article 2[, introductory sentence and (d),] of [that regulation], previously lodged in that country, the last of which was still under examination in the Netherlands at that time, because the Afdeling bestuursrechtspraak van de Raad van State [(Administrative Law Division of the Council of State)] had not yet delivered judgment in the appeal brought by the applicant against the ruling of [the referring court] of 7 July 2014 …?

(2) [If the answer to Question 1 is in the affirmative,] [d]oes it follow from Article 18(2) of [the Dublin III Regulation] that [examination of] the application for international protection which was still [ongoing] in the Netherlands when the [take back] request of 5 March 2015 was submitted should have been suspended by the Netherlands authorities immediately after that [take back] request had been submitted and should have been halted following the expiry of the period specified in Article 24 [of that regulation] through revocation or amendment of the earlier decision of 11 June 2014 rejecting the asylum application of 4 June 2014?

(3) If the answer to Question 2 is in the affirmative, has the responsibility for examining the applicant's application for international protection not been transferred to Italy but remained with the Netherlands authorities, because the defendant has not revoked or amended the decision of 11 June 2014?

(4) Did the Netherlands authorities, by not mentioning the appeal in the second asylum procedure pending before the Afdeling bestuursrechtspraak van de Raad van State [(Administrative Law Division of the Council of State)] in the Netherlands, fall short of the responsibility resting on them pursuant to Article 24(5) of [the Dublin III Regulation] to supply the Italian authorities with such information as would enable those authorities to check whether Italy [was] the Member State responsible on the basis of the criteria laid down in that regulation?

(5) If the answer to Question 4 is in the affirmative, does that shortcoming lead to the conclusion that the responsibility for examining the applicant's application for international protection has thereby not been transferred to Italy, but has remained with the Netherlands authorities?

(6) If the responsibility has not remained with the Netherlands, ought the Netherlands authorities then, with regard to the surrender of the applicant by Italy to the Netherlands in the context of the criminal proceedings against him, pursuant to Article 17(1) of [the Dublin III Regulation], in derogation from Article 3(1) [thereof], to have examined the application for international protection lodged by the applicant in Italy, and, by extension, ought those authorities, in all reasonableness, not to have made use of the power laid down in Article 24(1) of [the Dublin III Regulation] to request the Italian authorities to take back the applicant?'

12 C-63/15, EU:C:2016:409.

48. The German, Hungarian and Netherlands Governments and the Commission submitted observations.[13] Regrettably, the Italian Government failed to participate, having lodged no written observations and having also failed to attend the hearing.

V. Preliminary observations

49. Before analysing the above questions, it is necessary to make some preliminary remarks concerning the subject matter and scope of this reference for a preliminary ruling.[14]

50. The request for a preliminary ruling submitted by the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) seeks, in essence, to determine the Member State responsible for examining the application for international protection lodged by X in Italy.

51. In the light of the particular circumstances surrounding the legal and factual background to the case in the main proceedings, the referring court asks whether it may be considered that the Italian Republic has in fact become the Member State responsible for examining that application.

52. First of all, the referring court therefore raises the question of the scope and detailed rules of application of the two procedural provisions of the Dublin III Regulation on which the Kingdom of the Netherlands relies for the purposes of transferring responsibility:

– Article 23(3) of that regulation, the application of which entails a full transfer of responsibility triggered by the expiry of the periods prescribed for making a take back request (Question 1), and

– Article 24(1) of that regulation, the application of which also entails a transfer of responsibility following the explicit or implicit acceptance by the requested Member State of a take back request (Questions 1 to 6).

53. If the Court were to find that there was indeed a full transfer of responsibility on the basis of Article 23(3) of the Dublin III Regulation, the questions regarding the interpretation of Article 24 of that regulation would be raised only in the alternative.

54. Second, the referring court asks the Court of Justice to clarify the scope of the discretionary clause laid down in Article 17(1) of that regulation in the event that the Italian Republic is the Member State responsible for examining the application for international protection at issue (Question 6).

55. The referring court is uncertain whether the Netherlands authorities were required to apply that clause and thus to examine the application, in so far as the Italian Republic had executed the European arrest warrant and surrendered the person concerned to those authorities for the purposes of prosecuting him.

13 I take note of the fact that, at the hearing, the Commission stated that it was withdrawing its observations regarding the possibility of an applicant for international protection relying, in the context of judicial proceedings, on the provisions establishing, first, the periods laid down in the Dublin III Regulation and, second, the principle of cooperation between the services of the Member States.

14 In the light of the considerations set out, in particular, in paragraphs 3.2 and 3.3 of the order for reference and the content of the sixth question referred, I have opted to focus the first question on the interpretation of Article 23(3) of the Dublin III Regulation and then deal separately with the question relating to the interpretation of Article 24 of that regulation.

VI. My analysis

A. Transfer of responsibility flowing from Article 23 of the Dublin III Regulation (Question 1)

56. By its first question, the referring court asks the Court of Justice to interpret Article 23(3) of the Dublin III Regulation.

57. In particular, it asks whether that provision, read in the light of the objectives pursued by the EU legislature within the framework of the Dublin III Regulation,[15] precludes a transfer of responsibility resulting from the expiry of the periods laid down in Article 23(2) thereof where the Member State responsible for the purpose of Article 18(1)(d) of that regulation has examined the applications previously lodged by the person concerned and where the decision rejecting the second application is the subject of appeal proceedings which are still pending before the courts of that Member State.

58. In accordance with Article 3(1) of the Dublin III Regulation, an application for international protection lodged by a third-country national in the territory of any one of the Member States is, in principle, to be examined by the single Member State which the criteria set out in Chapter III indicate as being responsible.[16] However, in addition to the criteria set out in Chapter III of the Dublin III Regulation, Chapter VI of that regulation establishes procedures for taking charge and taking back by another Member State which 'also contribute, *in the same way as the criteria set out in Chapter III of the regulation*, to determining the Member State responsible'.[17]

59. Article 23 of the Dublin III Regulation thus sets out the rules applicable to the making of a take back request in a situation where a new application for international protection has been lodged in another Member State, namely the requesting Member State.

60. Under Article 23(1) of that regulation, where a person referred to in Article 18(1)(d) thereof, whose application for international protection has been rejected in one Member State, has lodged a new application for international protection in another Member State, the latter may request the former to take back the person concerned.

61. A person such as X who, after lodging two ultimately unsuccessful applications for international protection in one Member State, in this instance the Netherlands, on 23 March 2011 and 4 June 2014, then moves to another Member State, in this case Italy, where he lodges a new application on 23 October 2014, clearly falls within the scope of Article 23 of the Dublin III Regulation.

62. Following a number of questions raised and clarifications requested by the Court at the hearing, all the parties agreed that X does indeed fall within the situation referred to in Article 18(1)(d) of that regulation.

15 Although that point is not expressly apparent from the wording of the first question referred, it is clear from the considerations set out in paragraph 3.2 of the order for reference.

16 See judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 56).

17 See, to that effect, judgment of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805, paragraph 39, emphasis added). In its judgment of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587), the Court held that 'while the provisions of Article 21(1) of that regulation [(submitting a take charge request)] are intended to provide a framework for the take charge procedure, they also contribute, in the same way as the criteria set out in Chapter III of that regulation, to determining the responsible Member State, within the meaning of that regulation' (paragraph 53).

63. In Article 23(2) of the Dublin III Regulation, the EU legislature lays down mandatory time limits for making a take back request. Such a request must be made as quickly as possible and in any event within two months of receiving the Eurodac hit or within three months if the competent authorities base their request on evidence other than data obtained from the Eurodac system. Those time limits must ensure that the take-back procedure will be implemented without undue delay and, in any event, within a 'reasonable period' starting from the point at which the Member State has the necessary information, so as to guarantee the rapid processing of applications for international protection. [18]

64. In Article 23(3) of the Dublin III Regulation — which the Court is called upon to interpret in this case — the EU legislature defines the effects of the expiry of the prescribed periods. Under that provision, if the request is not made within those periods, responsibility for examining the application for international protection is to lie with the Member State in which the application was lodged. The EU legislature does not provide for any exceptions or grant any leeway.

65. The wording of that provision is very clear in all the language versions and unequivocally reflects the EU legislature's intention to transfer responsibility where the periods prescribed for making a request are not observed.

66. In the case in the main proceedings, it is not in dispute that the Italian Republic, where the third application was lodged, failed to request the Kingdom of the Netherlands to take back X within the binding periods laid down in Article 23(2) of the Dublin III Regulation. Under Article 23(3) of that regulation, the responsibility for examining that new application should therefore be transferred to the Italian Republic in 'full'. [19]

67. All the parties that have submitted observations, with the exception of X, agree that, in view of the wording of Article 23(3) of the Dublin III Regulation, the Italian Republic has in fact become the Member State responsible for examining that application, irrespective of the existence in the Netherlands of pending appeal proceedings against the decision rejecting the second application.

68. I would be inclined to concur with that conclusion if the situation at issue was indeed characterised by the mere existence in the Netherlands of those pending appeal proceedings. As we will see, however, that is not the case. There are many other circumstances which I think, when taken together, result in the Netherlands authorities having sole responsibility for examining the third application.

69. When applied to a situation as unusual as the one at issue, a literal interpretation raises more problems than it solves, which is quite obvious from the six questions referred to the Court of Justice by the referring court for a preliminary ruling. In the light of the particular circumstances of the present case, the consequence of such an interpretation is that the wording of Article 23(3) of the Dublin III Regulation produces effects which are clearly at odds with the principles underpinning the Common European Asylum System and the objectives pursued by the EU legislature within the framework of that regulation.

70. In order to preserve the effectiveness of the Dublin III Regulation, and for the reasons which I will set out below, I therefore propose that the Court make an exception to the automatic nature of the mechanism provided for in Article 23(3) of that regulation.

18 See judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35, paragraphs 62 and 63 and the case-law cited).

19 See judgment of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587). In paragraph 61 of that judgment, the Court held that '[the third subparagraph of] Article 21(1) of [the Dublin III Regulation] provides, in the case of the expiry of the periods laid down in the two preceding subparagraphs, for a full transfer of responsibility to the Member State in which the application for international protection was lodged, without making that transfer subject to any reaction by the requested Member State'.

71. In accordance with Article 67(2) and Article 80 TFEU, the Common European Asylum System, of which the Dublin III Regulation forms part, is based on solidarity between Member States and the fair sharing of responsibility between them.[20] As can be seen from recital 22 of that regulation, that solidarity is a 'pivotal element' in that system. It must, moreover, be 'genuine and practical' and be shown towards the Member States most affected by flows of asylum applicants which place disproportionate pressure on their systems.[21]

72. That system is also based on mutual trust between Member States, which is even one of its founding pillars.

73. It is precisely on account of the principle of mutual trust that the EU legislature adopted the Dublin III Regulation, in order to expedite the processing of applications for international protection by ensuring that applicants will have the merits of their applications examined by a single, clearly determined Member State. To that end, that legislature seeks to streamline the processing of such applications by avoiding blockages in the system as a result of the Member States being obliged to examine multiple applications by the same applicant, by increasing legal certainty with regard to determining the Member State responsible for processing the asylum application and, lastly, by avoiding forum shopping.[22]

74. As is apparent from recitals 4 and 5 of the Dublin III Regulation, the EU legislature seeks to establish a 'clear and workable' method for determining the Member State responsible for examining an application for international protection, which must be based on 'objective, fair criteria both for the Member States and for the persons concerned'. That method must, above all, 'make it possible to determine rapidly the Member State responsible, so as … not to compromise the objective of the rapid processing of applications for international protection'.

75. Although the EU legislature is primarily focussed on the criteria for determining the Member State responsible set out in Chapter III of the Dublin III Regulation, the fact remains that the procedures for taking charge and taking back by another Member State laid down in Chapter VI thereof must be based on criteria displaying the same attributes, not only because those procedures contribute, in the same way as the abovementioned criteria, to determining the Member State responsible,[23] but also because they play the same role in achieving the objectives of that regulation.

76. Thus, in its judgment of 26 July 2017, *Mengesteab*,[24] the Court held, as regards the transfer of responsibility arising from the expiry of the periods prescribed for making a take charge request (third subparagraph of Article 21(1) of the Dublin III Regulation), that that mechanism makes a decisive contribution to achieving the objective of rapidly processing applications for international protection by ensuring, in the event of a delay in the conduct of the take charge procedure, that the examination of the application is carried out in the Member State in which that application was lodged, so as not to further delay that examination by the adoption and implementation of a transfer decision.[25]

20 Article 67(2) TFEU provides that the European Union is to frame a common policy on asylum based on solidarity between Member States. Article 80 TFEU states that the European Union's asylum policy is to be governed by the principle of solidarity and fair sharing of responsibility between the Member States.

21 See the conclusions of the 'Justice and Home Affairs' Council of the European Union of 8 March 2012 on a common framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows, adopted at its 3151st meeting.

22 See, to that effect, judgment of 10 December 2013, *Abdullahi* (C-394/12, EU:C:2013:813, paragraph 53 and the case-law cited).

23 See point 58 of this Opinion.

24 C-670/16, EU:C:2017:587.

25 *Ibidem* (paragraph 54). See also, by analogy, judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35), in which the Court repeats that case-law in the context of interpreting Article 24(2) of the Dublin III Regulation.

77. That analysis is, in principle, capable of being applied here, since the mechanism established by Article 23(3) of the Dublin III Regulation is identical. However, as I will demonstrate below, in the first place, the circumstances of the present case are such that the transfer of responsibility at issue, far from contributing to the expeditiousness of the procedure, would deprive it of the rationality, objectivity and fairness pursued by the EU legislature within the framework of that regulation.

78. First, the transfer of responsibility required under Article 23(3) of the Dublin III Regulation is tantamount to determining the Member State responsible for examining the application by means of a penalty. As soon as a Member State fails to observe the periods laid down in that provision, the transfer of responsibility is automatic and takes place irrespective of the circumstances of the individual case and the associated human and material consequences. As I have mentioned above, the EU legislature has not provided for any exceptions and does not grant the competent authorities any leeway.

79. Thus, in the present case, it is clear from the material in the file that the transfer of responsibility required under Article 23(3) of the Dublin III Regulation is more akin to penalising the Italian Republic for its failure to comply with a formal requirement, namely the procedural rule laid down in Article 23(2) of that regulation,[26] than responding to a genuine 'legal necessity', the application for international protection lodged in Italy, as deserving of criticism as it may be, being nothing more than a contrivance.[27]

80. Second, the automatic nature of that mechanism does not enable account to be taken of the fact that the transfer of responsibility envisaged here concerns the examination of an application for international protection which is, if not identical, at least related to the previous two applications lodged by X in the Netherlands. Those applications have the same aim (the grant of international protection), the same basis (the possible existence of a risk of persecution on religious grounds) and were lodged by the same person (X).[28]

81. Third, the automatic nature of the mechanism also does not enable account to be taken of the fact that the Kingdom of the Netherlands fully acknowledged that it was competent to examine the two previous applications lodged by the person concerned on the basis of a substantive criterion: the criterion of the first Member State in which the application for international protection was lodged, as laid down in Article 3(2) of the Dublin III Regulation.

82. As evidenced by the duration of the procedure for examining the first application and the numerous documents appended to the national file before the Court, the first two applications for international protection were given careful consideration by the administrative and judicial authorities of the Netherlands and resulted in the adoption of two definitive rejections.

26 It is common ground that the Italian Republic failed to submit a take back request to the Kingdom of the Netherlands within the periods laid down in Article 23(2) of the Dublin III Regulation, with the result that the latter considered the former to have become the Member State responsible. It is also undisputed that the Italian Republic failed to reply within two weeks — that is to say within the period prescribed in Article 25(2) of that regulation — to the take back request sent to it by the Kingdom of the Netherlands, with the result that it was considered to have implicitly accepted that request.

27 X now challenges his transfer to that Member State. As confirmed by his representative at the hearing, X filed an application for international protection in Italy in order to obtain means of subsistence. In my view, it cannot be ruled out that the purpose of that application was to impede the execution of the European arrest warrant.

28 Although the applications were staggered over time, I do not think that the application for international protection lodged in Italy is based on new findings or elements compared with the first two applications examined in the Netherlands. First, the brevity of the examination carried out by the Netherlands authorities in relation to the second application demonstrates that there were no new elements capable of overturning the rejection of the first application. At the hearing, X's representative confirmed that the second application contained a statement of reasons solely because of a change of policy in the Netherlands. Second, it is difficult to imagine how the findings and elements underpinning the third application lodged on 23 October 2014 could have substantially changed since 7 July 2014, the date on which the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) ruled on the rejection of the second application.

83. Thus, when X lodged his third application in Italy, the decision of 5 September 2011 rejecting the first application had become final and the judgment of the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) had acquired the force of *res judicata*. The decision of 11 June 2014 rejecting the second application had also become final, since the appeal pending before that court did not have suspensive effect. [29]

84. Accordingly, if the aim pursued by the EU legislature is indeed to streamline and expedite the processing of asylum applications by objectively determining the Member State responsible, I think it is quite obvious, in view of the role played by the Netherlands authorities in the examination of the asylum applications of the person concerned, that those authorities remain the best placed to examine the third application. Unlike the situation in the case giving rise to the judgment of 26 July 2017, *Mengesteab*, [30] the transfer of responsibility at issue, over and above the human and financial costs it entails, will not help expedite the procedure or contribute to good administration in general. Since the prevailing framework is still one of national asylum systems, the Italian authorities will be required to conduct an examination which is as rigorous as that carried out in parallel by the Netherlands authorities in order to (i) establish the facts and assess the evidential value of the documents supplied by the person concerned, with all the complications that entails in the context of asylum applications, and (ii) assess the application for international protection of a person who, to date, they have never seen and with whom they have never spoken. If the applicant is vulnerable and destitute, does such a transfer of responsibility, in so far as it involves a new examination procedure, genuinely respect his rights?

85. Furthermore, transferring responsibility for examining the third application to the Italian authorities entails the risk that those authorities might adopt a different decision to the decisions taken by their Netherlands counterparts when examining the first two applications, even though those applications, as a whole, are related, if not identical. Although it increases the chances of the asylum applicant securing a positive decision, such a situation undermines the coherence and unity pursued by the European asylum system, which is meant to be a common system, and creates an increased risk of asylum shopping which the Dublin system is designed to prevent. In the same vein, it paves the way for each new Member State with competence to examine a new application for international protection to play the role of 'court of appeal' of the Member State previously responsible.

86. Fourth, the automatic nature of that mechanism does not enable account to be taken of ongoing judicial proceedings in the Netherlands, namely the administrative proceedings pending before the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) and the criminal proceedings initiated following the alleged commission of an offence.

87. While the transfer of responsibility is subject to binding and strict time limits, the same cannot be said of the ongoing judicial proceedings.

88. It is true that the administrative proceedings concerning the examination of the second application are closed. However, the judicial proceedings initiated in the context of the appeal may result in the administrative decision being varied, since the court of first instance is in a position to conduct a full and *ex nunc* examination of both facts and points of law [31] and the court of last instance is in a position to uphold a ground of appeal. There is, therefore, a risk that the court first seised in the requesting Member State might vary the decision initially rejecting the application for international protection, thereby rendering any transfer of responsibility meaningless and entirely irrelevant.

29 As the Court held in its judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35), 'where the bringing of [an] appeal [before the competent court] has no suspensive effect, [the] decision [rejecting an application for international protection made during a first stay on the territory of the Member State concerned] must be considered to have effect, as provided for in [the Dublin III Regulation], and thus to entail the closure of the administrative procedure instigated following the lodging of the application for international protection' (paragraph 50).

30 C-670/16, EU:C:2017:587.

31 See Article 46(3) of 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. 60).

89. In any event, this is similar to a European situation of *lis pendens* and, in the light of the related, if not identical, nature of the applications for international protection lodged by X in the Netherlands and Italy, it seems to me that, in those circumstances, no court of any other Member State could validly have jurisdiction concurrently.

90. Turning now to the criminal proceedings against the asylum applicant, it is extremely difficult to predict, except in the most straightforward and obvious cases, what will happen to the case and to the person concerned, so that the automatic nature of the transfer of responsibility, which will also, eventually, entail the transfer of the person concerned, seems to me to be similarly inappropriate here. Although the criminal proceedings in the present case were ultimately discontinued, they may, in other circumstances, result in the case being brought before an examining magistrate or a trial bench and, as the case may be, in the applicant being convicted.

91. The primacy of the criminal proceedings cannot therefore have the effect of stalling the examination of the newly-lodged application for international protection.

92. How, then, can those proceedings be disregarded in the context of a supposedly rational and objective assessment? Similarly, how can the European arrest warrant calling on the Italian authorities to surrender the person concerned be disregarded in the context of the case in the main proceedings?

93. Although, as will be seen below, the issue of a European arrest warrant by a Member State vis-à-vis an asylum applicant does not in itself act as a bar to a take-back procedure, that circumstance — because of its presence here alongside so many others — clearly interferes with the normal course of procedures under the Dublin III Regulation.

94. X lodged his application for international protection in Italy on 23 October 2014, just a few days after the issue of the European arrest warrant against him. The lodging of that application did not preclude the execution of the European arrest warrant.[32] As X's representative explained at the hearing, the Italian authorities accordingly arrested the person concerned at the beginning of December 2014, a few weeks after the lodging of his asylum application, before placing him in detention for a period of approximately two months with a view to his surrender to the Netherlands authorities, which took place on 30 January 2015. Although the Italian authorities have been criticised for failing to request the Kingdom of the Netherlands to take back X, it must nevertheless be pointed out that, at the same time, the Italian authorities executed the European arrest warrant by surrendering the person concerned.

95. In circumstances such as those of the present case, does it make sense to transfer responsibility for examining the application for international protection to Italy when, almost simultaneously, that Member State has surrendered the person concerned to the Netherlands authorities for the purposes of prosecution?[33]

96. The Dublin III Regulation contains no provisions enabling that issue to be resolved. Such resolution is only possible by reference to respect for human dignity and the pursuit of the objectives which the EU legislature seeks to achieve in the context of the establishment of a Common European Asylum System.

97. I mention human dignity because this case, if it did not concern an asylum applicant, might be mistaken for a game of ping-pong.

32 The grounds for non-execution of a European arrest warrant listed in Articles 3 and 4 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) do not include the existence of an application for asylum or an application for the grant of refugee status or subsidiary protection (see judgment of 21 October 2010, *B.* (C-306/09, EU:C:2010:626, paragraph 43)).

33 When the Kingdom of the Netherlands sent the Italian Republic a take back request, that prosecution had not yet been discontinued.

98. In the light of those preliminary considerations, and given the plethora and confusion of administrative and judicial proceedings regarding the person concerned in the Netherlands, I consider that the objectivity which must characterise the procedure for determining the Member State responsible for examining an application for international protection and the expeditiousness which must be ensured in the context of that examination require that the best placed authorities should be the ones to examine the new application lodged by X, namely the Netherlands authorities — whose supreme administrative bodies have already recognised that they are fully competent on the basis of a substantive criterion laid down in the Dublin III Regulation —, and not the authorities which failed to fulfil their obligations by not making a take back request on time. [34]

99. In the second place, the automatic nature of the transfer of responsibility is difficult to reconcile with the principles of sincere cooperation and solidarity between Member States underpinning the Common European Asylum System and the Dublin III Regulation.

100. In 2014, the competent authorities of the Member States could not have been unaware of the fact that the mass influx of migrants to the Italian coast was putting increased pressure on Italy's asylum authorities, which resulted in structural delays and, in particular, slowed down its reaction times and lengthened its response times to take charge/take back requests. By automatically transferring that responsibility on account of a failure to observe the prescribed periods, we are, quite frankly, a long way from the 'genuine and practical' solidarity hoped for. [35]

101. In the light of all of the foregoing, I consider that it is therefore necessary to derogate from the strict application of the wording of Article 23(3) of the Dublin III Regulation and from the transfer of responsibility flowing therefrom as regards the examination of the third application at issue in order to preserve the effectiveness of that regulation.

102. In a case such as this, I propose applying the principle of mutual recognition of judicial decisions as a means of preserving the effectiveness of the Dublin III Regulation and, in particular, streamlining the processing of applications for international protection.

103. As we know, that principle is the cornerstone of the area of freedom, security and justice, [36] which encompasses asylum policy. [37]

104. That principle applies in the context of the procedures laid down in Articles 23 and 24 of the Dublin III Regulation when a Member State decides to submit a take back request in respect of an applicant for international protection who has already been refused asylum by a final decision of another Member State.

34 It might also be asked whether such a failure ought to be viewed from a different angle, particularly by the Commission, which obviously takes account of the migratory pressure on the Italian authorities and the specific schemes in place, such as relocation. In response to the crisis in Italy, the Council had adopted two decisions on relocation which were applied until September 2017, namely Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ 2015 L 239, p. 146), and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80).

35 Moreover, Member States should not be able to exploit delays by Member States under strong migratory pressure in order to find that responsibility should be transferred.

36 See point 3.1. of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An open and secure Europe: making it happen (COM(2014) 154 final), entitled 'Consolidation of the Common European Asylum System (CEAS)', [the third paragraph of] which states: 'New rules on the mutual recognition of asylum decisions across Member States and a framework for transfer of protection should be developed in line with the Treaty objective of creating a uniform status valid throughout the EU. This would reduce obstacles to movement within the EU and facilitate the transfer of protection-related benefits across internal borders' (p. 7). See also the report of the European Parliament of 9 January 2015 entitled 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection', which reproduces that quotation (p. 58).

37 The principle of mutual recognition of judicial decisions also applies to expulsion. See, in that regard, Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJ 2001 L 149, p. 34), and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

105. Under Article 23(1) of that regulation, where a person referred to in Article 18(1)(d) thereof, whose application for international protection has been rejected by a final decision in one Member State, has lodged a new application for international protection in another Member State, the latter may accordingly request the former to take back the person concerned.

106. In accordance with Article 24(4) of the Dublin III Regulation, where a person referred to in Article 18(1)(d) thereof, whose application for international protection has been rejected by a final decision in one Member State, is on the territory of another Member State without a residence document, the latter may either request the former to take back the person concerned or carry out a return procedure in accordance with Directive 2008/115.

107. At present, the Member States therefore agree to recognise asylum decisions issued by other Member States where they are negative.

108. In the present case, when X lodged the third application with the Italian authorities on 23 October 2014, the Netherlands authorities had already issued a decision with the force of *res judicata*, dated 27 June 2013, rejecting the first application. The Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) had also, by judgment of 7 July 2014, dismissed the appeal brought by the person concerned against the decision rejecting the second application.

109. The recognition by the Netherlands authorities that they were competent to decide on the applications for international protection lodged by the person concerned on the basis of a substantive criterion, and the adoption by those authorities of a decision that has become final following the ruling of the supreme administrative court in respect of the first application must curtail the examination of any new application for international protection lodged by that person in another Member State which is not based on new elements or findings. Due to the application of the principle of mutual recognition, that Member State must take account of the force of *res judicata* attaching to the judgments handed down and that must therefore render, *ipso facto*, any new application inadmissible pursuant to Article 33(2)(d) of Directive 2013/32.

110. I recall that, in accordance with that provision, a Member State may consider an application for international protection to be inadmissible if the application concerned is a subsequent application where no new elements or findings have arisen or have been presented by the applicant. As I have already pointed out, I consider this to be the situation in the case at issue in the main proceedings. However, it is for the competent authorities to satisfy themselves on that point.

111. The exchanges of information established within the framework of the Dublin III Regulation mean that such a mechanism is perfectly feasible, since the Member State that has been requested to take back an applicant is in possession of, in accordance with the requirements set out in Article 24(5) of that regulation — or is able to obtain, upon request, under Article 34 thereof —, all the relevant information concerning the existence of a procedure relating to a previous application for international protection (date and place of lodging of a previous application for international protection, stage reached in the procedure, content and date of the decision taken).[38]

38 The situations in which a Member State may refuse to provide such information are limited and exhaustively listed in Article 34(3) of the Dublin III Regulation (protection of its essential interests or the protection of the liberties and fundamental rights of the person concerned or of others).

112. The application of the principle of mutual recognition would, in this case, enable the Common European Asylum System to operate in a more streamlined, efficient and consistent manner since, once a Member State's responsibility for examining an application for international protection has been established, that responsibility would be maintained permanently, thus ensuring that the procedure is swift, forestalling conflicting decisions and restricting the applicant's secondary movements on account of a transfer of responsibility.

113. That solution would, in fact, simply pre-empt the Commission's proposals for the reform of the Dublin system.[39] In its Proposal for a Regulation amending the Dublin III Regulation, the Commission suggests introducing a rule that once a Member State has examined an application for international protection as the Member State responsible, it should also remain responsible for examining subsequent applications lodged by the person concerned, irrespective of whether he has left or was removed from the territories of the Member States.[40] A single Member State would be and would remain responsible for examining an application, and the criteria of responsibility would therefore be applied only once. The Commission also proposes introducing a rule that the expiry of time limits would no longer result in a transfer of responsibility.

114. If those proposals were adopted, the request for a preliminary ruling submitted by the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam) would become irrelevant.

115. In the light of all of the foregoing, and taking into account the specific circumstances of the case in the main proceedings, I consider that Article 23(3) of the Dublin III Regulation and the transfer of responsibility flowing therefrom as regards the examination of the application for international protection lodged by the person concerned in Italy should be disapplied, in so far as that provision and transfer of responsibility deprive the procedure for determining the Member State responsible of the rationality, objectivity, fairness and expeditiousness pursued within the framework of that regulation and are incompatible with the principles of sincere cooperation and solidarity between Member States underpinning the Common European Asylum System.

B. Lawfulness of the take back request sent to Italy by the Netherlands authorities on the basis of Article 24 of the Dublin III Regulation (Questions 1 and 6)

116. The referring court next enquires as to the lawfulness of the take back request submitted by the Netherlands authorities to their Italian counterparts on the basis of Article 24 of the Dublin III Regulation (submitting a take back request when no new application has been lodged in the requesting Member State).

117. X's situation in this instance comes under Article 18(1)(b) of the Dublin III Regulation. That provision refers to a person who, first, has lodged an application for international protection which is under examination and, second, has either made an application in another Member State or is staying on the territory of another Member State without a residence document.

118. A person such as X who, after having submitted an application for international protection in one Member State, namely Italy in this case, returns illegally to the territory of another Member State, namely the Netherlands, without lodging a new application for international protection there, falls within the scope of Article 24 of the Dublin III Regulation.

39 See footnote 7 of this Opinion.

40 See recital 25, Article 3(5) and Article 20 of the Proposal for a Regulation.

119. A take-back procedure based on Article 24(1) of that regulation is to be initiated at the discretion of the Member States, as is apparent from the EU legislature's use of the words 'may request' in that provision, and is intended to arrange a transfer of responsibility for examining an application for international protection.

120. The question submitted by the referring court therefore arises in the event of the Court considering that the transfer of responsibility resulting from the application of Article 23(3) of the Dublin III Regulation should be disapplied.

121. In particular, that court asks the Court of Justice to clarify the detailed rules for the application of Article 24(1) of that regulation.

122. The referring court thus questions whether that provision precludes the submission of a take back request where the requesting Member State (i) was responsible for examining the applications for international protection lodged previously by the person concerned, (ii) has appeal proceedings pending before it concerning the decision rejecting one of those applications, and (iii) has issued a European arrest warrant for the purposes of prosecuting the person concerned, calling on the requested Member State to surrender that person.

123. None of those circumstances, viewed in isolation, precludes, per se, the submission of a take back request. I will examine each of them in turn.

1. The requesting Member State was responsible for examining an application for international protection lodged previously by the person concerned

124. It follows from the case-law of the Court that Article 24(1) of the Dublin III Regulation does not preclude the submission of a take back request where the requesting Member State was responsible for examining an application for international protection lodged previously by the person concerned.

125. In a recent judgment, delivered after the end of the written part of the procedure in the case forming the subject matter of this Opinion, the Court held that the procedure laid down in Article 24 of the Dublin III Regulation may be applied to a person who has, 'in the course of a first stay on the territory of the [requesting] Member State, already made an application for international protection, *which was rejected* within the framework laid down in Article 26(1) of the Dublin III Regulation'.[41] According to the Court, as that application was no longer under examination in that Member State, the person concerned could not be equated to a person who has lodged a new application for international protection.[42] It must be found that that interpretation of Article 24(1) of the Dublin III Regulation covers a situation such as that at issue where the requesting Member State has received and examined a previous application for international protection lodged by the person concerned and has rejected it.

41 See judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35, paragraph 48, emphasis added).

42 See judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35, paragraph 49).

2. The requesting Member State has appeal proceedings pending before it

126. The Court has also held that the fact that the decision rejecting an application for international protection made during a first stay on the territory of the requesting Member State has been the subject of an appeal that is pending before one of its courts does not render Article 24 of the Dublin III Regulation inapplicable, 'as, where the bringing of that appeal has no suspensive effect, that decision must be considered to have effect, as provided for in that regulation, and thus to entail the closure of the administrative procedure instigated following the lodging of the application for international protection'. [43]

127. That interpretation of Article 24 of that regulation thus applies a fortiori in a situation such as that at issue, since the appeal brought against the rejection of 11 June 2014 had no suspensive effect.

3. The requesting Member State has issued a European arrest warrant

128. At this juncture, it is necessary to examine whether Article 24(1) of the Dublin III Regulation precludes the submission of a take back request where the requesting Member State has issued a European arrest warrant against the asylum applicant, calling on the requested Member State to surrender him.

129. The Court has not ruled on that issue and the Dublin III Regulation makes no provision for such a situation.

130. A priori, the fact that a Member State has issued a European arrest warrant against an asylum applicant does not appear to be a bar to the submission by that Member State of a take back request in respect of that applicant.

131. The administrative procedure for the examination of an application for international protection and criminal proceedings against an asylum applicant are two separate procedures and there is, prima facie, no reason why the Member State that issued the European arrest warrant, after exercising its sovereign right to prosecute a person who has committed an offence on its territory, should not turn to the Member State it considers to be responsible for examining the application for international protection of the person concerned.

132. However, it is foolish to think that the issue of a European arrest warrant will not interfere with the procedure for the taking back of the asylum applicant by another Member State.

133. The take-back procedure referred to in Article 24 of the Dublin III Regulation is subject to strict time limits which, to my mind, are difficult to reconcile with the nature of criminal proceedings (in the case of a European arrest warrant issued for the purposes of prosecution) or with the duration of a custodial sentence (in the case of a European arrest warrant issued for the purposes of enforcing such a sentence).

134. First, under Article 24(2) of that regulation, the request to take back a person referred to in Article 18(1)(b) thereof must be made as quickly as possible and in any event within two months of receiving the Eurodac hit or within three months if the request is based on other evidence. Those time limits are mandatory.

43 See judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35, paragraph 50).

135. Second, under Article 29(1) and (2) of the Dublin III Regulation, if that request is accepted, the transfer of the person concerned must be carried out as soon as possible and in any event within six months of such acceptance.[44] That time limit may be extended up to a maximum of one year due to imprisonment of the person concerned. If the transfer does not take place within the one-year time limit, the Member State responsible is to be relieved of its obligation to take back the person concerned.

136. Therefore, if a Member State issues a European arrest warrant against an applicant for international protection, it may, after the person concerned has been surrendered, request the Member State which it considers to be responsible for examining the application to take back the person concerned, provided that the request is submitted within the periods laid down in Article 24(2) of the Dublin III Regulation and that, in the event the requested Member State accepts, the transfer is carried out in accordance with the deadlines referred to in Article 29(1) and (2) of that regulation.

137. If the European arrest warrant is issued for the purposes of prosecution, it is somewhat difficult to gauge to what extent it will be possible to comply with those conditions, except in cases where, as in the present case, the criminal proceedings are swiftly discontinued.

138. If the European arrest warrant is issued for the purposes of enforcing a custodial sentence, it is, however, quite clear that the submission of a take back request will make sense only if the sentence imposed is short.

139. In the light of those considerations, I therefore take the view that the issue of a European arrest warrant is not in itself a bar to the submission of a take back request if the periods laid down in Article 24(2) and Article 29(1) and (2) of the Dublin III Regulation are observed.

140. To my mind, that assessment is equally valid in a situation such as that at issue in which the Member State of execution of the European arrest warrant, which surrenders the person concerned to the authorities of the issuing Member State, is also the Member State requested by the latter to take back that person.

141. Accordingly, as a result of that analysis, it seems to me that none of the circumstances mentioned by the referring court, viewed in isolation, precludes, per se, the submission of a take back request.

142. By contrast, taken as a whole, they represent, in my view, a major obstacle to a take-back procedure.

143. For the same reasons as those set out in points 71 to 98 of this Opinion, where the competent authorities of the requesting Member State (i) were responsible for examining the applications for international protection lodged by the applicant during a first stay on the territory of that Member State, (ii) have appeal proceedings pending before them concerning the decision rejecting one of those applications, and (iii) have issued a European arrest warrant against the applicant, calling on the Member State to which a take back request has been sent and on whose territory the applicant is located to surrender that person, I consider that a take-back procedure initiated on the basis of Article 24(1) of the Dublin III Regulation deprives the procedure for determining the Member State responsible of the rationality, objectivity, fairness and expeditiousness pursued within the framework of that regulation and is incompatible with the principles of sincere cooperation and solidarity between Member States underpinning the Common European Asylum System.

44 Or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3) of that regulation.

C. Scope of the obligations of the Member State responsible under Article 18(2) of the Dublin III Regulation (Questions 2 and 3)

144. By its second and third questions, the referring court asks the Court of Justice to clarify the obligations of the requesting Member State in relation to the examination of an application for international protection for which it is responsible where that Member State submits, in accordance with Article 24 of the Dublin III Regulation, a take back request in respect of the applicant.

145. In particular, the referring court questions whether, once the take back request has been submitted, the requesting Member State is required, under Article 18(2) of the Dublin III Regulation, to suspend the ongoing examination of that application and halt it by revoking or amending the decision whereby the competent national authority rejected the application upon expiry of the period laid down in Article 24 of that regulation.

146. If so, the referring court asks whether a failure to comply with that obligation may preclude the taking back of the applicant by the requested Member State.

147. We know that, in accordance with the Court's case-law on the interpretation of Article 24(1) of the Dublin III Regulation, a Member State may indeed initiate a take-back procedure in respect of an asylum applicant even if there is an appeal pending before its courts in the context of the examination of an application for international protection for which it is still responsible. [45]

148. The referring court is thus unsure as to the nature of the obligations of the requesting Member State in relation to the ongoing processing of that application.

149. The consideration of this question raises an initial difficulty concerning the period alluded to by the referring court. Since the order for reference does not shed any light on the matter, I assume that it is the two-month period laid down in the first subparagraph of Article 24(2) of the Dublin III Regulation, [46] as the Kingdom of the Netherlands had, in this case, submitted its take back request on the basis of a hit after consulting the Eurodac system.

150. However, I do not consider that period to be relevant here. The referring court is asking the Court of Justice about the obligations of the requesting Member State '*immediately after* that [take back] request had been submitted'. [47] The period referred to in the first subparagraph of Article 24(2) of the Dublin III Regulation is the maximum period within which that request must be made.

151. The consideration of this question raises a second difficulty. The obligations of the requesting Member State in relation to the examination of an application for international protection for which it is responsible must not be examined in the light of the specific provisions laid down in Article 18(2) of the Dublin III Regulation, but in the light of the general provisions established in Directive 2013/32.

152. The Dublin III Regulation does not lay down specific provisions where the Member State responsible for examining an application for international protection has, in parallel, made a take back request in respect of an asylum applicant on the basis of Article 24(1) thereof.

45 See judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35, paragraph 50).

46 Under that provision, the request to take back a person referred to in Article 18(1)(b) of that regulation, whose application for international protection has not been rejected by a final decision, must be made as quickly as possible and in any event within two months of receipt of the Eurodac hit.

47 See Question 2 (emphasis added).

153. For its part, Article 18 of the Dublin III Regulation does not apply due to its limited scope. Although the aim of that provision, as its heading suggests, is to lay down the 'obligations of the Member State responsible', the obligations it establishes fall within the specific framework of take charge and take back procedures, as is clear from the wording of paragraph 1 of that provision. The obligations of the Netherlands authorities in relation to the examination of the second application do not fall within the framework of a take charge or take back procedure.

154. In order to provide the referring court with a useful answer, I therefore propose that the Court should examine the question submitted in the light of the principles and fundamental guarantees provided for in Directive 2013/32.

155. The obligations of the requesting Member State in relation to the examination of the application for international protection for which it is responsible are, to my mind, obvious. [48]

156. It is required, first, to conduct an adequate and complete examination of the application and to conclude it as soon as possible, in accordance with the right to good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union [49] and pursuant to Article 31 of Directive 2013/32. [50]

157. In appeal proceedings, the requesting Member State is required, second, to ensure compliance with the right to an effective judicial remedy, as enshrined in Article 47 of the Charter and pursuant to Article 46 of Directive 2013/32, which means that the court, at least in appeal proceedings before a court of first instance, must conduct a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs. [51]

158. The procedure for examining the asylum application must therefore run its course.

159. The submission of a take back request is not one of the grounds which may justify the suspension of the examination procedure. [52] This makes sense because two separate procedures are involved, one based on an application for international protection lodged previously in the requesting Member State and the other on an application for international protection lodged subsequently with the authorities of the requested Member State.

160. Nor is the submission of a take back request a ground which may justify the amendment or revocation of the individual decision forming the subject matter of the appeal proceedings at issue. Although it is true that the decision rejecting the application for international protection does not create a right for the person concerned because it is a decision rejecting the asylum application, the fact remains that it produces effects — as the Court acknowledged in its judgment of 25 January 2018, *Hasan* [53] — and that only the court, in the context of its powers and duties and for reasons relating to the inherent legality of the contested measure, may annul or vary that decision.

48 In the present case, the Kingdom of the Netherlands is and will remain, despite the take-back procedure that has been initiated, the Member State responsible for examining the second application, in the context of which an appeal before the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) was still pending when the third application was lodged in Italy.

49 'The Charter'.

50 Pursuant to that provision, Member States must process applications for international protection in the context of an adequate and complete examination and ensure that the procedure is concluded as soon as possible. In principle, the time limit is six months from the lodging of the application. Where the application is subject to the procedure laid down in the Dublin III Regulation, that time limit starts to run from the moment the Member State responsible is determined and the applicant is on the territory of that Member State and has been taken in charge by the competent authority. In any event, Member States must conclude the examination procedure within a maximum time limit of 21 months from the lodging of the application.

51 See Article 46(3) of that directive.

52 See, in that regard, the situations referred to in Article 31 of that directive.

53 C-360/16, EU:C:2018:35 (paragraph 50).

161. The submission of a take back request while appeal proceedings are pending in the requesting Member State raises a number of difficulties to which I have already referred.

162. Take-back procedures and judicial proceedings do not follow the same course. While the former are subject to strict and extremely tight deadlines, the only deadline the latter have to comply with is that of a reasonable time.

163. As evidenced by proceedings before the Court, judicial proceedings may therefore take time and, where successful, may result in the contested decision being annulled or varied.

164. This entails a risk that the court first seised in the requesting Member State might vary the decision initially rejecting the application for international protection, thereby rendering the taking back of the asylum applicant by another Member State meaningless and entirely irrelevant.

165. It also entails the risk of a European situation of *lis pendens* if the applications for international protection lodged with the requesting Member State and the requested Member State are identical. In that scenario, I do not think that any court of the requesting Member State could validly have jurisdiction concurrently.

166. However, those are difficulties that are not addressed by any of the legislation governing the Common European Asylum System. In the light of the scope of the question raised and the limits imposed by the *audi alteram partem* rule, I will not expand on possible solutions in this Opinion.

167. I must, however, point out that, since it is not possible to defer the submission of a take back request once the requesting Member State has become aware that another Member State might be responsible — the periods laid down in Article 24(2) of the Dublin III Regulation being mandatory —, it is for the requesting Member State to make sure that the court seised will give judgment as soon as possible following the making of a take back request in respect of the asylum applicant, in accordance with Article 46(10) of Directive 2013/32.

168. As regards the conduct required of the requested Member State, it must still be informed of the existence of pending appeal proceedings in the requesting Member State. As we will see, the requesting Member State is not bound, under Article 24(5) of the Dublin III Regulation, to mention the stage reached in any procedure for the examination of an application for international protection in its take back request.

169. At this stage of my analysis, I therefore propose that the Court should rule that the combined provisions of Articles 31 and 46 of Directive 2013/32 and Articles 41 and 47 of the Charter must be interpreted as meaning that, once the take back request has been submitted to the requested Member State, in accordance with Article 24(1) of the Dublin III Regulation, the requesting Member State is required to conclude the examination of an application for international protection for which it is responsible as soon as possible.

D. Scope of the requesting Member State's obligation to provide information under Article 24(5) of the Dublin III Regulation (Questions 4 and 5)

170. In its fourth and fifth questions, the referring court is concerned with the scope of the requesting Member State's obligation to provide information where it makes a take back request on the basis of Article 24 of the Dublin III Regulation.

171. In particular, the referring court questions whether, under Article 24(5) of that regulation, the requesting Member State is bound to inform the requested Member State of the existence of pending appeal proceedings in the context of the examination of an application for international protection for which it was responsible. The referring court seeks to ascertain whether the Netherlands authorities failed to fulfil their obligations by not informing the Italian authorities that the decision rejecting the second application was still under appeal before the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State).

172. If so, the referring court asks the Court of Justice whether that failure precludes the taking back of the applicant by the requested Member State.

173. The Dublin III Regulation contains two provisions, namely Article 24(5) and Article 34 thereof, concerning the information that Member States must share in take charge/take back procedures.

174. The application of Article 34 of that regulation must be excluded from the outset, since there was no request for information from the Italian Republic.

175. That article, which forms part of Chapter VII of the Dublin III Regulation dealing with 'administrative cooperation', is entitled 'Information sharing' and is triggered only upon a request by a Member State, as is clear from paragraphs 1 and 6 thereof. Thus, even though Article 34(2)(g) of that regulation covers information such as that at issue relating to the existence of pending proceedings in the context of the examination of a previous application for international protection,[54] the fact remains that, in the case in the main proceedings, the Italian Republic did not request such information from the Netherlands authorities.

176. It is therefore necessary to examine the obligations of the requesting Member State under Article 24(5) of the Dublin III Regulation, the detailed rules for the application of which are laid down in Article 2 of the Implementing Regulation.

177. Under those provisions, the request to take back a person referred to in Article 18(1)(b) of the Dublin III Regulation must be submitted using the standard form set out in Annex III to the Implementing Regulation. That form must state the nature of the request, the reasons for it and its legal basis.

178. It must also include, as appropriate, a copy of all the proof and circumstantial evidence showing that the requested Member State is responsible for examining the application for international protection, which may be accompanied by statements made by the person concerned and/or the Eurodac hit. The proof and circumstantial evidence is described in Article 22(3) of the Dublin III Regulation and a list is drawn up in Annex II to the Implementing Regulation.

179. Article 24(5) of the Dublin III Regulation provides that that information as a whole must enable 'the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in [that regulation]'.

180. However, the existence in the requesting Member State of a pending appeal against a decision rejecting an application for international protection does not, in itself, fall within the criteria which the requested Member State may take into account in order to determine whether it is responsible. As the Court has held, that fact does not act as a bar to a take-back procedure.[55]

54 Under Article 34(1) and (2)(g) of the Dublin III Regulation, a Member State is thus required to communicate personal data concerning the applicant and all information relating to 'the date on which any previous application for international protection was lodged, the date on which the present application was lodged, the stage reached in the proceedings and the decision taken, if any' to any Member State 'that so requests'. It would then be necessary to ensure that the reference to the 'stage reached in the proceedings' refers to the previous application for international protection.

55 See judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35, paragraph 50).

181. Let us now consider the content of the standard form which the requesting State must use to submit its take back request, set out in Annex III to the Implementing Regulation.

182. I note that, in addition to information relating to the legal basis of the request and the identity of the asylum applicant, the requesting Member State is required, under point 12 of that form, to provide the requested Member State with information on 'previous procedures'. Point 12 reads as follows:

'Has the applicant ever previously applied for international protection … in the country of residence or in another country?

– Yes/No

When and where?

Was any decision taken on the application?

– No/Don't know/Yes, application rejected

When was the decision taken'

183. On a strict interpretation of point 12 of the standard form, the requesting Member State is only required to state whether the applicant has previously lodged an application for international protection with its authorities or with those of another Member State and whether a decision was taken on that application by ticking the options 'No', 'Don't know'[56] or 'Yes, application rejected', indicating the date of the decision where appropriate.

184. The requesting Member State is therefore not required, per se, to provide details on the stage reached in a procedure, particularly its judicial stages. It therefore appears that the Netherlands authorities were not under an obligation to disclose the existence of a pending appeal concerning the rejection of 11 June 2014.

185. Moreover, that information is not included in the proof and other circumstantial evidence which the requesting Member State is required to provide. Here, too, such proof and circumstantial evidence must show that the requested Member State is in fact responsible on the basis of the criteria laid down in the Dublin III Regulation. However, we have seen that a circumstance such as that at issue does not fall within such criteria.

186. For the sake of completeness, I note that the means of proof, which are exhaustively set out[57] in List A of Annex II to the Implementing Regulation, are formal means of proof which must show, for example, that a family member of an applicant who is an unaccompanied minor is lawfully resident in the territory of the requested Member State (copy of residence permit in the context of Article 8 of the Dublin III Regulation) or that the applicant in fact irregularly entered the territory of the requested Member State by an external border (copy of entry stamp in a falsified passport in the context of Article 13(1) of that regulation).

56 I imagine that that option refers to a situation where the application for international protection was lodged in a Member State other than the Member State making the take back request, as the latter would not necessarily be in possession of information concerning the stage reached in the procedure in the former.

57 Under Article 22(3)(a)(ii) of the Dublin III Regulation, Member States are required to furnish the committee provided for in Article 44 thereof with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs.

187. As for the circumstantial evidence, which is non-exhaustively set out in List B of Annex II to the Implementing Regulation, this must consist of indicative elements making it possible to determine whether a Member State is responsible on the basis of the criteria laid down in the Dublin III Regulation, such as substantiated statements by the applicant, reports drawn up by an international organisation, transport tickets or hotel bills.

188. Accordingly, I do not think that, under Article 24(5) of the Dublin III Regulation, the Netherlands authorities failed to fulfil their obligations by not mentioning in their request that the decision of 11 June 2014 rejecting the second application was the subject of appeal proceedings pending before the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State).

189. On the other hand, that omission is, to my mind, more deserving of criticism in the light of the principle of sincere cooperation underpinning the Dublin III Regulation, there being nothing to prevent the Netherlands authorities from providing the information in question as 'other useful information', to which reference is made at the bottom of the standard form set out in Annex III to the Implementing Regulation.

190. In view of those considerations, Article 24(5) of the Dublin III Regulation must therefore be interpreted as meaning that a Member State which has made a take back request in respect of an applicant for international protection does not fail to fulfil its obligations where it does not inform the requested Member State that the decision rejecting the application lodged by the person concerned during a first stay on its territory is subject to appeal proceedings pending before its courts.

E. Scope of the discretionary clause laid down in Article 17(1) of the Dublin III Regulation (Question 6)

191. By its sixth question, the referring court asks, in essence, whether Article 17(1) of the Dublin III Regulation must be interpreted as requiring a Member State which the criteria set out in Chapter III of that regulation do not indicate is responsible to examine an application for international protection where the applicant has been surrendered to it under a European arrest warrant.

192. In other words, if the Italian Republic has become the Member State responsible, the referring court asks whether the Netherlands authorities were required to conduct their own examination of the application for international protection at issue by making use of that discretionary clause, in so far as the Italian authorities had surrendered X to them under a European arrest warrant which they had issued against him.

193. All the interested parties that have lodged observations with the Court consider that Article 17(1) of the Dublin III Regulation must be interpreted as precluding such an obligation.

194. I concur with that view on account of the scope of the provision in question and the absolutely clear terms in which it is couched.

195. It should be borne in mind that, under Article 3(1) of the Dublin III Regulation, an asylum application is to be examined by a single Member State, which is to be the one which the criteria set out in Chapter III of that regulation indicate is responsible.

196. However, Chapter IV of the Dublin III regulation specifies the situations in which a Member State may be deemed to be responsible for examining an asylum application by way of derogation from those criteria. Article 17 of that regulation, entitled 'Discretionary clauses', thus provides, in the first subparagraph of paragraph 1 thereof, that 'each Member State may decide to examine an application for international protection *lodged with it* by a third-country national …, even if such examination is

not its responsibility under the criteria laid down in [that regulation]'. [58]

197. It should be noted at the outset that the clause set out in that provision is directed at Member States with which an application for international protection has been 'lodged … by a third-country national'.

198. A situation such as that at issue, in which the application for international protection was lodged with a Member State other than the Member State at which that provision is directed, in this case the Italian Republic, does not therefore fall within the scope of that provision.

199. In any event, even if the situation at issue were to fall within the scope of the first subparagraph of Article 17(1) of the Dublin III Regulation, it should be borne in mind that the clause set out in that provision, as its heading unambiguously indicates, is a discretionary clause.

200. By stating that 'each Member State *may* decide to examine an application for international protection', [59] that provision unequivocally reflects the EU legislature's intention to leave to the discretion of each Member State the possibility of examining an application for which it is not responsible under the determination criteria laid down in the Dublin III Regulation, and not to impose an obligation. Moreover, it is clear from the very wording of the provision in question that the exercise of that discretion is not subject to any particular conditions. [60]

201. Based on the *travaux préparatoires* for the Dublin III Regulation, the Court has thus stated that that rule was introduced in order to allow each Member State to decide sovereignly, for political, humanitarian or practical considerations, to agree to examine an asylum application even if it is not responsible under the criteria laid down in that regulation. [61]

202. Accordingly, in its judgment of 16 February 2017, *C.K. and Others*, [62] concerning the transfer of a seriously ill asylum applicant to the Member State responsible for examining his application, the Court held that if it is noted that the state of health of the applicant is not expected to improve in the short term, or that the suspension of the procedure for a long period would risk worsening his condition, the requesting Member State '*may choose* to conduct its own examination of his application by making use of the "discretionary clause" laid down in Article 17(1) of the Dublin III Regulation', but under no circumstances does that provision imply an obligation on that Member State to make use of it. [63]

203. That interpretation is based on the need to preserve the discretionary clause's very function and to safeguard the discretion thus left to the requesting Member State. It should therefore be applied to a situation in which a Member State with which an application for international protection has been lodged issues a European arrest warrant against the applicant. [64]

58 Emphasis added.

59 Emphasis added.

60 The wording is essentially the same as that of the sovereignty clause set out in Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 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 50, p. 1).

61 See judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 53) and Proposal 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 (COM(2001) 447 final).

62 C-578/16 PPU, EU:C:2017:127.

63 Judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 88, emphasis added).

64 Consequently, if the requesting Member State were required to issue a European arrest warrant against the applicant, calling on the Member State which the criteria set out in Chapter III of the Dublin III Regulation indicate is responsible and on whose territory the applicant is located to surrender him for the purposes of prosecution, the requesting Member State could choose to conduct its own examination of the application for international protection by making use of the discretionary clause laid down in the first subparagraph of Article 17(1) of that regulation. This would make it possible, inter alia, to consolidate all proceedings, both criminal and administrative, in a single location and avoid a further — and moreover belated — transfer of the person concerned. The fact remains that, irrespective of the certain benefits of such consolidation, the requesting Member State is not required to apply that discretionary clause.

204. Having regard to those considerations, it must be concluded that the first subparagraph of Article 17(1) of the Dublin III Regulation is not applicable to a situation such as that at issue in the main proceedings in which the application for international protection was lodged with a Member State other than the Member State at which that provision is directed.

VII. Conclusion

205. In the light of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, the Netherlands) as follows:

(1) In view of the specific circumstances of the case in the main proceedings, Article 23(3) 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, and the transfer of responsibility flowing therefrom as regards the examination of the application for international protection lodged by the person concerned in Italy, should be disapplied, in so far as that provision and transfer of responsibility deprive the procedure for determining the Member State responsible of the rationality, objectivity, fairness and expeditiousness pursued within the framework of Regulation No 604/2013 and are incompatible with the principles of sincere cooperation and solidarity between Member States underpinning the Common European Asylum System.

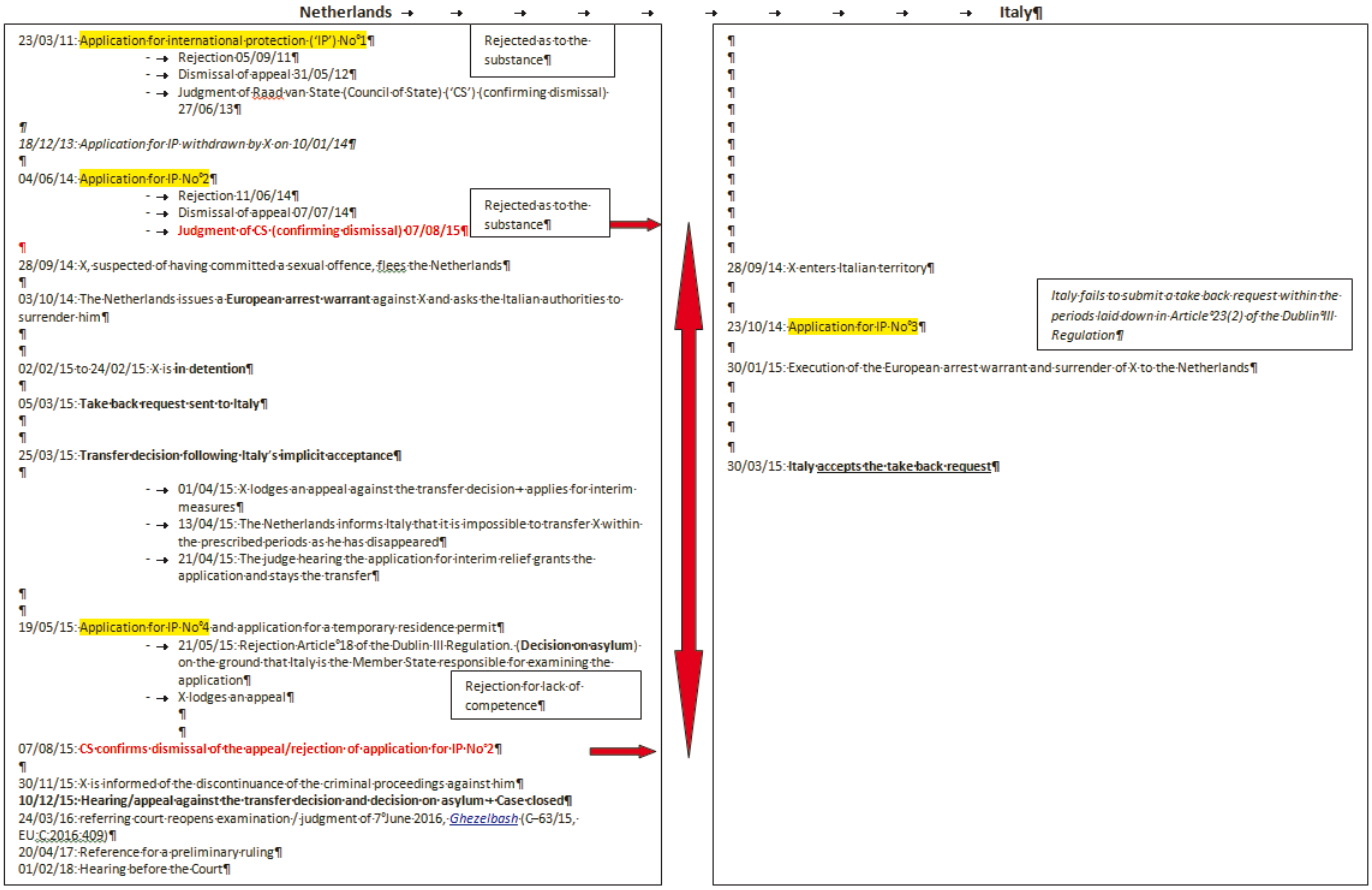
(2) In view of the specific circumstances of the case in the main proceedings, the submission of a take back request on the basis of Article 24(1) of Regulation No 604/2013 deprives the procedure for determining the Member State responsible of the rationality, objectivity, fairness and expeditiousness pursued within the framework of that regulation and is incompatible with the principles of sincere cooperation and solidarity between Member States underpinning the Common European Asylum System where the competent authorities of the requesting Member State (i) were responsible for examining the applications for international protection lodged by the applicant during a first stay on the territory of that Member State, (ii) have appeal proceedings pending before them concerning the decision rejecting one of those applications, and (iii) have issued a European arrest warrant against the applicant, calling on the Member State to which a take back request has been sent and on whose territory the applicant is located to surrender that person.

(3) The combined provisions of Articles 31 and 46 of 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 and Articles 41 and 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, once the take back request has been submitted to the requested Member State, in accordance with Article 24(1) of Regulation No 604/2013, the requesting Member State is required to conclude the examination of an application for international protection for which it is responsible as soon as possible.

(4) Article 24(5) of Regulation No 604/2013 must be interpreted as meaning that a Member State which has made a take back request in respect of an applicant for international protection does not fail to fulfil its obligations where it does not inform the requested Member State that the decision rejecting the application lodged by the person concerned during a first stay on its territory is subject to appeal proceedings pending before its courts.

(5) The first subparagraph of Article 17(1) of Regulation No 604/2013 is not applicable to a situation such as that at issue in the main proceedings in which the application for international protection was lodged with a Member State other than the Member State at which that provision is directed.

VIII. Annex


Netherlands → → → → → → → → → → → Italy
23/03/11: Application for international protection ('IP') No°1
- → Rejection 05/09/11
- → Dismissal of appeal 31/05/12
- → Judgment of Raad van State (Council of State) ('CS') (confirming dismissal) 27/06/13
Rejected as to the substance
18/12/13: Application for IP withdrawn by X on 10/01/14
04/06/14: Application for IP No°2
- → Rejection 11/06/14
- → Dismissal of appeal 07/07/14
- → Judgment of CS (confirming dismissal) 07/08/15
Rejected as to the substance
28/09/14: X, suspected of having committed a sexual offence, flees the Netherlands
03/10/14: The Netherlands issues a European arrest warrant against X and asks the Italian authorities to surrender him
02/02/15 to 24/02/15: X is in detention
05/03/15: Take back request sent to Italy
25/03/15: Transfer decision following Italy's implicit acceptance
- → 01/04/15: X lodges an appeal against the transfer decision + applies for interim measures
- → 13/04/15: The Netherlands informs Italy that it is impossible to transfer X within the prescribed periods as he has disappeared
- → 21/04/15: The judge hearing the application for interim relief grants the application and stays the transfer
19/05/15: Application for IP No°3 and application for a temporary residence permit
- → 21/05/15: Rejection Article°18 of the Dublin III Regulation. (Decision on asylum) on the ground that Italy is the Member State responsible for examining the application
- → X lodges an appeal
Rejection for lack of competence
07/08/15: CS confirms dismissal of the appeal/rejection of application for IP No°2
30/11/15: X is informed of the discontinuance of the criminal proceedings against him
10/12/15: Hearing/appeal against the transfer decision and decision on asylum + Case closed
24/03/16: referring court reopens examination / judgment of 7°June 2016, Ghezelbash (C-63/15, EU:C:2016:409)
20/04/17: Reference for a preliminary ruling
01/02/18: Hearing before the Court
28/09/14: X enters Italian territory
23/10/14: Application for IP No°3
Italy fails to submit a take back request within the periods laid down in Article°23(2) of the Dublin°III Regulation
30/01/15: Execution of the European arrest warrant and surrender of X to the Netherlands
30/03/15: Italy accepts the take back request