

## **Dublin III Regulation: The obligation of administrative bodies to review a final decision on a take charge request after *Mengesteab***

### **I. Introduction**

This legal note will briefly address the obligation of administrative bodies, such as an immigration and naturalization service, to review under certain conditions a final decision on a take charge request after the decision of the Court of Justice of the European Union (“CJEU”) in the case *Mengesteab*.<sup>1</sup>

The legal note begins by outlining the case law of the CJEU on the obligation of administrative bodies to review a final administrative decision. The CJEU has held that administrative bodies are prevented from acting upon a body of (national) case law, if the CJEU has confirmed the illegality under EU law of this case law. Under these circumstances, administrative bodies are thus required to review final administrative decisions based on erroneous national case law.

It will then go on to apply this case law to final decisions on take charge requests under the Dublin system. In *Mengesteab*, the CJEU clarified when an application for international protection shall be deemed to have been lodged, which is important for the commencement of the three-month limit within which a Member State may submit a take charge request with another Member State. As will be shown, administrative bodies will be obliged to review a final decision on a take charge request if based on an erroneous understanding of the commencement of this three-month limit.

### **II. *Kühne & Heitz* and *Byankov*: The obligation of an administrative body to review a final administrative decision**

In *Kühne & Heitz*, the CJEU held that the principle of cooperation<sup>2</sup> requires – under certain circumstances – an obligation of an administrative body to review a final administrative decision.<sup>3</sup> In principle, administrative bodies are not obliged to reopen a final administrative decision, as it would undermine the general principle of legal certainty.<sup>4</sup> An administrative body is, however, obliged to review a final administrative decision when the following criteria are met:

- The administrative body has the power to reopen the final administrative decision under national law;
- The administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- That judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC<sup>5</sup>; and
- The person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.<sup>6</sup>

The CJEU continued to further clarify the relationship between the principle of legal certainty with regard to a final administrative act and the requirement for legality under EU law in *Byankov*.<sup>7</sup> According to the CJEU, administrative bodies are prevented from acting upon a body of (national) case

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<sup>1</sup> CJEU 26 July 2017, C-670/16, ECLI:EU:C:2017:587 (*Mengesteab*).

<sup>2</sup> In the Lisbon Treaty, the principle of cooperation is laid down in Article 4(3) of the Treaty on European Union.

<sup>3</sup> CJEU 13 January 2004, C-453/00, ECLI:EU:C:2004:17 (*Kühne & Heitz*).

<sup>4</sup> *Ibid*, para. 24.

<sup>5</sup> In the Lisbon Treaty, the preliminary reference procedure is laid down in Article 267 of the Treaty on the Functioning European Union.

<sup>6</sup> CJEU 13 January 2004, C-453/00, ECLI:EU:C:2004:17 (*Kühne & Heitz*), para. 28.

<sup>7</sup> CJEU 4 October 2012, C-249/11, ECLI:EU:C:2012:608 (*Byankov*), para. 50.

law, whereby the CJEU has confirmed the illegality under EU law of this case law.<sup>8</sup> With reference to the principle of effectiveness and the principle of sincere cooperation arising from Article 4(3) TEU, the CJEU repeated that a national administrative body is under these circumstances required to review a final administrative decision by taking into account the interpretation of a relevant provision of European law which the Court has given subsequently.<sup>9</sup>

### III. ***Mengesteab*: when is an application for international protection deemed to have been lodged?**

In *Mengesteab*<sup>10</sup>, the Court of Justice of the European Union (“CJEU”) clarified when an application for international protection shall be deemed to have been lodged for the purpose of applying Article 20(2) of the Dublin III Regulation.<sup>11</sup> This is important for the commencement of the three-month limit within which a Member State may submit a take charge request with another Member State, as prescribed in Article 21(1) of the Dublin III Regulation.

Mr. Mengesteab, for instance, requested asylum on 14 September 2015 and received, on the same day, an initial certificate of registration as an asylum seeker. He was able to lodge a formal application on 22 July 2016. The German authorities eventually issued a “take charge request” to Italy on 19 August 2016. Mr Mengesteab challenged that decision by arguing that Germany was responsible for examining his application as per Article 21(1) of the Dublin III Regulation since the take charge request had been made after the expiry of the three-month time limit set out in the Regulation. In his view, the time for making such request should run from the day of his request for asylum i.e. the 14 September 2015.

Article 20(1) of the Dublin III Regulation establishes that the process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State. An application for international protection shall thus be deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities has reached the competent authorities of the Member State concerned, as is determined in Article 20(2) of the Dublin III Regulation.

In *Mengesteab*, the CJEU clarified that “an application for international protection is deemed to have been lodged if a written document, prepared by a public authority and certifying that a third-country national has requested international protection, has reached the authority responsible for implementing the obligations arising from that regulation, and as the case may be, if only the main information contained in such a document, but not that document or a copy thereof, has reached that authority.”<sup>12</sup> From this moment, a Member State has three months to request another Member State to take charge of the applicant, if it considers that other Member State responsible for examining the application for international protection, as laid down in Article 21(1) of the Dublin III Regulation

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<sup>8</sup> Idem, para. 81.

<sup>9</sup> Idem, para. 77.

<sup>10</sup> CJEU 26 July 2017, C-670/16, ECLI:EU:C:2017:587 (*Mengesteab*). See a detailed summary on EDAL <http://www.asylumlawdatabase.eu/en/content/cjeu-c%E2%80%99167016-tsegezab-mengesteab-v-bundesrepublik-deutschland>.

<sup>11</sup> 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 (recast) [2013] OJ L 180/31 (“Dublin III Regulation”).

<sup>12</sup> CJEU 26 July 2017, C-670/16, ECLI:EU:C:2017:587 (*Mengesteab*), para. 103.

#### **IV. Conclusion: the obligation to review a final decision on a take charge request after *Mengesteab***

In conclusion, if an administrative body has reached a final decision on the take charge request before the judgement of the CJEU in *Mengesteab* on the basis of an incorrect interpretation of when an application for international protection is deemed to have been lodged, the principles of effectiveness and cooperation require the administrative body to review this final administrative decision on the basis of *Kühne & Heitz* and *Byankov*.

In several cases, administrative bodies have already reached a final administrative decision on the take charge request before the judgement of the CJEU in *Mengesteab*. In these cases, the applicant could request the administrative body to revisit and review a final administrative decision on the basis of *Kühne & Heitz* and *Byankov*. If denied, it might be worth lodging an appeal in order for a judge to rule on this issue or to refer it, if need be, to the CJEU.