Provisional text

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 20 April 2023 (1)

**Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21**

**Ministero dell'Interno – Dipartimento per le libertà civili e l'immigrazione – Unità Dublino**
**v**
**CZA**

(Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))
**and**
**DG**
**v**
**Ministero dell'Interno – Dipartimento per le libertà civili e l'immigrazione – Unità Dublino**

(Request for a preliminary ruling from the Tribunale di Roma (District Court, Rome, Italy))
**and**
**XXX.XX**
**v**
**Ministero dell'Interno – Dipartimento per le libertà civili e l'immigrazione – Unità Dublino**

(Request for a preliminary ruling from the Tribunale di Firenze (District Court, Florence, Italy))
**and**
**PP**
**v**
**Ministero dell'Interno – Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino**

(Request for a preliminary ruling from the Tribunale di Milano (District Court, Milan, Italy))
**and**
**GE**
**v**
**Ministero dell'Interno – Dipartimento per le libertà civili e l'immigrazione – Unità Dublino**

(Request for a preliminary ruling from the Tribunale di Trieste (District Court, Trieste, Italy))

(References for a preliminary ruling – Common policy on asylum and subsidiary protection – Regulation (EU) No 604/2013 – Take back procedure – Failure to fulfil the obligations to issue the common leaflet, laid down in Article 4, and to hold a personal interview, laid down in Article 5 – Regulation (EU)

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## I. Introduction

1. The Common European Asylum System is based on the principle that an asylum application lodged by a third-country national or a stateless person in the European Union must be examined by only one Member State. In that connection, the way in which that Member State is to be determined is governed by Regulation (EU) No 604/2013 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 ('the Dublin III Regulation'). (2)

2. In order to avoid secondary movements and divergent outcomes, that regulation requires that not only the material examination of an asylum application itself but also the procedure for determining the Member State responsible for carrying out that examination (in accordance with Article 1 of the Dublin III Regulation, 'the Member State responsible') is carried out by only one Member State.

3. The Dublin III Regulation is informed by the desire to involve asylum seekers in the procedure for determining the Member State responsible. (3) To that end, they are to be provided with information, in the form of a common leaflet drawn up by the Commission, on the Dublin system, the procedure for determining the Member State responsible and the criteria for establishing responsibility. That leaflet is intended in particular to allow them to communicate during the procedure for determining the Member State responsible information that is relevant to that determination.

4. What is the position, however, under the take back procedure, that is to say in the case where an asylum seeker, after lodging an asylum application in a first Member State, has left that Member State and lodged a new asylum application, or is present, in a second Member State, with the result that the second Member State asks the first Member State to take back the person concerned? Must the common leaflet be issued by the second Member State too, even though the Member State responsible falls to be determined by the first Member State alone or, where appropriate, has already been determined there? And, if the obligation to issue the common leaflet applies in the take back procedure too, what in that event are the consequences of failing to discharge that obligation vis-à-vis the lawfulness of the decision by the second Member State to transfer the person concerned to the first Member State?

5. These questions, which have been answered differently by a number of Italian courts, form the first set of questions in three of the five requests for a preliminary ruling at issue here. (4)

6. The second set of questions, raised by one of the aforementioned three requests for a preliminary ruling as well as by the other two requests, (5) concerns the principle of mutual trust and, thus, the core of the Dublin III system. These questions revolve around whether the courts of the requesting Member State, when reviewing a transfer decision, can examine whether there is a risk that the principle of *non-refoulement* may be infringed in the requested Member State in the case where that Member State exhibits no systemic deficiencies that would warrant doubts as to the lawfulness of the asylum and judicial systems.

## II. Legal framework

### *A. European Union law*

#### *1. Dublin III Regulation*

7. The Dublin III Regulation (6) lays 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. Recitals 3 to 5, 14 to 19 and 32 of the Dublin III Regulation read as follows:

‘(3) The European Council … agreed to work towards establishing the [Common European Asylum System (CEAS)], based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 … , thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*. In this respect, and without the responsibility criteria laid down in this Regulation being affected, Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third-country nationals.

(4) The Tampere conclusions also stated that the CEAS 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.

…

(14) In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation.

(15) The processing together of the applications for international protection of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly, the decisions taken in respect of them are consistent and the members of one family are not separated.

(16) In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant’s pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.

(17) Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation.

(18) A personal interview with the applicant should be organised in order to facilitate the determination of the Member State responsible for examining an application for international protection. As soon as the application for international protection is lodged, the applicant should be informed of the application of this Regulation and of the possibility, during the interview, of providing information regarding the presence of family members, relatives or any other family relations in the Member States, in order to facilitate the procedure for determining the Member State responsible.

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

…

(32) With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights'.

9. Article 1 of the Dublin III Regulation defines the subject matter of that regulation:

'This Regulation lays 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 ("the Member State responsible")'.

10. Article 2 of the Dublin III Regulation contains 'Definitions' and point (b) thereof defines an 'application for international protection' as an 'application for international protection within the meaning of Article 2(h) of Directive 2011/95/EU'.

11. Article 3 of the Dublin III Regulation carries the heading 'Access to the procedure for examining an application for international protection' and reads as follows:

'1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

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

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

3. Any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU'.

12. Article 4 of the Dublin III Regulation carries the heading 'Right to information' and provides:

'1. As soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State, its competent authorities shall inform the applicant of the application of this

Regulation, and in particular of:

(a) the objectives of this Regulation and the consequences of making another application in a different Member State as well as the consequences of moving from one Member State to another during the phases in which the Member State responsible under this Regulation is being determined and the application for international protection is being examined;

(b) the criteria for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration, including the fact that an application for international protection lodged in one Member State can result in that Member State becoming responsible under this Regulation even if such responsibility is not based on those criteria;

(c) the personal interview pursuant to Article 5 and the possibility of submitting information regarding the presence of family members, relatives or any other family relations in the Member States, including the means by which the applicant can submit such information;

(d) the possibility to challenge a transfer decision and, where applicable, to apply for a suspension of the transfer;

(e) the fact that the competent authorities of Member States can exchange data on him or her for the sole purpose of implementing their obligations arising under this Regulation;

(f) the right of access to data relating to him or her and the right to request that such data be corrected if inaccurate or be deleted if unlawfully processed, as well as the procedures for exercising those rights, including the contact details of the authorities referred to in Article 35 and of the national data protection authorities responsible for hearing claims concerning the protection of personal data.

2. The information referred to in paragraph 1 shall be provided in writing in a language that the applicant understands or is reasonably supposed to understand.

Where necessary for the proper understanding of the applicant, the information shall also be supplied orally, for example in connection with the personal interview as referred to in Article 5.

3. The Commission shall, by means of implementing acts, draw up a common leaflet, as well as a specific leaflet for unaccompanied minors, containing at least the information referred to in paragraph 1 of this Article. This common leaflet shall also include information regarding the application of Regulation (EU) No 603/2013 and, in particular, the purpose for which the data of an applicant may be processed within Eurodac. The common leaflet shall be established in such a manner as to enable Member States to complete it with additional Member State-specific information. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2) of this Regulation'.

13. Article 5 of the Dublin III Regulation provides that the determining Member State is to conduct a personal interview with the applicant in order to facilitate the process of determining the Member State responsible, and lays down the detailed rules governing that interview. Paragraph 1 of that provisions states:

'1. In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4'.

14. Article 7 of the Dublin III Regulation, which is located in Chapter III of that regulation ('Criteria for determining the Member State responsible'), carries the heading 'Hierarchy of criteria' and paragraphs 1 and 3 thereof state:

‘1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

…

3. In view of the application of the criteria referred to in Articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance’.

15. Articles 8 to 10 and 16 of the Dublin III Regulation govern the determination of the Member State responsible in cases, in particular involving minors or dependent persons, in which family members of applicants are already located in a Member State.

16. Article 17 of the Dublin III Regulation carries the heading ‘Discretionary clauses’ and the first subparagraph of paragraph 1 provides:

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

17. Article 18 of the Dublin III Regulation is headed ‘Obligations of the Member State responsible’ and provides as follows:

‘1. The Member State responsible under this Regulation shall be obliged to:

(a) take charge, under the conditions laid down in Articles 21, 22 and 29, of an applicant who has lodged an application in a different Member State;

(b) take back, under the conditions laid down in Articles 23, 24, 25 and 29, 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;

(c) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person who has withdrawn the application under examination and made an application in another Member State or who is on the territory of another Member State without a residence document;

(d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, 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.

2. In the cases falling within the scope of paragraph 1(a) and (b), the Member State responsible shall examine or complete the examination of the application for international protection made by the applicant.

…

In the cases falling within the scope of paragraph 1(d), where the application has been rejected at first instance only, the Member State responsible shall ensure that the person concerned has or has had the opportunity to seek an effective remedy pursuant to Article 46 of Directive 2013/32/EU’.

18. Article 19 of the Dublin III Regulation carries the heading ‘Cessation of responsibilities’ and reads as follows:

‘1. Where a Member State issues a residence document to the applicant, the obligations specified in Article 18(1) shall be transferred to that Member State.

2. The obligations specified in Article 18(1) shall cease where the Member State responsible can establish, when requested to take charge or take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States for at least three months, unless the person concerned is in possession of a valid residence document issued by the Member State responsible.

An application lodged after the period of absence referred to in the first subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.

3. The obligations specified in Article 18(1)(c) and (d) shall cease where the Member State responsible can establish, when requested to take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States in compliance with a return decision or removal order issued following the withdrawal or rejection of the application.

An application lodged after an effective removal has taken place shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible’.

19. Chapter VI of the Dublin III Regulation (‘Procedures for taking charge and taking back’) governs the start of the procedure for determining the Member State responsible (Section I), the procedure for taking charge in the case where a Member State in which an application for international protection has been lodged considers that another Member State is responsible for examining the application (Section II), and the procedure for taking back in cases where a Member State in which a person who had previously lodged an application for international protection in another Member State lodges a new application or is present without a residence document requests that other Member State to take back that person (Section III).

20. Article 20 of the Dublin III Regulation carries the heading ‘Start of the procedure’, is located in Section I, bearing the same heading, of Chapter VI, and paragraphs 1 and 2 and the first subparagraph of paragraph 5 thereof provide:

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

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

…

5. An applicant who is present in another Member State without a residence document or who lodges an application for international protection there after withdrawing his or her first application made in a different Member State during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Articles 23, 24, 25 and 29, by the Member State with which that application for international protection was first lodged, with a view to completing the process of determining the Member State responsible’.

21. Article 21 of the Dublin III Regulation forms part of Section II (‘Procedures for take charge requests’) of Chapter VI of that regulation, carries the heading ‘Submitting a take charge request’ and paragraph 1 thereof provides as follows:

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

Notwithstanding the first subparagraph, in the case of a Eurodac hit with data recorded pursuant to Article 14 of Regulation (EU) No 603/2013, the request shall be sent within two months of receiving that hit pursuant to Article 15(2) of that Regulation.

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

22. Articles 23 (‘Submitting a take back request when a new application has been lodged in the requesting Member State’), 24 (‘Submitting a take back request when no new application has been lodged in the requesting Member State’) and 25 (‘Replying to a take back request’) of the Dublin III Regulation are located in Section III (‘Procedures for take back requests’) of Chapter VI and provide in extract:

‘Article 23

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.

…

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.

Article 24

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.

Article 25

1. The requested Member State shall make the necessary checks and shall give a decision on the request to take back the person concerned as quickly as possible … ’

23. Article 26 of the Dublin III Regulation carries the heading ‘Notification of a transfer decision’ and reads as follows:

‘1. Where the requested Member State accepts to take charge of or to take back an applicant or other person as referred to in Article 18(1)(c) or (d), the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection. If a legal advisor or other counsellor is representing the person concerned, Member States may choose to notify the decision to such legal advisor or counsellor instead of to the person concerned and, where applicable, communicate the decision to the person concerned.

2. The decision referred to in paragraph 1 shall contain information on the legal remedies available, including on the right to apply for suspensive effect, where applicable, and on the time limits applicable

for seeking such remedies and for carrying out the transfer, and shall, if necessary, contain information on the place where, and the date on which, the person concerned should appear, if that person is travelling to the Member State responsible by his or her own means.

Member States shall ensure that information on persons or entities that may provide legal assistance to the person concerned is communicated to the person concerned together with the decision referred to in paragraph 1, when that information has not been already communicated.

3. When the person concerned is not assisted or represented by a legal advisor or other counsellor, Member States shall inform him or her of the main elements of the decision, which shall always include information on the legal remedies available and the time limits applicable for seeking such remedies, in a language that the person concerned understands or is reasonably supposed to understand'.

24. Article 27 of the Dublin III Regulation is headed 'Remedies' and paragraph 1 thereof reads:

'1. The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal'.

25. Article 29 of the Dublin III Regulation carries the heading 'Modalities and time limits' and paragraph 2 thereof provides:

'2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds'.

### *2. Eurodac Regulation*

26. Regulation (EU) No 603/2013 ('the Eurodac Regulation') (7) governs the establishment of a database for the comparison of finger prints for the effective application of the Dublin III Regulation.

27. The first subparagraph of Article 9(1) of the Eurodac Regulation provides as follows:

'1. Each Member State shall promptly take the fingerprints of all fingers of every applicant for international protection of at least 14 years of age and shall, as soon as possible and no later than 72 hours after the lodging of his or her application for international protection, as defined by Article 20(2) of Regulation (EU) No 604/2013, transmit them together with the data referred to in Article 11(b) to (g) of this Regulation to the Central System'.

28. The first subparagraph of Article 17(1) of the Eurodac Regulation provides:

'1. With a view to checking whether a third-country national or a stateless person found illegally staying within its territory has previously lodged an application for international protection in another Member State, a Member State may transmit to the Central System any fingerprint data relating to fingerprints which it may have taken of any such third-country national or stateless person of at least 14 years of age together with the reference number used by that Member State'.

29. Article 29 of the Eurodac Regulation concerns the rights of data subjects. Article 29(1) and (2) of the Eurodac Regulation states that such persons are to be provided with certain information concerning the purpose of, and the arrangements for, taking fingerprints, and paragraph 3 thereof states that a common leaflet is to be drawn up for that purpose:

'1. A person covered by Article 9(1), Article 14(1) or Article 17(1) shall be informed by the Member State of origin in writing, and where necessary, orally, in a language that he or she understands or is

reasonably supposed to understand, of the following:

…

(b) the purpose for which his or her data will be processed in Eurodac, including a description of the aims of [the Dublin III Regulation], in accordance with Article 4 thereof and an explanation in intelligible form, using clear and plain language, of the fact that Eurodac may be accessed by the Member States and Europol for law enforcement purposes;

…

2.

…

In relation to a person covered by Article 17(1), the information referred to in paragraph 1 of this Article shall be provided no later than at the time when the data relating to that person are transmitted to the Central System. …

3. A common leaflet, containing at least the information referred to in paragraph 1 of this Article and the information referred to in Article 4(1) of [the Dublin III Regulation] shall be drawn up in accordance with the procedure referred to in Article 44(2) of that Regulation.

The leaflet shall be clear and simple, drafted in a language that the person concerned understands or is reasonably supposed to understand.

The leaflet shall be established in such a manner as to enable Member States to complete it with additional Member State-specific information. This Member State-specific information shall include at least the rights of the data subject, the possibility of assistance by the national supervisory authorities, as well as the contact details of the office of the controller and the national supervisory authorities'.

30. Article 37 of the Eurodac Regulation is headed 'Liability' and paragraphs 1 and 3 thereof provide as follows:

'1. Any person who, or Member State which, has suffered damage as a result of an unlawful processing operation or any act incompatible with this Regulation shall be entitled to receive compensation from the Member State responsible for the damage suffered. That State shall be exempted from its liability, in whole or in part, if it proves that it is not responsible for the event giving rise to the damage.

…

3. Claims for compensation against a Member State for the damage referred to in paragraphs 1 and 2 shall be governed by the provisions of national law of the defendant Member State'.

### *3. Qualification Directive*

31. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted ('the Qualification Directive') (8) governs the criteria in accordance with which international protection is to be granted.

32. Article 2 of the Qualification Directive contains 'Definitions' and point (h) thereof defines an 'application for international protection' as a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection

status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately'.

33. Article 8 thereof, under the heading 'Internal protection', provides for exceptions to the need for international protection in the event that the applicant is able to seek protection in a part of his country of origin:

'1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:

(a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or

(b) has access to protection against persecution or serious harm as defined in Article 7;

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.'

34. Chapter V of the Qualification Directive lays down as a condition of qualification for subsidiary protection the risk of 'serious harm'. In accordance with Article 15(c), serious harm consists of:

'(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

### *4. Asylum Procedures Directive*

35. Article 33 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 ('the Asylum Procedures Directive') (9) carries the heading 'Inadmissible applications' and paragraphs 1 and 2(a) provide as follows:

'1. In addition to cases in which an application is not examined in accordance with Regulation (EU) No 604/2013, Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive 2011/95/EU where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for international protection as inadmissible only if:

(a) another Member State has granted international protection'.

### *5. Regulation No 1560/2003*

36. Article 16a of Regulation (EC) No 1560/2003, (10) the Commission regulation implementing the Dublin System, as amended by the Dublin III Regulation and Implementing Regulation (EU) No 118/2014, (11) carries the heading 'Information leaflets for applicants seeking international protection' and paragraphs 1 and 4 thereof provide:

‘1. A common leaflet informing all applicants for international protection of the provisions of [the Dublin III Regulation] and on the application of [the Eurodac Regulation] is set out in Annex X.

…

4. Information for third-country nationals or stateless persons found illegally staying in a Member State, are set out in Annex XIII’.

37. The leaflet referred to in Annex X to Regulation No 1560/2003, contains in its Part A, entitled ‘Information about the Dublin Regulation for applicants for international protection pursuant to Article 4 of Regulation (EU) No 604/2013’, in particular the following information (emphasis in the original):

‘You have asked us to protect you because you consider that you have been forced to leave your own country due to persecution, war or risk of serious harm. The law calls this an “application/request for international protection” – and you – an “applicant”. People seeking protection are often referred to as “asylum seekers”.

**The fact that you asked for asylum here does not guarantee that we will examine your request here. The country that will examine your request is determined through a process established by a European Union law known as the “Dublin” Regulation. According to this law, only one country is responsible for examining your request.**

…

Before your request for asylum can be considered, we need to establish whether we are responsible to examine it or whether another country is responsible – we call this a “Dublin procedure”. The Dublin procedure will not concern your reason for applying for asylum. It will only deal with the question of which country is responsible for making a decision on your application for asylum.

…

If our authorities decide that we are responsible for deciding on your application for asylum, this means that you may remain in this country and have your application examined here. The process of examining your application will then start immediately.

If we decide that another country is responsible for your application, we will seek to send you to that country as soon as possible so that your application can be considered there. …

The law sets out various reasons why a country may be responsible for examining your request. These reasons are considered in the order of importance by the law, starting from whether you have a family member present in that Dublin country; whether you now or in the past have had a visa or a residence permit issued by a Dublin country; or whether you have travelled to, or through, another Dublin country, either legally or irregularly.

**It is important that you inform us as soon as possible if you have family members in another Dublin country.** If your husband, wife or child is an applicant for asylum or has been granted international protection in another Dublin country, that country could be responsible for examining your asylum application.

We may decide to examine your application in this country, even if such examination is not our responsibility under the criteria laid down in the Dublin Regulation. We will not send you to a country where it is established that your human rights could be violated.

…

You have the possibility to say that you disagree with a decision to be sent to another Dublin country, and may challenge that decision in front of a court or tribunal. You can also ask to remain in this country until your appeal or review is decided.

If you abandon your application for asylum and you move to another Dublin country, you are likely to be transferred back to this country or to the country responsible.

**It is therefore important that once you apply for asylum, you stay here until we decide 1) who is responsible for the examination of your asylum request and/or 2) to examine your asylum request in this country.**

…

If we consider that another country could be responsible for examining your application, you will receive more detailed information about that procedure and how it affects you and your rights'.

38. In Part B, the leaflet referred to in Annex X to Regulation No 1560/2003 contains inter alia the following 'Information for applicants for international protection found in a Dublin procedure':

**'You have been given this leaflet because you requested international protection (asylum) in this country or in another Dublin country and the authorities here have reasons to believe that another country might be responsible for examining your request.**

**We will determine which country is responsible through a process established by a European Union law known as the "Dublin" Regulation. This process is called the "Dublin procedure". This leaflet seeks to answer the most frequent questions you might have about this procedure.**

…

The Dublin procedure establishes which single country is responsible for examining your application for asylum. This means you may be transferred from this country to a different country that is responsible for examining your application.

…

REMEMBER: You are not supposed to move to another Dublin country. If you move to another Dublin country, you will be transferred back here or to a country where you previously asked for asylum. Abandoning your application here will not change the responsible country. If you hide or run away, you also risk being detained.

…

**How will the authorities establish the country responsible for examining my application?**

There are various reasons why a country may be responsible for examining your application. These reasons are applied in an order of importance given by the law. If one reason is not relevant, the next will be considered, and so on.

The reasons relate to the following factors, in order of importance:

– you have a family member (husband or wife, children under the age of 18) who has been granted international protection or who is an asylum seeker in another Dublin country;

**It is therefore important that you inform us if you have family members in another Dublin country, before a first decision is made on your asylum request.** If you want to be brought together in the same country, you and your family member will have to express your desire in writing.

…

**What if I depend on someone's care or somebody depends on me?**

You could be re-united in the same country as your **mother, father, child, brother or sister** if all of the following conditions apply:

– they are legally resident in one of the Dublin countries;

– one of you is pregnant, or has a new-born child, or is seriously ill, or has a severe disability or is old;

– one of you depends on the assistance of the other, who is able to take care of him or her.

The country where your child, sibling or parent is resident should normally accept responsibility for examining your application, provided that your family ties existed in your country of origin. You will also be asked to indicate in writing that you both wish to be re-united.

You can ask for this possibility if you are already present in the country where your child, sibling or parent is present, or if you are in a different country to the one where your relatives are resident. In this second case, it will mean that you will have to travel to that country, unless you have a health condition that prevents you from travelling for a long period of time.

In addition to this possibility, you can always ask during the asylum procedure to join a family relation for humanitarian, family or cultural reasons. If this is accepted, you may have to move to the country where your family relation is present. In such a case you would also be asked to give your agreement in writing. It is important that you inform us of any humanitarian reasons for having your request examined here or in a different country.

…

– *If this is the first time that you have applied for asylum in a Dublin country but there is reason to believe that another Dublin country should examine your asylum application, we will request that other country to " **take charge**" of your case.*

…

– *If you have already applied for asylum in another Dublin country different from the one where you are now present, we will request that other country to " **take you back**".*

…

If, however, you did not apply for asylum in this country and your previous asylum application in another country has been rejected by a final decision, we can either choose to send a request to the responsible country to take you back, or to proceed with your return to your country of origin or of permanent residence or to a safe third country.

…

The responsible country will treat you as an asylum seeker and you will benefit from all related rights. If you never applied for asylum before in that country, you will be given the opportunity to apply after your arrival.

…'

39. The leaflet referred to in Annex XIII to Regulation No 1560/2003 contains 'Information for third-country nationals or stateless persons found illegally staying in a Member State, pursuant to Article 29(3)

of [the Eurodac Regulation]':

'If you are found illegally staying in a "Dublin" country, authorities may take your fingerprints and transmit them to a fingerprint database called "Eurodac". This is only for the purpose of seeing if you have previously applied for asylum. Your fingerprint data will not be stored in the Eurodac database, but if you have previously applied for asylum in another country, you may be sent back to that country.

…

If our authorities consider that you might have applied for international protection in another country which could be responsible for examining that application, you will receive more detailed information about the procedure that will follow and how it affects you and your rights. (12)'

### *B. Italian law*

40. In Italian law, Article 3 of Decreto legislativo No 25/2008 of 28 January 2008 implementing Directive 2005/85/EC, which was repealed and replaced by Directive 2013/32/EU on common procedures for granting and withdrawing international protection (GURI No 40 of 16 February 2008), in its current version, governs actions against transfer decisions under the Dublin system.

## III. Facts and requests for a preliminary ruling

### *A. Case C-228/21*

41. The applicant in Case C-228/21, Mr CZA, lodged an application for international protection in Italy, after having already lodged such an application in Slovenia. Next, the competent Italian authority, the Dublin Unit within the Ministry of the Interior, asked Slovenia to take back the applicant, in accordance with Article 18(1)(b) of the Dublin III Regulation. Slovenia agreed to that request. There then followed a transfer decision, as provided for in Article 26 of the Dublin III Regulation, informing the applicant of the decision to transfer him to Slovenia.

42. The action brought by the applicant against that decision, based on an infringement of the obligation to provide information laid down in Article 4 of the Dublin III Regulation, was successful at first instance before the Tribunale di Catanzaro (District Court, Catanzaro, Italy). The competent authority could not prove that the applicant had been provided with the leaflet required under Article 4 of the Dublin III Regulation. The court considered the production of the personal interview record drawn up in accordance with Article 5 of that regulation, and the provision of another leaflet at the time when the application for international protection was formally lodged in Italy, to be insufficient. It concluded that the infringement of the obligation to provide information laid down in Article 4 of the Dublin III Regulation rendered the transfer decision invalid.

43. The Ministry of the Interior brought an appeal in cassation against that decision before the Corte suprema di cassazione (Supreme Court of Cassation, Italy). That court, by decision of 29 March 2021, received on 8 April 2021, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 4 of [the Dublin III Regulation] be interpreted as meaning that an action may be brought under Article 27 of [that regulation] against a transfer decision adopted by a Member State, using the mechanism provided for in Article 26 of [that regulation] and on the basis of the obligation to take back laid down in Article 18(1)(b) thereof, solely because of a failure to deliver the information leaflet required under Article 4(2) of [that] regulation by the Member State which adopted the transfer decision?

(2) Should Article 27 of [that regulation], read in conjunction with recitals 18 and 19 and Article 4 thereof, be interpreted as meaning that, where it has been determined that there has been a failure to fulfil

the obligations laid down in Article 4 [of that regulation], an effective remedy requires that the court adopt a decision annulling the transfer decision?

(3) If the answer to Question 2 above is in the negative, should Article 27 of [that regulation], read in conjunction with recitals 18 and 19 and Article 4 thereof, be interpreted as meaning that, where it has been determined that there has been a failure to fulfil the obligations laid down in Article 4 [of that regulation], an effective remedy requires that the court verify the significance of that failure to fulfil obligations in the light of the circumstances alleged by the applicant and permits confirmation of the transfer decision in all cases where there are no grounds for adopting a transfer decision with different content?'

### *B. Case C-254/21*

44. In Case C-254/21, DG, an Afghan national, lodged a second application for international protection in Italy, after his first application for the grant of international protection, lodged in Sweden, had already been rejected by final decision there. Next, following a Eurodac hit, the Italian Ministry of the Interior sent the Swedish authorities a take back request under Article 18(1)(d) of the Dublin III Regulation, to which the latter agreed, and ordered DG's transfer to Sweden.

45. The applicant is challenging that decision before the Tribunale di Roma (District Court, Rome, Italy), claiming that there has been an infringement of Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 17(1) of the Dublin III Regulation. His ground for that claim is that he faces indirect *refoulement* via Sweden to Afghanistan and that he is at risk of inhuman and degrading treatment in Afghanistan. It follows from Article 17 of the Dublin III Regulation that Italy is responsible for protecting him against indirect *refoulement*.

46. In those circumstances, the Tribunale di Roma (District Court, Rome) decided to stay the proceedings before it and, by decision of 12 April 2021, received on 22 April 2021, to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the right to an effective remedy under Article 47 of the Charter require that Articles 4 and 19 of that charter, in the circumstances referred to in the main proceedings, also provide protection against the risk of indirect *refoulement* following a transfer to a Member State of the European Union which has no systemic flaws within the meaning of Article 3(2) of the Dublin Regulation (in the absence of other Member States responsible on the basis of the criteria set out in Chapters III and IV) and which has already examined and rejected the first application for international protection?

(2) Should the court of the Member State where the second application for international protection was lodged, hearing an appeal pursuant to Article 27 of the Dublin Regulation – and thus having jurisdiction to assess the transfer within the European Union but not to adjudicate on the application for protection – conclude that there is a risk of indirect *refoulement* to a third country, where the concept of "internal protection" within the meaning of Article 8 of Directive 2011/95 has been assessed differently by the Member State where the first application for international protection was lodged?

(3) Is the assessment of the risk of indirect *refoulement*, following the different interpretation by two Member States of the need for 'internal protection', compatible with the second part of Article 3(1) of the Dublin Regulation and with the general principle that third-country nationals may not decide in which Member State of the European Union the application for international protection is to be lodged?

(4) In the event that the previous questions are answered in the affirmative:

(a) Does the assessment of the existence of the risk of indirect *refoulement*, made by the court of the Member State in which the applicant lodged the second application for international protection

following the rejection of the first application, require the application of the clause provided for in Article 17(1), defined by the Regulation as a 'discretionary clause'?

(b) Which criteria must the court seised pursuant to Article 27 of the Regulation apply in order to assess the risk of indirect *refoulement*, other than those identified in Chapters III and IV, given that that risk has already been ruled out by the country that examined the first application for international protection?'

### *C. Case C-297/21*

47. In Case C-297/21, XXX.XX, an Afghan national, lodged a second application for international protection in Italy, after a first application for the grant of international protection previously lodged in Germany had been rejected by final decision and the applicant had received a final deportation order. Next, following a Eurodac hit, the Italian Ministry of the Interior sent the German authorities a take back request under Article 18(1)(d) of the Dublin III Regulation, to which the latter agreed.

48. The applicant brought an action against the transfer decision that was then adopted before the Tribunale di Firenze (District Court, Florence, Italy). He is of the view that the contested decision infringes Article 4 of the Charter and Article 3(2) and Article 17(1) of the Dublin III Regulation, inasmuch as he faces indirect *refoulement* via Germany to Afghanistan and is at risk of inhuman and degrading treatment after being returned there. In his view, responsibility therefore lies with Italy, in accordance with Article 17(1) of the Dublin III Regulation.

49. In those circumstances, the Tribunale di Firenze (District Court, Florence) decided to stay the proceedings before it and, by decision of 29 April 2021, received on 10 May 2021, to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 17(1) of [the Dublin III Regulation] be interpreted, in accordance with Articles 19 and 47 of the Charter and Article 27 of [the Dublin III Regulation], as meaning that the court of the Member State, hearing an appeal against the decision of the Dublin Unit, may establish the responsibility of the Member State which would have to carry out the transfer under Article 18(1)(d), if it determines the existence, in the Member State responsible, of a risk of infringement of the principle of *non-refoulement* by returning the applicant to his country of origin, where the applicant's life would be in danger and where he would be at risk of inhuman and degrading treatment?

(2) In the alternative, must Article 3(2) of [the Dublin III Regulation] be interpreted in accordance with Articles 19 and 47 of the Charter and Article 27 of [the Dublin III Regulation], as meaning that the court may establish the responsibility of the Member State required to carry out the transfer under Article 18(1)(d) of that regulation, where it is established that:

(a) there is a risk in the Member State responsible of infringing the principle of *non-refoulement* by returning the applicant to his country of origin, where his life would be in danger and where he would be at risk of inhuman or degrading treatment?

(b) it is impossible to carry out the transfer to another Member State designated on the basis of the criteria set out in Chapter III of [the Dublin III Regulation]?'

### *D. Case C-315/21*

50. In Case C-315/21, PP, born in Pakistan, lodged an application for international protection in Italy, after having previously already lodged a similar application in Germany. Next, the Italian Ministry of the Interior sent the German authorities a take back request under Article 18(1)(b) of the Dublin III Regulation, to which the latter agreed as a take back request under Article 18(1)(d) of the Dublin III Regulation. The Italian Ministry of the Interior subsequently ordered the applicant's transfer to Germany.

51. The applicant brought an action against that decision before the Tribunale di Milano (District Court, Milan, Italy) and successfully applied for a temporary stay of execution of the decision. By way of grounds, it relied, first, on an infringement of the obligations to provide information, laid down in Articles 4 and 5 of the Dublin III Regulation, and, second, on a threat of indirect *refoulement* via Germany to Pakistan, where he would be at actual risk of inhuman and degrading treatment. The Dublin Unit within the Ministry of the Interior rebutted those claims and adduced proof that the personal interview provided for in Article 5 of the Dublin III Regulation had been conducted with the applicant.

52. In those circumstances, the Tribunale di Milano (District Court, Milan) decided to stay the proceedings and, by decision of 14 April 2021, received on 17 May 2021, referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Articles 4 and 5 of [the Dublin III Regulation] be interpreted as meaning that infringement thereof in itself renders unlawful a decision challenged under Article 27 of [the Dublin III Regulation], irrespective of the specific consequences of that infringement for the content of the decision and the identification of the Member State responsible?

(2) Must Article 27 of [the Dublin III Regulation], read in conjunction with Article 18(1)(a) or with Articles 18[(1)](b), (c) and (d) and with Article 20(5) of [the Dublin III Regulation], be interpreted as identifying different subjects of appeal, different complaints to be raised in judicial proceedings and different aspects of infringement of the obligations to provide information and conduct a personal interview under Articles 4 and 5 of [the Dublin III Regulation]?

If the answer to question 2 is in the affirmative, must Articles 4 and 5 of [the Dublin III Regulation] be interpreted as meaning that the guarantees relating to information, provided for therein, are enjoyed only in the scenario set out in Article 18(1)(a) and not also in the take back procedure, or must they be interpreted as meaning that in that procedure the obligations to provide information are enjoyed at least in relation to the cessation of responsibilities referred to in Article 19 or the systemic flaws in the asylum procedure and in the reception conditions for applicants which result in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union referred to in Article 3(2)?

(3) Must Article 3(2) be interpreted as meaning that “systemic flaws in the asylum procedure” includes any consequences of final decisions rejecting an application for international protection already adopted by the court of the Member State effecting the take back, where the court seised pursuant to Article 27 of [the Dublin III Regulation] considers that there is a real risk that the applicant could suffer inhuman and degrading treatment if he or she is returned to his or her country of origin by the Member State [referred to above], also having regard to the presumed existence of a general armed conflict within the meaning of Article 15(c) of Directive 2011/95?’

### *E. Case C-328/21*

53. In Case C-328/21, the Italian Ministry of the Interior ordered that GE, an applicant from Iraq, be transferred to Finland, after he had been found to be unlawfully present in Italy and a Eurodac hit had revealed that he had previously lodged an application for international protection in Finland. In response to a take back request made under Article 18(1)(b) of the Dublin III Regulation, Finland recognised its own responsibility under Article 18(1)(d) of that regulation.

54. The applicant brought an action against the transfer decision before the Tribunale di Roma (District Court, Rome, Italy), which declined jurisdiction and referred the case to the Tribunale di Trieste (District Court, Trieste, Italy). The applicant relies in particular on a failure to fulfil the obligations to provide information laid down in Article 4 of the Dublin II Regulation and Article 29 of the Eurodac Regulation.

55. In those circumstances, the Tribunale di Trieste (District Court, Trieste, Italy) decided to stay the proceedings and, by decision of 2 April 2021, received on 26 May 2021, to refer the following questions to

the Court of Justice for a preliminary ruling:

’(1) What legal consequences are imposed by EU law in relation to take back transfer decisions under Chapter VI, Section III, of [the Dublin III Regulation], where the State has failed to provide the information required under Article 4 of [the Dublin III Regulation] and Article 29 of [the Eurodac Regulation]?

(2) If a full and effective remedy has been implemented against the transfer decision, the Court of Justice of the European Union clarify the following:

(2.1.) Must Article 27 of [the Dublin III Regulation] be interpreted:

– as meaning that a failure to provide the information leaflet required under Article 4(2) and (3) of [the Dublin III Regulation] to a person who meets the conditions described in Article 23(1) of [the Dublin III Regulation] in itself renders the transfer decision irremediably invalid (and potentially also establishes the responsibility of the Member State to which the person has submitted the new application to take a decision on the application for international protection);

– or as meaning that it is for the appellant to prove in court that the procedure would have had a different outcome if the leaflet had been provided to him or her?

(2.2.) Must Article 27 of [the Dublin III Regulation] be interpreted:

– as meaning that a failure to provide the information leaflet required under Article 29 of [the Eurodac Regulation] to a person who meets the conditions described in Article 24(1) of [the Dublin III Regulation] in itself renders the transfer decision irremediably invalid (and potentially also results in the need to provide a possibility to submit a new application for international protection);

– or as meaning that it is for the appellant to prove in court that the procedure would have had a different outcome if the leaflet had been provided to him or her?’

## IV. Procedure before the Court

56. The referring courts in Cases C-254/21, C-297/21, C-315/21 and C-328/21 requested that the cases be dealt with under the expedited procedure provided for in Article 105 of the Rules of Procedure of the Court of Justice, or be given priority under Article 53(3) of the Rules of Procedure.

57. By orders of the President of the Court of Justice of 14 June and 6 July 2021, those requests were dismissed.

58. By order of the President of the Court of Justice of 6 July 2021, Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21 were joined for the purposes of the written and oral procedure and the judgment.

59. Written observations have been submitted by Germany, France, Italy, the Netherlands, the European Commission and the applicants in the main proceedings in Cases C-297/21 and C-328/21.

60. The joint hearing held on 8 June 2022 was attended by Italy, the Commission and the applicants in the main proceedings in Cases C-297/21 and C-328/21.

## V. Assessment

61. The situations underlying these five requests for a preliminary ruling are all characterised by the fact that the asylum seekers concerned, after having lodged a first application for international protection

in a Member State, travelled to Italy and, there, either lodged another application for international protection (Cases C-228/21, C-254/21, C-297/21 and C-315/21) or stayed without a residence document (Case C-328/21, it being a matter of dispute in the latter instance whether the applicant in the main proceedings made a new application in Italy or not (see in this regard points 98 and 123 of this Opinion)). Next, the competent Italian authority asked the Member States in which the persons concerned had previously made applications for international protection to take those persons back, adopting in respect of the persons concerned transfer decisions under Article 26 of the Dublin III Regulation which now form the subject of the main proceedings.

62. Against that background, the questions which have been referred to the Court in these requests for a preliminary ruling, as set out at the outset, concern two sets of issues. These have to do, first, with the obligations to provide information and issue the common leaflet, laid down in Article 4 of the Dublin III Regulation and Article 29 of the Eurodac Regulation, and the obligation to conduct a personal interview, laid down in Article 5 of the Dublin III Regulation (Cases C-228/21, C-315/21 and C-328/21) (A), and, second, with whether, in the context of an action against a transfer decision, the courts of the requesting Member State are able to examine the risk that the requested Member State may infringe the principle of *non-refoulement*, in the case where the latter Member State exhibits no systemic deficiencies (Cases C-254/21, C-297/21 and C-315/21) (B).

### *A. The common leaflet and the personal interview*

63. By their questions in Cases C-228/21, C-315/21 and C-328/21, the referring courts wish to ascertain, first, whether the obligations to provide applicants with information and to issue the common leaflet, laid down in Article 4 of the Dublin III Regulation and Article 29 of the Eurodac Regulation, and the obligation to conduct a personal interview, laid down in Article 5 of the Dublin III Regulation, apply not only in the context of the procedure for determining the Member State responsible that is followed in connection with a first application for international protection in a Member State, but also in the take back procedure. The latter is followed where an asylum seeker lodges an application for international protection, or is present, in another Member State and the second Member State plans to transfer him or her to the first Member State.

64. If the obligations concerned apply in the take back procedure too, the referring courts also wish to ascertain whether an action against a transfer decision can be based on a failure to fulfil those obligations, and what the consequences of such a failure to fulfil obligations are for the transfer decision.

65. Since Article 4 of the Dublin III Regulation (1), Article 29 of the Eurodac Regulation (2) and Article 5 of the Dublin III Regulation (3) each raise specific questions, it is appropriate to deal with them in turn.

#### *1. The obligation to provide information laid down in Article 4 of the Dublin III Regulation*

66. The question as to whether the obligations to provide information and issue the common leaflet, laid down in Article 4 of the Dublin III Regulation, apply in the take back procedure too, is raised as the second part of the second question in Case C-315/21. Implicitly, however, it also underlies the questions in Cases C-228/21 and C-328/21 for these concern what consequences a failure to fulfil the aforementioned obligations has for a transfer decision in the take back procedure, assuming that those obligations apply.

67. I shall begin by outlining the difference between the take charge and the take back procedures and the various scenarios in which the latter applies (a). Next, I shall explain why the obligation to provide information at issue applies in the take back procedure too (b). Finally, I shall turn to the question of whether a failure to fulfil that obligation can be challenged in the context of an action against a transfer decision and what the consequences of such a failure to fulfil obligations are (c).

##### *(a) Take charge and take back procedures in the Dublin system*

68. In accordance with Article 20(1) of the Dublin III Regulation, the process of determining the Member State responsible must start as soon as an application for international protection is first lodged with a Member State. If that Member State considers another Member State to be responsible, it can ask it to take charge of the applicant (Article 18(1)(a) in conjunction with Article 21(1) of the Dublin III Regulation).

69. The take back procedure laid down in Articles 23 and 24 of the Dublin III Regulation, on the other hand, is applicable to persons who, after having lodged a first application in one Member State, move to another Member State and, there, make another application or stay without a residence document. As a result, the latter Member State may ask the Member State to which they had previously applied to take them back.

70. In the take back procedure, a distinction must be drawn between two situations which are also addressed by the referring court in Case C-315/21. First, that procedure is applicable to the situation of persons who lodged an application in a first Member State and subsequently left that Member State before the procedure for determining the Member State responsible had even been concluded (Article 20(5) of the Dublin III Regulation). This scenario is not relevant to the main proceedings.

71. Second, the take back procedure is applicable to the situation of persons who, during the substantive examination of their application or following its rejection by the Member State responsible, move to another Member State and, there, lodge another application or stay without a residence document (Article 18(1)(b) to (d) of the Dublin III Regulation). (13) That situation describes the circumstances of the main proceedings in these cases.

***(b) Obligation to provide information, laid down in Article 4 of the Dublin III Regulation, in the take back procedure too***

72. Article 4(1) of the Dublin III Regulation provides that the authorities are to inform the applicant of the application of that regulation and its relevant features ‘as soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State’. That information is contained in a common leaflet drawn up by the Commission in Implementing Regulation No 118/2014, in accordance with Articles 4(2) and (3) of the Dublin III Regulation.

73. Hereafter, I shall look first at the wording and scheme of Article 4 of the Dublin III Regulation (1), next at the meaning and purpose of that article (2), and finally at the situation in which no new application is lodged in the second Member State (3).

*(1) Wording and scheme of Article 4 of the Dublin III Regulation*

74. In its wording, Article 4(1) of the Dublin III Regulation draws no distinction, so far as concerns the obligation to provide information, between a first and any further applications for international protection or between the take charge and take back procedures.

75. It is true that Article 20 of the Dublin III Regulation carries the heading ‘Start of the procedure’ and paragraph 1 thereof provides that the process of determining the Member State responsible is to start as soon as an application for international protection is *first* (14) lodged with a Member State. However, paragraph 2 of that provision then governs on a general basis when an application for international protection (defined in Article 2(b) of the Dublin III Regulation and Article 2(h) of the Qualification Directive) is deemed to have been lodged, and does not apply to the first application alone. This also follows from the second subparagraph of Article 23(2) of the Dublin III Regulation, which refers to Article 20(2). Article 23, however, applies only to cases of a further application for international protection, and thus specifically *not* to the first application.

76. Schematically, Article 4 of the Dublin III Regulation is located in Chapter II thereof, which carries the heading ‘General principles and safeguards’. The provisions of that chapter thus apply to the entire

scope of that regulation and not only to a specific type of procedure.

*(2) Meaning and purpose of Article 4 of the Dublin III Regulation*

77. As regards the rationale for the obligation to provide information, the Commission and Italy raise the objection that, according to recital 18 of the Dublin III Regulation, that obligation is intended to facilitate the determination of the Member State responsible for the substantive examination of an application for international protection. The take back procedure, however, is applicable mainly to situations in which the Member State responsible has already been determined. In the latter procedure, therefore, it is no longer necessary to provide all of the information concerning the determination of the Member State responsible. Rather, it must be sufficient to inform the persons concerned of those matters on which they can rely at this stage of the procedure too. The Commission and Italy base that submission in particular on the judgment of the Court of Justice in *H. and R.* ('the judgment in *H. and R.*'). (15)

78. The Commission and Italy are right to say that, in the situations covered by Article 18(1)(b) to (d) of the Dublin III Regulation (point 71 above), the procedure for determining the Member State responsible has already been concluded and that Member State has started or even already completed the substantive examination of the application. It was for this reason that the Court held in the judgment in *H. and R.* that, in such a case, there is no need to reapply the rules governing the procedure for determining responsibility. (16)

79. Likewise in the situation covered by Article 20(5) of the Dublin III Regulation (point 70 above), where the examination of responsibility is still under way in the requested Member State, the requesting Member State is in principle not obliged to examine whether the requested Member State is responsible. Rather, it has a duty only to examine whether the criteria laid down in Article 20(5) are fulfilled, that is to say whether a first application was lodged in the requested Member State and that Member State has started but not yet concluded the procedure for determining the Member State responsible. (17)

80. However, this does not mean that certain criteria for determining responsibility do not have to be taken into account in the take back procedure too. As I shall explain in greater detail below, the Court has already explicitly established this in relation to a number of criteria for determining responsibility, as the Commission and Italy themselves concede. What is more, the obligation to provide information laid down in Article 4 of the Dublin III Regulation covers not only the criteria for determining the Member State responsible but also general information on the way the Dublin system works. All of that information is contained in the common leaflet. Against that background, a selective obligation to provide information in the take back procedure, as proposed by the Commission and Italy, appears to be inconsistent with the objectives of the Dublin III Regulation (i) and difficult to implement in practice (ii).

*(i) Relevance of the information in the common leaflet to applicants in the take back procedure*

*– Criteria for determining responsibility which are to be taken into account in the take back procedure too*

81. In the take back procedure, the requesting Member State is no longer required to examine of its own motion the criteria for determining the Member State responsible which are set out in Chapter III of the Dublin III Regulation. (18) This does not mean, however, that it can close its eyes to considerations raised by an applicant which may preclude transfer to the requested Member State at this stage too. That is why it is necessary in the take back procedure too for the common leaflet to be used to inform applicants of the possibility of raising such considerations.

82. This is true in particular of the transfer of responsibility to the requesting Member State under Article 19, (19) Article 23(3) (20) and Article 29(2) (21) of the Dublin III Regulation, systemic flaws in the requested Member State (the second subparagraph of Article 3(2) (22)) or, in special cases concerning the applicants' state of health, the risk of inhuman treatment as a result of transfer to the requested Member State itself. (23) What is more, the Court has stated that, in cases where the applicant left the requested

Member State even before the procedure for determining the Member State responsible was concluded (Article 20(5), point 70 above), it can be argued in the take back procedure too that, on the basis of the criteria set out in Articles 8 to 10, the requesting Member State is in fact the Member State responsible. (24)

83. Furthermore, applicants in the take back procedure (in the situations covered by both Article 20(5) (point 70 above) and Article 18(1)(b) to (d) of the Dublin III Regulation (point 71 above)) can in particular produce evidence of the presence of family members, relatives or any other family relations in the territory of the requesting Member State which may lead to the application of the criteria referred to in Articles 8, 10 and 16 of the Dublin III Regulation. In accordance with Article 7(3), Member States must take such evidence into consideration, on condition that it is produced before another Member State accepts the request to take charge of *or take back* (25) the person concerned, pursuant to Articles 22 *and* 25 respectively, (26) and that the previous applications for international protection have not yet been the subject of a first decision regarding the substance.

84. Thus, according to its wording and its rationale, Article 7(3) of the Dublin III Regulation applies in the take procedure too. There is nothing to indicate that this was called into question by the Court in the judgment in *H. and R.,* since the Court did not consider that provision in that judgment.

85. The common leaflet too expressly states that applicants must inform the authorities whether they have family members in a Dublin country '**before a first decision is made on [their] asylum request**', (27) without restricting that possibility to the take charge procedure.

86. This is also logical.

87. It is true that the aim of the Dublin III Regulation is to ensure a prompt determination of the Member State responsible and thus a timely examination of asylum applications. (28) Where appropriate, therefore, asylum applications may be examined by a Member State other than the one responsible according to the criteria set out in Chapter III of that regulation. (29) This does not pose a problem given the presumption that asylum seekers will be treated in each Member State in accordance with the Charter, as well as with the Geneva Refugee Convention (30) and the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). (31) What is more, as a result of harmonisation under EU law, Member States examine asylum applications largely according to the same rules. (32) It follows that responsibility, once determined, is in principle not to be called into question thereafter.

88. However, in view of the importance of the right to the protection of family life, that principle must be derogated from where evidence is produced, in accordance with Article 7(3) of the Dublin III Regulation, which supports the conclusion that the applicant has family members in a Member State other than the Member State originally determined as being responsible.

89. That provision takes into account the protection of family life. According to the Commission's proposal for the Dublin III Regulation, that provision is intended to reinforce the right to family reunification and to prevent an applicant from being transferred to one Member State even though, for reasons of family unity, another Member State is responsible. (33) Recitals 14 to 16 of the Dublin III Regulation confirm the importance of respect for family life in the implementation of that regulation. Thus, the processing together of the applications for international protection of the members of one family by a single Member State is intended in particular to ensure that the decisions taken in respect of those applications are consistent and the members of one family are not separated.

90. Providing information to applicants in the take back procedure by issuing the common leaflet to them thus serves, inter alia, and in particular to protect their right to family life.

– *General information on the Dublin system*

91. What is more, not issuing the common leaflet in the take back procedure would be contrary to the objectives of the Dublin III Regulation. That regulation is, after all, informed by the desire to strengthen the rights of applicants, to involve them as much as possible in the procedure for determining the Member State responsible (34) and to explain to them how the Dublin system works in order to counter secondary movements. (35)

92. The obligation to provide information laid down in Article 4(1) of the Dublin III Regulation does not therefore relate only to the criteria for determining the Member State responsible (point b). Rather, it also encompasses the scheme of the Dublin system, in particular the consequences of making another application or moving to another Member State, the personal interview pursuant to Article 5 and the possibility of submitting information regarding the presence of family members, and the possibility of challenging a transfer decision (points a, c and d).

93. There is no question that it is appropriate for such general information on the Dublin system to be communicated to the persons concerned in the take back procedure too. Indeed, the common leaflet contains an express note for applicants in the take back procedure: '*If you have already applied for asylum in another Dublin country different from the one where you are now present, we will request that other country to " **take you back**"*'. (36) In addition, therefore, there is no fear that the re-issue of the common leaflet in the take back procedure might give applicants the false impression that the requesting Member State will in any event conduct of its own motion a new determination of the Member State responsible.

*(ii) Practicalities*

94. What is more, the provision of selective information to applicants, as the Commission and Italy propose, seems difficult to put into practice, given that there is only one common leaflet. It is also important to note that, in certain circumstances (in particular before a Eurodac search is conducted; see in this regard points 115 and 116 of this Opinion), it may not be immediately obvious to the authorities in the second Member State exactly what the applicant's circumstances are, or, therefore, what evidence he or she may yet adduce. The systematic communication of the common leaflet in the take back procedure, on the other hand, is a clear, simple and legally certain solution which ensures that every applicant in every case will receive – if necessary, twice – all of the information relevant to his or her particular situation.

95. It is, admittedly, safe to assume that an applicant who lodges an application for international protection in a second Member State will have been issued with the common information leaflet at the time of lodging his or her first application in the first Member State. It is not inconceivable, however, that this may occasionally have been forgotten, or that a reminder of that information may be useful. In any event, it will often be difficult for the authorities in the second Member State to check whether applicants have already received the leaflet.

96. Furthermore and finally, it is not the case that the obligation to issue (in some cases, for a second time) the common leaflet in the take back procedure imposes a disproportionate burden on the requesting Member State. After all, the requesting Member State has to make the common leaflet available in all language versions anyway, in order to be able to issue it to applicants who submit their first application for international protection to its authorities.

*(3) Obligation to provide information even if no new application has been lodged in the second Member State?*

97. For the sake of completeness, it must further be noted that the take back procedure covers not only situations in which an applicant who, after having lodged an application for international protection in a first Member State, lodges a similar application in another Member State. Rather, the take back procedure is also applicable in situations in which an applicant, after having lodged a first application in one Member State, moves to another Member State and stays there without a residence document and without lodging a further application (Article 24 in conjunction with Article 20(5) and Article 18(1)(b) to (d) of the Dublin III Regulation).

98. According to the information provided by the referring court, the foregoing describes, in the present instance, the situation in the main proceedings in Case C-328/21. GE, the person concerned in that case, submits conversely that he was classified as being illegally present (in Italian territory) only because the Italian authorities did not properly register his application for international protection. Whether this is the case is a matter for the referring court to assess, bearing in mind that the requirements governing the presence of an application for international protection must not be interpreted too strictly and formalistically. (37)

99. According to the wording of Article 4(1) of the Dublin III Regulation, the obligation to provide the information listed there exists only 'as soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State'. It cannot therefore be extended to cases in which an applicant, after lodging a first application in one Member State, moves to another Member State und simply stays there without a residence document, but does not lodge a further application.

100. In the light of the foregoing considerations, issuing the common leaflet, which explains how the Dublin system works, would indeed seem to be helpful in these cases too. It could in particular help the persons concerned to make known to the authorities whether they wish to lodge an application for international protection. However, issuing the common leaflet here too would simply be a good administrative practice which Member States are able to employ. Article 4 of the Dublin III Regulation imposes no formal obligation on them in this regard.

*(4) Interim conclusion*

101. It follows from all of the foregoing that Article 4 of the Dublin III Regulation must be interpreted as meaning that the obligation to provide the information listed there applies in the situations covered by both Article 20(1) and Article 18(1)(a), on the one hand, and Article 20(5) and Article 18(1)(b) to (d), on the other, of that regulation, as soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State.

***(c) Consequences of a failure to fulfil the obligation to provide information, laid down in Article 4 of the Dublin III Regulation, in the take back procedure***

102. By their questions in Cases C-228/21 and C-328/21 and the first and second questions in Case C-315/21, the referring courts wish to ascertain, first, whether failures to fulfil the obligation to provide information laid down in Article 4 of the Dublin III Regulation which are committed in the take back procedure can be relied on in an action against a transfer decision (a). Second, they ask whether such failures to fulfil obligations necessarily give rise in and of themselves to the annulment of that decision, or whether the competent judge must examine on a case-by-case basis whether they have affected the content of that decision (b).

*(1) Actionability of infringements of Article 4 of the Dublin III Regulation in the context of an action against a transfer decision adopted in the take back procedure*

103. The question as to whether infringements of Article 4 of the Dublin III Regulation can be relied on in the context of an action against a transfer decision must be answered in the affirmative. The Court, after all, has already held that an action brought against a transfer decision under Article 27(1) of the Dublin III Regulation must be capable of seeking a review of the application of that regulation, including respect for the procedural guarantees laid down in that regulation. (38)

104. Conversely, the view taken by the Commission, that failures to fulfil the obligation to provide information may be relied on only if they have affected the content of the transfer decision, cannot be endorsed. This, after all, would have the effect of confusing the examination of the admissibility of the action against the transfer decision with the examination of its merits.

*(2) Consequences of infringements of Article 4 of the Dublin III Regulation for the transfer decision*

105. Contrary to the view expressed by GE in Case C-328/21, the possibility of relying on infringements of Article 4 of the Dublin III Regulation does not necessarily mean, however, that the transfer decision must be annulled and that responsibility for examining the application passes to the requesting Member State. According to GE, this must be the case in the event of infringements of Article 4 too, just as it is in the event of infringements of the rules on time limits in take charge, take back and transfer procedures, laid down in the third subparagraph of Article 21(1), Article 23(3), Article 24(3) and Article 29(2) of the Dublin III Regulation.

106. However, such a legal consequence is specifically *not* provided for in relation to Article 4 of the Dublin III Regulation. On the contrary, that regulation does not provide for any legal consequences in this regard. In this case, the legal consequences are governed by national law, provided that the Member States observe the principles of equivalence and effectiveness. In particular, the detailed rules laid down by national law in this connection must not call into question the practical effectiveness of the Dublin III Regulation. (39)

107. The standard which EU law requires Member States to observe in this regard is set out in the case-law on infringements of the rights of the defence. Such an infringement, in particular of the right to be heard, results in annulment of the decision that is adopted at the end of the administrative procedure in question only if the outcome of that procedure might have been different had it not been for such an irregularity. (40)

108. As just stated, the purpose of the obligation to provide information laid down in Article 4 of the Dublin III Regulation is to explain to the persons concerned how the Dublin system works and what their rights are under that system. In the context of the take back procedure in particular, they should know, as a result of that obligation, inter alia that they can put forward certain arguments to oppose transfer to the Member State examining responsibility or the Member State responsible.

109. Nevertheless, a failure to provide that information to the persons concerned is not in itself such as to justify the assumption that the transfer decision is necessarily vitiated by a defect and must for that reason be annulled. As Germany argues, after all, such an omission can be made good later in the procedure, in particular during the personal interview (see also Article 4(2) of the Dublin III Regulation). This can be done by asking for the relevant information, in particular regarding the presence in the requesting Member State or in a third Member State of any family members, the existence of whom, if they exist, may lead to the application of Articles 8, 10 or 16 of the Dublin III Regulation, in the personal interview. That personal interview should also be an opportunity to ask questions about or to bring to light considerations indicative of the existence of a risk that Article 4 of the Charter will be infringed in the requested Member State or in the course of transport to it.

110. In order for the failure to issue the leaflet to lead to the annulment of the transfer decision, it would thus have to be proved that a consideration such as to preclude transfer to the requested Member State could not be raised in the personal interview because the person concerned did not receive the common leaflet and did not therefore know that the consideration in question was relevant. In addition, it would have to be impossible for the procedural defect to be remedied in the judicial procedure (see in this regard point 141 below).

111. As Germany argues, however, the burden of demonstrating the effects of a procedural failure of the competent authority in the requesting Member State cannot fall to the applicant alone. Rather, the court hearing the action against the transfer decision must examine whether, in the special factual and legal circumstances of the particular case, the outcome of the take back procedure in question might have been different had it not been for this failure, because the third-country nationals concerned could have defended themselves better and raised considerations which would have been such as to affect the content of the transfer decision. (41)

112. In Case C-328/21, the referring court, by its first question, asks in general terms about the legal consequences of an infringement of Article 4 of the Dublin III Regulation, without reference to the

bringing of a legal action. With or without a judicial review, however, a failure to issue the common leaflet cannot *ipso iure* render the transfer decision invalid. In accordance with Article 26(2), however, that decision must contain information on the legal remedies available. Paragraph 3 of that article provides that, where the person concerned is not assisted by a legal representative, the Member State must inform him or her, in a language he or she understands, not only of the legal remedies available but also of the main elements of the decision. That information can only be effective if the person concerned is also in possession by this stage (at the latest) of the information contained in the common leaflet.

*(3) Interim conclusion*

113. It follows from the foregoing that infringements of Article 4 of the Dublin III Regulation may be relied on in the context of an action against a transfer decision adopted in the take back procedure. However, they necessarily lead to the annulment of the transfer decision only if a failure to provide the information listed in that provision made it impossible to raise a consideration which would be such as to preclude transfer to the requested Member State, and if that defect cannot be remedied in the procedure for the judicial review of that decision that is provided for in Article 27.

***2. The obligation to provide information laid down in Article 29 of the Eurodac Regulation***

114. In Case C-328/21, the referring court asks about the consequences for the transfer decision of a failure to fulfil the obligation to issue the common leaflet that is laid down in Article 29 of the Eurodac Regulation.

115. In order to ensure that the Dublin system is implemented, the Eurodac Regulation governs the establishment of a database containing information, in particular fingerprint information, on persons applying for international protection or entering or staying in Member States illegally. That database enables Member States in particular to find out whether such a person has already lodged an application for international protection in another Member State. Article 29 provides that persons who are the subjects of such data processing must be informed of the purpose of, and arrangements for, processing their data and that a common leaflet is to be drawn up for this purpose too.

***(a) Obligation to provide information, laid down in Article 29 of the Eurodac Regulation, in the take back procedure too***

116. It is common ground that the obligation to issue the common leaflet that is laid down in Article 29 of the Eurodac Regulation applies in the take back procedure too. This is true both where a new application for international protection is lodged in the second Member State (Article 9), and where a person is illegally staying in a Member State (Article 17). In both cases, the fingerprint data of the persons concerned will be entered into the Eurodac system, thus rendering the obligation to provide information laid down in Article 29 applicable. The Eurodac system is specifically intended for cases in which a Member State transmits a person's fingerprint data to the Central System in order to find out whether that person has already lodged an application for international protection in another Member State. If this proves to be the case, the former Member State can then ask the latter Member State to take back the person concerned.

117. Accordingly, the common leaflet provided for in Article 29 of the Eurodac Regulation also contains the following notice: 'if you have previously applied for asylum in another country, you may be sent back to that country'. (42)

***(b) Actionability and consequences of a failure to fulfil the obligation to provide information, laid down in Article 29 of the Eurodac Regulation, in the take back procedure***

118. The obligation to provide information laid down in Article 29 of the Eurodac Regulation is intended to explain to the persons concerned the purpose for which, and the manner in which, data are processed under the Eurodac Regulation. The right to receive the common leaflet is thus a right relating to the

protection of data, not a procedural right in relation to the take back procedure under the Dublin III Regulation. It is intended to promote the exercise of rights in connection with the protection of data, not to help improve the result of the transfer procedure. By extension, therefore, an infringement of that right cannot affect the outcome of the transfer procedure.

119. Article 37 of the Eurodac Regulation provides that the persons concerned may seek compensation from the Member State responsible for any damage arising from acts which are incompatible with that regulation. Member States must provide for an effective remedy for that purpose. To that extent, it seems perfectly possible (but need not necessarily be the case) that an infringement of Article 29 of the Eurodac Regulation may be relied on (inter alia) in the context of an action against a transfer decision.

120. In accordance with the case-law set out in points 107 and 111 above, however, an infringement of that provision would necessarily result in the annulment of a transfer decision only if the outcome of the procedure might have been different had it not been for that irregularity and the defect cannot be remedied by way of a hearing in the judicial procedure. However, it seems unlikely that a failure to provide the information set out in Article 29 of the Eurodac Regulation would be such as to make it impossible to raise a consideration that would be relevant to the transfer decision.

### *(c) Interim conclusion*

121. It must therefore be concluded that Article 29, in conjunction with Articles 9(1) and 17(1), of the Eurodac Regulation is to be interpreted as meaning that the obligation to provide the information listed there applies in the situations covered by both Articles20(1) and Article 18(1)(a), on the one hand, and Article 20(5) and Article 18(1)(b) to (d), on the other, of the Dublin III Regulation. Infringements of Article 29 of the Eurodac Regulation may be relied on in the context of an action against a transfer decision adopted under Article 26 of the Dublin III Regulation. However, they necessarily lead to the annulment of the transfer decision only if a failure to provide the information concerned made it impossible to raise a consideration which would be such as to preclude transfer to the requested Member State, and if that defect cannot be remedied in the judicial procedure.

### *3. The personal interview provided for in Article 5 of the Dublin III Regulation*

122. In Case C-315/21, the referring court asks whether the obligation to conduct a personal interview with the applicant, laid down in Article 5 of the Dublin III Regulation, applies in the take back procedure too, and, if so, what consequences any failure to discharge that obligation has for the transfer decision. In that case, however, that question is not relevant to the judgment to be given, since, according to the information provided by the referring court, a personal interview was conducted with the applicant.

123. In Case C-328/21, the referring court mentions Article 5 of the Dublin III Regulation in its order for reference but not in the questions it refers for a preliminary ruling. GE, the party in the main proceedings in the case, argues that he was wrongly not classified as an applicant (see in this regard point 98 above). It is a matter for the referring court to dispose of that question. At the hearing, GE submitted that the Italian authorities had not conducted a personal interview with him either.

124. As I shall explain shortly, it is my view that a personal interview must be conducted in the take back procedure whether or not a new application was made in the requesting Member State. The question as to the consequences of a failure to fulfil that obligation is therefore, to my mind, relevant in any event to the judgment to be given in Case C-328/21.

125. What is more, the question as to whether a personal interview must be conducted in the take back procedure, and, if so, what the consequences are for the transfer decision if it is not conducted, is raised in the currently pending Case C-80/22, which is not the subject of the present proceedings. (43)

126. In the other three cases forming the subject of these proceedings (C-228/21, C-254/21 and C-297/21), on the other hand, either the personal interview was conducted (Case C-228/21) or the referring courts

provide no further information in this regard.

127. I shall begin by discussing why the obligation to conduct a personal interview laid down in Article 5 of the Dublin III Regulation applies in the take back procedure too (a), before turning to the consequences of failures to fulfil that obligation (b).

***(a) Obligation to conduct a personal interview, laid down in Article 5 of the Dublin III Regulation, in the take back procedure too***

128. In keeping with their position in relation to the obligation to provide information, laid down in Article 4 of the Dublin III Regulation, the Commission and Italy also deny the existence of any obligation to conduct a personal interview, laid down in Article 5, in the take back procedure. That interview, they contend, is intended to facilitate the determination of the Member State responsible, which is a task that no longer needs to be carried out at this stage.

129. The Commission and Italy are right to say that recital 18 and Article 5(1) of the Dublin III Regulation provide for a personal interview with the applicant in connection with the determination of the Member State responsible. As explained in points 78, 79 and 81 above, in the take back procedure, the requesting Member State no longer has to make such a determination of its own motion.

130. As submitted in points 81 to 90, however, the foregoing does not support the conclusion that the personal interview must be dispensed with in the take back procedure. As I explained in those points, in the take back procedure too, an applicant can raise considerations which call into question the responsibility of the requested Member State and are such as to preclude the adoption of a transfer decision.

131. What is more, it is settled case-law that the rights of the defence, which include the right be heard, are among the fundamental principles of EU law. For that reason, observance of those rights is required even where the applicable legislation does not expressly provide for such procedural rights. (44)

132. It is true that, in principle, a personal hearing does not always imply a personal interview, but can in some circumstances take place in writing instead. In the case of third-country nationals or stateless persons involved in a Dublin procedure, however, it is necessary for the hearing to take place in a personal interview. This, after all, is the only way of ensuring that such persons understand the Dublin system and raise any considerations which are relevant to the determination of the Member State responsible.

133. This is also confirmed by the case-law on similar situations arising under the Asylum Procedures Directive. In its judgment in *Addis*, the Court held that the personal interview with the applicant for which that directive provides cannot be dispensed with in any circumstances. That is because, in this context, a personal oral hearing is of paramount importance. If the interview is not conducted (by the administrative authority) and cannot be held in the judicial procedure either, the decision concerned must be annulled and the case remitted to the relevant authority. (45) This is particularly true in the case where an application is rejected as inadmissible because another Member State has already granted international protection (Article 33(2)(a) of that directive). (46)

134. It is true that the Asylum Procedures Directive governs the procedure for the material examination of asylum applications, while the Dublin III Regulation concerns only the procedure for determining the Member State responsible for that examination. Nevertheless, the situation covered by Article 33(2)(a) of that directive (rejection of an application as inadmissible because another Member State has already granted protection) is comparable to the situation in the take back procedure under the Dublin III Regulation. When applying Article 33(2)(a) of the Asylum Procedures Directive, the Member Sate wishing to regard the application as inadmissible must ensure by means of the personal interview that, if the applicant were to be transferred to the Member State which has granted him or her protection, there would be no risk of Article 4 of the Charter being infringed. (47)

135. In the take back procedure under the Dublin III Regulation, the personal interview likewise serves in particular to determine whether the requesting Member State must refrain from transferring the applicant to the requested Member State. This may be the case, inter alia, on account of the risk of Article 4 of the Charter being infringed in the requested Member State or on account of indications as to the presence of family members, relatives or any other family relations of the applicant in the territory of the requesting Member State (see points 82 to 85 above). The cases, referred to in Article 33(2) of the Asylum Procedures Directive, in which Member States do not have to examine the substance of applications for international protection are, according to paragraph 1 of that provision, additional to the cases in which an application is not examined in accordance with the Dublin III Regulation. What is more, both texts were adopted on the same day as part of the general revision of the Common European Asylum System.

136. It follows that, in the take back procedure under the Dublin III Regulation too, the requesting Member State must give the person concerned the opportunity to express his or her views in a personal interview before a transfer decision is adopted. This is the case whether or not that person has lodged another application for international protection. As GE submits, this is important in particular in order to ensure that a third-country national or a stateless person is not classified as being illegally present notwithstanding that he or she was actually intending to lodge an application for international protection.

137. However, as Germany submits, Article 5(2) of the Dublin III Regulation provides that the personal interview may be omitted in certain circumstances. It may be dispensed with if the applicant has absconded (a) or if he or she has already provided the information relevant to determining the Member State responsible (b). In the latter case, the Member State must simply give the applicant the opportunity to present all further relevant information before a transfer decision is taken.

138. In the light of the importance, as emphasised above, of the personal interview in the Dublin procedure, that provision must be interpreted as meaning that there must be a genuine opportunity to present all further relevant information. In the light of this and all of the other circumstances, it is important to examine on a case-by-case basis whether the omission of the personal interview is justifiable.

***(b) Consequences of a failure to fulfil the obligation to conduct a personal interview, laid down in Article 5 of the Dublin III Regulation, in the take back procedure***

*(1) Actionability of infringements of Article 5 of the Dublin III Regulation in the context of an action against a transfer decision adopted in a take back procedure*

139. If one agrees with the view that the obligation to conduct a personal interview laid down in Article 5 of the Dublin III Regulation applies in the take back procedure too, it follows from the case-law cited in point 103 that a failure to fulfil that obligation can be relied on in the context of an action against a transfer decision.

*(2) Consequences of infringements of Article 5 of the Dublin III Regulation for a transfer decision*

140. As I explained in point 107, it is settled case-law that an infringement of the rights of the defence, in particular of the right to be heard, leads to the annulment of the decision adopted at the end of the administrative procedure only if the outcome of that procedure might have been different had it not been for such an irregularity.

141. However, the Court made it clear in its judgment in *Addis*, already discussed in points 133 to 135, that that case-law is not transposable to the case of the rights to be heard under the Asylum Procedures Directive. (48) It is true that, even in this case, a failure to conduct a hearing in the administrative procedure does not necessarily lead to the annulment of the decision and the remission of the case to the competent authority. However, the failure to conduct a hearing can be compensated for only if a hearing affording all of the required procedural guarantees can be held in the judicial procedure instead and it so transpires that, notwithstanding the arguments put forward during that hearing, no other decision can be

taken in the matter. If, on the other hand, there can be no guarantee of such a hearing in the judicial procedure, the decision must be annulled and the case remitted to the competent authority. (49)

142. As explained in points 134 and 135, the situation at issue in the judgment in *Addis* is comparable to that at issue here. It follows that, in the context of the take back procedure under the Dublin III Regulation too, a failure to fulfil the obligation to conduct a personal interview cannot be a procedural infringement that produces effects only if the decision taken might have been different had it not been for that infringement. Rather, such an infringement is without impact on the validity of the transfer decision only if the interview can be conducted in the judicial procedure instead. This then raises the question as to what consequences arise if new relevant considerations are raised (i). If, on the other hand, no legal action is taken against the transfer decision, the latter may become final even in the absence of a personal interview, provided that the person concerned was duly provided with information on the legal remedies available (ii).

*(i) Possibility of remedying a procedural defect in the judicial procedure and the consequences of new relevant considerations being raised*

143. It follows from the foregoing that, in a case in which there is no justification under Article 5(2) of the Dublin III Regulation for dispensing with the personal interview (see points 137 and 138 above), the procedural defect consisting in the failure to conduct such an interview in the take back procedure can be remedied only if that interview is held in the judicial proceedings instituted in order to challenge the transfer decision. If this can be guaranteed under the relevant national law (which, according to GE in the present case, is doubtful in Italian law), the transfer decision can be confirmed if it transpires that, notwithstanding the arguments put forward in that interview, no other decision can be taken in the matter. Otherwise, the transfer decision must be annulled.

144. As regards considerations relating to family life, it should be noted in this regard that Article 7(3) of the Dublin III Regulation does indeed provide that evidence regarding the presence, on the territory of a Member State, of family members or other relatives of the applicant is to be taken into consideration, 'on condition that [it] is produced before another Member State accepts the request to take charge [of] or take back the person concerned … , and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance'. In accordance with Article 26(1), however, the transfer decision can be taken only after the requested State has agreed to take charge of or take back the person concerned, and the judicial review of that decision therefore necessarily takes place after such consent has been given. (50)

145. In the light of the importance of the protection of family life which Article 7(3) serves to ensure (see points 88 and 89 above), it must be assumed that evidence of the presence of family members of the applicant in the territory of a Member State must also be taken into consideration in the event that it is adduced in the course of the judicial review of a transfer decision and the fact of its having been adduced belatedly is attributable to the requesting Member State. After all, the fact that the requested Member State agrees to take charge of or take back the person concerned does not prevent an applicant from pleading, in an action against the transfer decision, the incorrect application of a criterion for determining responsibility set out in Chapter III of the Dublin III Regulation.(51) By the same token, it must be possible, in this or any other legal action, to rely on circumstances which arose after the transfer decision was adopted. (52)

146. Should it transpire, on the basis of considerations which come to light during the personal interview conducted with the person concerned in the course of the judicial procedure, that the transfer decision must be annulled, two scenarios in particular appear to be conceivable: either the applicant remains in the requesting Member State if the latter proves to be responsible; or a third Member State is responsible, for example because the applicant has family members there. In the latter situation, the question would be whether the time limits laid down in Articles 21, 23 or 24 for asking that Member State to take charge of or take back the applicant could be reopened.

147. Those time limits serve to ensure that asylum applications are processed swiftly. That objective is the reason why such applications are in some cases examined by a Member State other than that which is determined as being responsible in accordance with the criteria set out in Chapter III of the Dublin III Regulation. (53) For that reason, once the time limits for doing so have expired, a request to take back the person concerned can, in principle, no longer be validly made, and responsibility passes to the Member State with which a new application for international protection was lodged. (54)

148. It must, however, be possible to make an exception to that principle where the responsibility of the third Member State is based on the applicant's having family members in the territory of that Member State. As explained in points 88 and 89, the possibility of raising considerations relating to the presence of family members even at a late stage serves to protect the family life of applicants. It is intended to ensure that their applications are not examined in a Member State other than that in which the family members are present. This must also be true in the case where the reason that the relevant considerations are raised late is attributable to the requesting Member State's having failed to give an applicant a hearing in time. (55)

*(ii) Finality of a transfer decision which goes unchallenged*

149. If no legal action is brought against the transfer decision, a failure to fulfil the obligation to conduct a personal interview, like an infringement of the obligation to provide information (point 112 above), cannot *ipso iure* render the transfer decision invalid. It is true that a failure to fulfil the obligation to conduct a personal interview is a serious procedural infringement. However, if the person concerned, notwithstanding that information on the legal remedies available has been duly provided in such a way as to meet the requirements applicable to such information, and in particular to ensure that that person understands the Dublin system (point 112 above), does not bring a legal action, the finality of the transfer decision would seem to be justified. This is true in particular in so far as the second subparagraph of Article 26(2) lays down an obligation to ensure that information on persons or entities that may provide legal assistance to the person concerned is communicated to the person concerned together with the transfer decision, when that information has not already been communicated.

### *(c) Interim conclusion*

150. It follows from the foregoing that Article 5 of the Dublin III Regulation, in conjunction with the EU-law principle of observance of the rights of the defence, must be interpreted as meaning that the personal interview provided for there is to be conducted in the situations covered by both Article 20(1) and Article 18(1)(a), on the one hand, and Article 20(5) and Article 18(1)(b) to (d), on the other, of that regulation. This is true whether or not an application for international protection was lodged in the requesting Member State. Infringements of Article 5 may be relied on in the context of an action against a transfer decision adopted under Article 26. Such infringements necessarily lead to the annulment of the transfer decision unless the personal interview can instead be held, in a manner affording the required procedural guarantees, in the procedure for the judicial review of that decision that is provided for in Article 27, and it so transpires that, notwithstanding the arguments put forward in that interview, no other decision can be taken in the matter. If no action is brought against the transfer decision, however, the latter may become final even in the absence of a personal interview, provided that information on the remedies available was duly provided.

## *B. Indirect refoulement*

151. By their questions in Cases C-254/21, C-297/21 and the third question in Case C-315/21, the referring courts wish to ascertain whether, in the context of reviewing a transfer decision adopted in the take back procedure, they are required to examine the risk that the requested Member State may infringe the principle of *non-refoulement* (that is to say, the risk of 'indirect *refoulement*'). In the main proceedings giving rise to these cases, the applications for international protection lodged by the persons concerned had already been examined and rejected as to their substance by the Member State requested in each case (Sweden and Germany). The referring courts therefore ask whether they may or must examine whether the

persons concerned are at risk in the requested Member States of *refoulement* to their countries of origin, where they would again be in danger of their lives and at risk of inhuman treatment.

152. The various questions raised by the referring courts in this regard can be summarised as follows: must Articles 3(1) and (2), 17(1) and Article 27 of the Dublin III Regulation, in conjunction with Articles 4, 19 and 47 of the Charter, be interpreted as meaning that:

– a court in the requesting Member State, when reviewing a transfer decision adopted in the take back procedure, may or must review the risk that the requested Member State may infringe the principle of non-*refoulement*, even if it exhibits no systemic flaws within the meaning of Article 3(2) of the Dublin III Regulation; (56)

– the relevant court in the requesting Member State may or must establish the responsibility of that Member State if it is of the view that there is a risk that the principle of *non-refoulement* may be infringed in the requested Member State; (57)

– the relevant court in the requesting Member State must find that there is a risk of indirect *refoulement* to a third country if its assessment of the term 'internal protection' within the meaning of Article 8 of the Qualification Directive is different from that of the requested Member State; (58)

– 'systemic flaws in the asylum procedure' within the meaning of Article 3(2) of the Dublin III Regulation also include the consequences of rejection of the application for international protection by the requested Member State, where the competent court in the requesting Member State finds that there is a risk in the case in question that the applicant may suffer inhuman and degrading treatment if repatriated to his or her country of origin, in the light of, inter alia, the presumed existence of an armed conflict within the meaning of Article 15(c) of the Qualification Directive. (59)

153. In addition, the court in Case C-254/21 asks what criteria it must apply, where appropriate, in order to assess the risk of *refoulement* by the requested Member State after the latter has already ruled out that risk. (60)

### *1. The presumption of respect of fundamental rights by all Member States and the conditions for its rebuttal*

154. In accordance with Article 3(1) of the Dublin III Regulation, an application for international protection which a third-country national or a stateless person lodged in the territory of a Member State must be examined by a single Member State, which is to be the one which the criteria set out in Chapter III indicate is responsible. As Germany submits, it is, after all, the principle of the Dublin system that, within the European Union, there should be only one Member State that deals with the examination of an application for international protection. This is intended in particular to rationalise and accelerate the asylum procedure and to avoid secondary movements.

155. That system is based on the principle of mutual trust. This requires each Member State to assume, in all but exceptional circumstances, that all the other Member States observe EU law, in particular the fundamental rights recognised there. Accordingly, in the context of the Common European Asylum System, in particular the Dublin III Regulation, it must be presumed that the treatment of applicants in all Member States complies with the requirements of the Charter, the Geneva Refugee Convention and the ECHR. (61) Recital 3 of the Dublin III Regulation thus states that the Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third-country nationals.

156. In the context of the Dublin system, EU law therefore requires Member States, in principle, to presume that fundamental rights are observed by the other Member States. Consequently, not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional circumstances, they may not check whether

that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union. (62)

157. That presumption as to the observance of fundamental rights by the other Member States is not irrefutable. As the Court has held, it is not inconceivable that the asylum system may, in practice, experience major operational problems in a given Member State, meaning that there is a risk that fundamental rights may be infringed when an applicant is transferred to that Member State. (63) Article 3(2) of the Dublin III Regulation, which codifies that case-law, therefore provides that an applicant is not to be transferred to a Member State if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter. (64)

158. That provision was later supplemented by the Court when it held that, where a court or tribunal hearing an action challenging a transfer decision has available to it evidence provided by the person concerned for the purposes of establishing the existence of a risk of infringement of Article 4 of the Charter, that court or tribunal is obliged to assess whether, at the time of the transfer, during the asylum procedure or following it, that person might be exposed, on account of deficiencies, which may be systemic or generalised, or which may affect certain groups of people, to a serious risk of suffering inhuman or degrading treatment in the Member State responsible. (65)

159. In accordance with the prohibition laid down in Article 4 of the Charter, it is therefore incumbent upon the Member States not to carry out any transfer within the framework of the Dublin system to a Member State in the case where they cannot be unaware that such flaws exist in that Member State. Rather, the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which preclude that transfer from resulting in a real risk of the person concerned suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter. (66)

160. However, as that breach of mutual trust is an exception, it is justified only in cases where there is evidence that the deficiencies that exist in the requested Member State attain a particularly high level of severity. (67) Above all, such deficiencies must be of a general, systemic nature. They must relate not to the handling of individual cases by the administration but to general, systemic shortcomings. Conversely, not every infringement of a fundamental right by the Member State responsible in an individual case will affect the obligations of the other Member States to comply with the provisions of the Dublin III Regulation. (68)

161. First, it would not be compatible with the aims and modus operandi of the Dublin system were any infringement of the relevant provisions – in particular the Qualification Directive – to prevent the transfer of an asylum seeker to the Member State responsible. It is not only that this would divest of their substance the obligations laid down in the Dublin III Regulation for the purposes of determining the Member State responsible, thus bringing the entire Dublin system to a standstill. More than that, at issue, in the words of the Court, are ‘the raison d’être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights’. (69)

162. Second and most importantly, however, if there are no systemic deficiencies in the requested Member State, any (alleged) misapplication of the relevant asylum provisions must not, by extension, necessarily cause the transfer of an applicant to the requested Member State to be suspended. In the absence of any systemic deficiencies, in particular in the justice system, it must be assumed that any decision in the requested Member State to deny international protection will be amenable to a judicial review upholding the fundamental rights of the person concerned. In the case of decisions adopted under Article 18(1)(d), such as those at issue here, the third subparagraph of Article 18(2) of the Dublin III Regulation makes explicit provision to that effect.

163. What is more, as France submits, the court of a requesting Member State could not yet definitively examine the risk that the requested Member State may infringe the principle of *non-refoulement* simply by rejecting the application for international protection. It is, after all, not yet certain that that rejection will result in the applicant's being sent back to his country of origin. (70) Rather, the requested Member State must first adopt a return decision under Article 6 of the Returns Directive. (71) That decision must, in turn, be open to an effective remedy as provided for in Article 13 of that directive. Such a remedy must have suspensive effect if there are substantial grounds for believing that, should the person concerned be deported, there would be a real risk that he or she may be treated in a manner contrary to Article 4 of the Charter. (72) The referring court in Case C-297/21 states, however, that a final return decision has already been adopted in respect of the applicant in the requested Member State.

164. As regards the application of substantive asylum law and the asylum procedure, the Dublin system operates, as already explained in point 87, on the basis that the relevant provisions have been largely harmonised at EU level, in particular by the Qualification Directive and the Asylum Procedures Directive. It must therefore be assumed in principle that an application lodged by an asylum seeker will be examined in accordance with the same provisions no matter which Member State is responsible for examining it. (73) Nevertheless, differences of opinion in individual cases are unavoidable, it being only natural that applying the law to individual cases will not always lead clearly and unambiguously to the same result.

165. Furthermore, the fact that the asylum rules have been harmonised under EU law does not mean that the Member States do not enjoy some discretion in certain respects. Thus, in particular, as France notes, Article 8 of the Qualification Directive, cited by the referring court in Case C-254/21, provides that Member States *may* determine that an applicant is not in need of international protection if, in a part of the country of origin accessible by him or her, he or she is able to find protection against persecution. Conversely, in accordance with recital 14 and Article 3 of the Qualification Directive, Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with that directive.

166. Against the background of the mutual trust shared by the Member States, differences of opinion between the authorities and courts of the requesting and requested Member States as regards the interpretation of the material conditions for international protection cannot therefore, in the case where the requested Member State exhibits no systemic deficiencies, be classified as systemic flaws. Neither are they such as to cause responsibility for the material examination of an application for international protection to pass to the requesting Member State.

167. In so far as such differences of opinion concern the interpretation of provisions of EU law, it is for the courts of the Member State responsible under the Dublin III Regulation to make a reference to the Court of Justice under Article 267 TFEU. Any Member State which is of the view that another Member State is applying that regulation incorrectly and does not refer questions to the Court of Justice, contrary to the third paragraph of Article 267 TFEU, is at liberty to institute proceedings for failure to fulfil obligations under Article 259 TFEU. However, it is not the task of the courts of a Member State not responsible to take over that role and make an (allegedly) necessary correction to the interpretation of a provision adopted by the Member State responsible.

168. It follows from all of the foregoing that the courts of the requesting Member State, when reviewing a transfer decision under Article 27 of the Dublin III Regulation, may not, in the absence of systemic deficiencies, in particular of the justice system, in the requested Member State, examine whether there is a risk that the principle of *non-refoulement* may be infringed in that Member State. This, after all, would amount to an examination of the application for international protection, which is specifically *not* provided for as part of the judicial review of a transfer decision under Article 27 of the Dublin III Regulation.

169. The judgment in *C.K. and Others,* (74) discussed by several of the parties to the present proceedings, does not preclude that finding. It is true that, in that judgment, the Court held that the transfer of an asylum seeker may be impermissible even in the case where there are no systemic flaws in the requested Member

State. However, that judgment concerned a situation in which, because of the state of health of the person concerned, transfer to the requested Member State could in itself – and thus irrespective of the circumstances in that Member State – potentially constitute treatment incompatible with Article 4 of the Charter. Accordingly, the Court made it clear that, in such a case, the principle of mutual trust remains fully respected even if the transfer is not carried out. In this instance, the existence of a presumption that fundamental rights are observed in all the Member States is not affected by the decision not to carry out the transfer. (75)

170. That, however, is – subject to an examination by the referring courts – precisely *not* the situation in the present cases. A decision not to carry out the transfer because of doubts as to the lawfulness of the transfer decision which are not warranted by systemic deficiencies in the requested Member States would therefore undermine the principle of mutual trust.

171. In the present cases, therefore, the courts of the requesting Member States, in accordance with the case-law cited in point 156, have an obligation under EU law to assume that the requested Member States observe fundamental rights. For that reason, they may not examine whether those other Member States have actually observed the fundamental rights granted by the European Union.

### *2. Discretionary clause in Article 17(1) of the Dublin III Regulation*

172. As explained above, Article 3(1) of the Dublin III Regulation provides that an application for international protection must be examined by a single Member State, which must be the one which the criteria set out in Chapter III of that regulation indicate is responsible. By way of derogation therefrom, Article 17(1) of that regulation provides that 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 those criteria.

173. Further to their questions on Article 3(2) of the Dublin III Regulation, the referring courts in Cases C-254/21 and C-297/21 wish to know whether the requesting Member State has an obligation to apply the discretionary clause contained in Article 17(1) where there is a risk that the principle of *non-refoulement* may be infringed in the requested Member State. In addition, they ask whether, in that event, they may compel the authorities in the requesting Member State to apply that clause.

174. As just explained, in the case where there are no systemic deficiencies in the requested Member State, neither the authorities nor the courts in the requesting Member State may examine the risk that the requested Member State may infringe the principle of *non-refoulement*. It follows that, in such a case, a court in the requesting Member State cannot compel the authorities in that Member State to apply the discretionary clause in Article 17(1) of the Dublin III Regulation.

175. It is therefore only in the interests of providing further information that I note that the Court has already held that the application of that clause is an option available to the Member States and is not subject to any particular condition. (76) The purpose of that power is, rather, to preserve the prerogatives enjoyed by the Member States in the exercise of the right to grant international protection. It is intended to allow each Member State to agree, in the light of political, humanitarian or practical considerations, to examine an application for international protection, granting to the Member States a broad margin of discretion in this regard. (77) It is for this reason that Member States are never compelled to apply that clause under EU law, not even in the light of humanitarian considerations such as an applicant's state of health or a child's best interests. (78)

176. The justification for this is the fact, as explained above, that the Dublin system is founded on the premiss that the Member States all observe fundamental rights. It must therefore be assumed that the Member States all take adequate account of humanitarian considerations. As stated, that trust can be shaken only in the presence of systemic deficiencies casting doubt in that particular regard. In that event, however, the requesting Member State assumes responsibility pursuant to Article 3(2) of the Dublin III Regulation, making it unnecessary to have recourse to Article 17(1).

177. It is true that the Court has held that a Member State's refusal to apply Article 17(1) of the Dublin III Regulation may, should the case arise, be challenged at the time of an appeal against the transfer decision. (79) In view of the broad discretion which Member States enjoy in the application of that provision, however, EU law requires only a judicial review confined to manifest errors of discretion. Even then, such manifest errors of assessment can be found to be present only in the case where the requesting Member State has not declared its responsibility for examining an application for international protection, notwithstanding that there are systemic deficiencies in the requested Member State and the conditions for the application of Article 3(2) of that regulation are therefore met.

178. The foregoing notwithstanding, the national courts retain the option to oblige Member States to grant national protection, on the basis of the existence of more favourable provisions under national law, on condition that that option is available under national law and is compatible with the provisions of the Qualification Directive. (80)

### *3. Interim conclusion*

179. It follows from the foregoing considerations that Articles 3(1) and (2), 17(1) and Article 27 of the Dublin III Regulation, in conjunction with Articles 4, 19 and 47 of the Charter, must be interpreted as meaning that a court in the requesting Member State hearing an action against a transfer decision may not examine the risk that the requested Member State may infringe the principle of *non-refoulement* if the latter Member State exhibits no systemic deficiencies warranting doubts as to the effectiveness of the judicial review of the measures making it possible to deport unsuccessful asylum seekers. Differences of opinion between the authorities and courts in the requesting and requested Member States as regards the interpretation of the material conditions for international protection are not systemic deficiencies.

180. In the light of the above finding, there is no need to answer Question 4(b) in Case C-254/21, referred to in point 153.

## VI. Conclusion

181. In the light of all the foregoing, I propose that the Court's answers to the questions referred should be as follows:

(1) Article 4 of the Dublin III Regulation must be interpreted as meaning that the obligation to provide the information listed there applies in the situations covered by both Article 20(1) and Article 18(1)(a), on the one hand, and Article 20(5) and Article 18(1)(b) to (d), on the other, of that regulation, as soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State. Infringements of Article 4 of the Dublin III Regulation may be relied on in the context of an action against a transfer decision adopted in the take back procedure. However, they necessarily lead to the annulment of the transfer decision only if a failure to provide the information listed in that provision made it impossible to raise a consideration which would be such as to preclude transfer to the requested Member State, and if that defect cannot be remedied in the procedure for the judicial review of that decision that is provided for in Article 27.

(2) Article 29, in conjunction with Articles 9(1) and Article 17(1), of the Eurodac Regulation must be interpreted as meaning that the obligation to provide the information listed there applies in the situations covered by both Article 20(1) and Article 18(1)(a), on the one hand, and Article 20(5) and Article 18(1)(b) to (d), on the other, of the Dublin III Regulation. Infringements of Article 29 of the Eurodac Regulation may be relied on in the context of an action against a transfer decision adopted under Article 26 of the Dublin III Regulation. However, they necessarily lead to the annulment of the transfer decision only if a failure to provide the information concerned made it impossible to raise a consideration which would be such as to preclude transfer to the requested Member State, and if that defect cannot be remedied in the judicial procedure.

(3) Article 5 of the Dublin III Regulation, in conjunction with the EU-law principle of observance of the rights of the defence, must be interpreted as meaning that the personal interview provided for there is to be conducted in the situations covered by both Article 20(1) and Article 18(1)(a), on the one hand, and Article 20(5) and Article 18(1)(b) to (d), on the other, of that regulation. This is true whether or not an application for international protection was lodged in the requesting Member State. Infringements of Article 5 may be relied on in the context of an action against a transfer decision adopted under Article 26. Such infringements necessarily lead to the annulment of the transfer decision unless the personal interview can instead be held, in a manner affording the required procedural guarantees, in the procedure for the judicial review of that decision that is provided for in Article 27, and it so transpires that, notwithstanding the arguments put forward in that interview, no other decision can be taken in the matter. If no action is brought against the transfer decision, however, the latter may become final even in the absence of a personal interview, provided that information on the remedies available was duly provided.

(4) Articles 3(1) and (2), 17(1) and Article 27 of the Dublin III Regulation, in conjunction with Articles 4, 19 and 47 of the Charter, must be interpreted as meaning that a court in the requesting Member State hearing an action against a transfer decision may not examine the risk that the requested Member State may infringe the principle of *non-refoulement* if the latter Member State exhibits no systemic deficiencies warranting doubts as to the effectiveness of the judicial review of the measures making it possible to deport unsuccessful asylum seekers. Differences of opinion between the authorities and courts in the requesting and requested Member States as regards the interpretation of the material conditions for international protection are not systemic deficiencies.

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1 Original language: German.

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2 Regulation of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 180, p. 31).

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3 See, to this effect, judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 51).

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4 Cases C-228/21, C-315/21 and C-328/21. Similar questions also arise in the currently pending Cases C-80/22 and C-217/22, which are not the subject of the present proceedings.

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5 Cases C-254/21, C-297/21 and C-315/21.

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6 See point 1 and footnote 2.

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7 Regulation of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, p. 1).

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8 OJ 2011 L 337, p. 9.

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9 OJ 2013 L 180, p. 60.

10 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).

11 Commission Implementing Regulation of 30 January 2014 amending Regulation (EC) No 1560/2003 (OJ 2014 L 39, p. 1).

12 'The information provided is that foreseen under Part B of Annex X'.

13 On the difference between the two scenarios referred to in points 70 and 71, see also judgment in *H. and R.*, (footnote 15 below), paragraphs 46 to 52, and judgment of 12 January 2023, *Staatssecretaris van Justitie en Veiligheid (Time limit for transfer – Multiple applications)* (C-323/21 to C-325/21, EU:C:2023:4, paragraphs 47 to 50).

14 My emphasis.

15 Judgment of 2 April 2019, *H. and R.* (C-582/17 and C-583/17, EU:C:2019:280).

16 Judgment in *H. and R.*, paragraphs 51, 52, 65 to 67 and 80.

17 Judgment in *H. and R.*, paragraphs 61 to 63 and 80.

18 Judgment in *H. and R.*, paragraphs 54 to 80.

19 Judgment of 7 June 2016, *Karim* (C-155/15, EU:C:2016:410, paragraph 27).

20 See, by analogy with Article 21(1) of the Dublin III Regulation, judgment of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587, paragraph 55).

21 Judgment of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805, paragraph 46).

22 Judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraphs 87 to 89 and 98).

23 Judgment of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraphs 65, 66, 73, 74 and 96).

24 Judgment in *H. and R.*, paragraphs 81 to 84.

25 My emphasis.

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26 Idem.

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27 Emphasis in original. See point 38 of this Opinion.

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28 See recitals 4 and 5 of the Dublin III Regulation and judgments of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 57), and of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 58).

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29 See judgments of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805, paragraph 31); of 13 November 2018, *X and X* (C-47/17 and C-48/17, EU:C:2018:900, paragraphs 69 and 70); and of 12 January 2023, *Staatssecretaris van Justitie en Veiligheid* (Time limit for transfer – Multiple applications) (C-323/21 to C-325/21, EU:C:2023:4, paragraph 55).

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30 Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, *United Nations Treaty Series*, volume 189, p. 137, No. 2545 (1954).

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31 See judgments of 21 December 2011, *NS* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80), and of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 82). See also in this regard point 155 et seq. of this Opinion.

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32 Judgment of 10 December 2013, *Abdullahi* (C-394/12, EU:C:2013:813, paragraphs 54 and 55).

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33 See the Commission 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/2008/0820 final, pp. 9 and 12 et seq.: ‘Exclude the possibility of sending back an applicant for whom one of the family unity criteria can be applied at the time of the most recent application, on condition that the Member State where the first application was lodged has not already taken a first decision regarding the substance. The aim is to ensure in particular that possible new elements regarding the family situation of the asylum seeker can duly be taken into account by the Member State on whose territory the asylum seeker is, in line with the obligations laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms … **The right to family reunification** will be considerably reinforced, in particular by enlarging the scope of the Regulation to include applicants and beneficiaries of subsidiary protection, by making compulsory the reunification of dependent relatives and by forbidding, subject to certain conditions, the sending back of an applicant for whom one of the family unity criteria can be applied at the time of his/her most recent application. These safeguards will not only provide for an increased standard of protection for asylum-seekers but will also contribute to reduce the level of secondary movements, as the personal situation of each asylum-seeker will be better taken into account in the process of determining the Member State responsible’. (Emphasis in original.)

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34 See, to this effect, judgments of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraphs 47 to 51), and of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587, paragraph 58).

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35 See in this regard the explanatory memorandum to the Commission's proposal for the Dublin III Regulation (footnote 33 of this Opinion), pp. 8 and 12: '… Better informing applicants for international protection of the implications of the Dublin Regulation will increase their awareness of the responsibility determination procedure, which could *inter alia* contribute to reducing the phenomenon of secondary movements … **better informing** asylum-seekers about the application of this Regulation and their rights and obligations within it will on the one hand enable them to better defend their rights and on the other hand could contribute to diminish the level of secondary movements as asylum-seekers will be better inclined to comply with the system'. (Emphasis in original.)

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36 Emphasis in original. See point 38 of this Opinion.

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37 See, in this regard, judgment of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587, paragraphs 76 to 103).

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38 Judgments of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587, paragraph 48); of 2 April 2019, *H. and R.* (C-582/17 and C-583/17, EU:C:2019:280, paragraph 40); and of 12 January 2023, *Staatssecretaris van Justitie en Veiligheid (Time limit for transfer – Multiple applications)* (C-323/21 to C-325/21, EU:C:2023:4, paragraph 91). In particular on Article 5 of the Dublin III Regulation, see judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 53).

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39 See judgments of 10 September 2013, *G. und R.* (C-383/13 PPU, EU:C:2013:533, paragraphs 35 and 36); of 16 July 2020, *Addis* (C-517/17, EU:C:2020:579, paragraph 57); and of 15 April 2021, *État belge* (Circumstances subsequent to the transfer decision) (C-194/19, EU:C:2021:270, paragraph 42).

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40 See judgment of 10 September 2013, *G. und R.* (C-383/13 PPU, EU:C:2013:533, paragraph 38 and the case-law cited).

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41 See, to this effect, judgment of 10 September 2013, *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 40), and, in a different context, judgment of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraphs 52 and 53). See also judgments of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council* (C-141/08 P, EU:C:2009:598, paragraph 94); of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686, paragraph 57); and of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23, paragraph 56).

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42 See point 39 of this Opinion.

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43 The other pending case, C-217/22, on the other hand, raises the question of what the consequences are for the transfer decision of a failure by the *requested* Member State to conduct a personal interview.

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44 See judgments of 22 November 2012, *M.* (C-277/11, EU:C:2012:744, paragraphs 81 to 87 and the case-law cited), of 10 September 2013, *G. und R.* (C-383/13 PPU, EU:C:2013:533, paragraph 32 and the case-law cited), and of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraphs 42 to 50 and the case-law cited).

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45 Judgment of 16 July 2020 (C-517/17, EU:C:2020:579, paragraphs 70 and 71).

46 Judgment of 16 July 2020, *Addis* (C-517/17, EU:C:2020:579, paragraph 74).

47 Judgment of 16 July 2020, *Addis* (C-517/17, EU:C:2020:579, paragraphs 49 to 54).

48 Judgment of 16 July 2020 (C-517/17, EU:C:2020:579, paragraph 70).

49 Judgment of 16 July 2020, *Addis* (C-517/17, EU:C:2020:579, paragraphs 56 to 74).

50 See judgment of 26 July 2017, *A.S.* (C-490/16, EU:C:2017:585, paragraph 33).

51 See judgments of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 61), and of 26 July 2017, *A.S.* (C-490/16, EU:C:2017:585, paragraphs 27 to 35).

52 See judgments of 15 April 2021, *État belge* (Circumstances subsequent to the transfer decision) (C-194/19, EU:C:2021:270, paragraphs 36 and 49 and the case-law cited), and of 12 January 2023, *Staatssecretaris van Justitie en Veiligheid (Time limit for transfer – Multiple applications)* (C-323/21 to C-325/21, EU:C:2023:4, paragraphs 92 to 95).

53 See judgments of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805, paragraph 31); of 13 November 2018, *X and X* (C-47/17 and C-48/17, EU:C:2018:900, paragraphs 69 and 70); and of 12 January 2023, *Staatssecretaris van Justitie en Veiligheid* (*Time limit for transfer – Multiple applications)* (C-323/21 to C-325/21, EU:C:2023:4, paragraph 55).

54 See, on Article 23 of the Dublin III Regulation, judgment of 5 July 2018, *X* (C-213/17, EU:C:2018:538, paragraphs 34 and 35), and, on Article 24, judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35, paragraph 77; on the situation in which no new application is lodged in the second Member State, see paragraph 86 et seq.).

55 On a situation in which a new time limit for a take back request begins to run because responsibility has since passed to a third Member State but for a reason not attributable to the requesting Member State, see judgment of 12 January 2023, *Staatssecretaris van Justitie en Veiligheid (Time limit for transfer – Multiple applications)* (C-323/21 to C-325/21, EU:C:2023:4, paragraph 85).

56 Questions 1 and 3 in Case C-254/21 and Questions 1 and 2 in Case C-297/21.

57 Question 4(a) in Case C-254/21 and Questions 1 and 2 in Case C-297/21.

58 Question 2 in Case C-254/21.

59 Question 3 in Case C-315/21.

60 Question 4(b) in Case C-254/21.

61 Judgments of 21 December 2011, *NS* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80), and of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 82).

62 See in this regard, *mutatis mutandis*, Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraph 192), and judgment of 22 February 2022, *Openbaar Ministerie* (Tribunal established by law in the issuing Member State) (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraph 41).

63 Judgments of 21 December 2011, *NS* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 81), and of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 83).

64 See, to this effect, judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 86).

65 Judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraphs 87 to 90).

66 Judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraphs 60 and 65).

67 Judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 91).

68 Judgment of 21 December 2011, *NS* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 82).

69 See judgment of 21 December 2011, *NS* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 83 to 85).

70 See judgments of 17 December 2015, *Tall* (C-239/14, EU:C:2015:824, paragraph 56), and of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 55).

71 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) (‘the Returns Directive’).

72 Judgments of 18 December 2014, *Centre public d’action sociale d’Ottignies-Louvain-La-Neuve* (C-562/13, EU:C:2014:2453, paragraphs 52 and 53); of 17 December 2015, *Tall* (C-239/14, EU:C:2015:824, paragraphs 54, 57 and 58); of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraphs 54 and 56); and of 26 September 2018, *Staatssecretaris van Veiligheid en Justitie* (Suspensory effect of the appeal) (C-180/17, EU:C:2018:775, paragraphs 28 and 29).

73 See judgment of 10 December 2013, *Abdullahi* (C-394/12, EU:C:2013:813, paragraphs 54 and 55).

74 Judgment of 16 February 2017 (C-578/16 PPU, EU:C:2017:127).

75 Judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraphs 65, 66, 73 and 91 to 96); see also to this effect, mutatis mutandis, judgment of 18 April 2023, *Presidente del Consiglio dei Ministri and Others (Grounds for refusal based on illness)* (C-699/21, EU:C:2023:295, paragraphs 39 and 42).

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76 See judgments of 30 May 2013, *Halaf* (C-528/11, EU:C:2013:342, paragraph 36), and of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53, paragraph 58).

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77 Judgments of 30 May 2013, *Halaf* (C-528/11, EU:C:2013:342, paragraph 37); of 10 December 2013, *Abdullahi* (C-394/12, EU:C:2013:813, paragraph 57); of 4 October 2018, *Fathi* (C-56/17, EU:C:2018:803, paragraph 53); and of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53, paragraphs 58 to 60).

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78 See judgments of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraphs 88 and 97), and of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53, paragraph 71).

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79 Judgment of 23 January 2019, M.A. and Others (C-661/17, EU:C:2019:53, paragraphs 78, 79 and 86).

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80 See judgments of 9 November 2010, *B* (C-57/09 and C-101/09, EU:C:2010:661, paragraphs 113 to 121); of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraphs 42 to 46); of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraphs 69 to 71); and of 9 November 2021, *Bundesrepublik Deutschland* (Maintaining family unity) (C-91/20, EU:C:2021:898, paragraphs 38 to 40 and 46).