



22.9.2016

# **NATIONAL PARLIAMENT REASONED OPINION ON SUBSIDIARITY**

**Subject:** Reasoned opinion of the Hungarian Parliament on the proposal for a regulation 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 (recast)

(COM(2016)0270 – C8-0173/2016 – 2016/0133(COD))

Under Article 6 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality, national parliaments may, within eight weeks of the date of transmission of a draft legislative act, send the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why they consider that the draft in question does not comply with the principle of subsidiarity.

The Hungarian Parliament has sent the attached reasoned opinion on the aforementioned proposal for a regulation.

Under Parliament's Rules of Procedure the Committee on Legal Affairs is responsible for compliance with the subsidiarity principle.

# PRESIDENT OF THE HUNGARIAN PARLIAMENT

To: **Martin Schulz**OE-40/707-1/2016  
President of the European Parliament

Brussels  
Rue Wiertz 60  
B-1070  
Belgium

Subject: Reasoned Opinion Adopted by the Hungarian Parliament

*Dear Mr President,*

Subject to Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality attached to the Treaties of the European Union ('Protocol No 2') and the relevant provisions of Act XXXVI of 2012 on the Hungarian Parliament and Resolution of Parliament No 10/2014 of 24 February 2014 on certain provisions of the Rules of Parliament, the Hungarian Parliament has examined the enforcement of the principle of subsidiarity with respect to the Draft 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 (recast) [COM (2016) 270; 2016/0133 (COD)] (the 'Proposal').

The Resolution adopted by the Hungarian Parliament on 13 June 2016 established that the Proposal violated the principle of subsidiarity, therefore please find enclosed the reasoned opinion in accordance with Article 6 of Protocol No 2.

There follows a summary of the reasoned opinion of the Hungarian Parliament on the basis of Report No B/10929 submitted by the European Affairs Committee:

The corrective allocation mechanism to be introduced by Articles 34 to 36 of the Proposal envisages a fully automated procedure controlled by an IT system, which Member States are not allowed to influence.

The financial solidarity regulated in Article 37 of the Proposal does not recognise any equity, flexibility or objective grounds of excuse; its extent is clearly contrary to the principle of proportionality; and it would be implemented on the basis of a Commission Implementing Decision to be adopted at a later date .

The Proposal extends beyond the authorisation granted in Article 78(2)(e) of the Treaty on the Functioning of the European Union because it does not provide any legal grounds for either the introduction of the so-called financial solidarity or the establishment of an automated allocation mechanism without upper limits.

Please find attached the full text of the Parliament's reasoned opinion, comprising the Parliament's decision and the report by the European Affairs Committee.

Budapest, 5 September 2016

Yours  
faithfully,

László Kövér

## **Report**

### **on the fulfilment of the conditions for accepting the reasoned opinion on the Draft 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**

Rapporteur: Dr Richárd Hörcsik  
President

Budapest, 30 May 2016

#### **1. Legislative background to subsidiarity assessment**

According to the principle of subsidiarity, decisions should always be taken at the lowest possible level.

Under Article 5<sup>1</sup> of the Treaty on the European Union (the ‘TEU’), a proposed action by the Union fulfils the principle of subsidiarity only if it cannot be achieved by the Member States, or if the set goal can be achieved at Union level in a better, more efficient way and action by the Union creates added value.

On the basis of Protocol No 2<sup>2</sup> attached to the Treaty of Lisbon, the national parliament of the Member State is entitled to examine the enforcement of the principle of subsidiarity in connection with the legislative proposals of the European Union in a procedure regulated by law. If the parliamentary chamber concerned finds that the principle has been infringed, it may, within eight weeks of the date of transmission of the draft legislative act, send a reasoned

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<sup>1</sup> The legislative background of the Union relating to the enforcement of the principle of subsidiarity and the possible consequences of the procedure are set out in the Annex.

<sup>2</sup> Protocol No 2 regarding the application of the principles of subsidiarity and proportionality, attached to the Treaty on the European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community.

opinion to the proposer of the legislation – the Commission – and the Union’s legislative authority. If the number of reasoned opinions stipulated in Protocol No 2 is received, the proposer of the legislation must review the legislative proposal and may ultimately withdraw it. The purpose of the procedure is that, where necessary, national parliaments should be able to prevent European Union institutions from exceeding their powers.

The European Affairs Committee of the Hungarian Parliament may examine a legislative proposal by the Union regarding the enforcement of the principle of subsidiarity on the basis of Sections 71(1) and (2) of Act XXXVI of 2012 on the Hungarian Parliament and Section 142(1) and (2) of Resolution of Parliament No 10/2014 of 24 February 2014 on certain provisions of the Rules of Parliament.

If the European Affairs Committee finds that a legislative proposal is contrary to the principle of subsidiarity, it will submit a report on the fulfilment of the conditions for accepting the reasoned opinion and a draft proposal for the approval of the report. On the basis of Section 142(3) of Resolution of Parliament No 10/2014, the Hungarian Parliament decides on the approval of the report and the adoption of the proposal for a resolution. The eight-week time limit available for submitting the reasoned opinion is objective. It is therefore advisable that the Hungarian Parliament take it into account.

## **2. Subject of the subsidiarity assessment: The Commission’s proposal**

The Commission submitted the Draft 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 (recast) [COM (2016) 270; 2016/0133 (COD)] (the ‘Proposal’) on 4 May 2016.

Similarly to the Regulation to be recast<sup>3</sup> (the ‘Dublin III Regulation’), the legal grounds for the Proposal are set out in Article 78(2)(e) of the Treaty on the Functioning of the European Union (the ‘TFEU’). Based on this, the European Parliament and the Council establish actions within the framework of normal legislative procedures to establish a common European refugee system, including the *‘criteria and procedures for determining the Member State responsible for assessing applications for asylum or supplementary protection’*.

In its Resolution No 55/2015 of 6 November 2015, the Hungarian Parliament adopted a reasoned opinion on the Draft Regulation of the European Parliament and of the Council on a

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<sup>3</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 80, 29.6.2013, pp. 31–59).

crisis relocation mechanism<sup>4</sup>. The subject matter of the Draft Regulation shows a number of similarities with the Proposal, while at the same time, there is no progress in its discussion at Council level. The Proposal fits into the burden-sharing regulation concept of Council Decisions adopted in September 2015 regarding the relocation of applicants for international protection. The implementation of the above-mentioned Council Decisions can be considered unsuccessful in practical terms.

Main content elements of the Proposal:

- In accordance with the Dublin III Regulation, it is intended to determine the Member State responsible for examining applications for international protection. In this respect, it does not materially modify the fundamental conditions in force and the order specified in Chapter III of the Dublin III Regulation, and the promotion of the principle of family unity may be given broader guarantees.
- As a new provision, an application may be declared unacceptable if the applicant comes from a first country of asylum or from a safe third country.
- It provides for the main principles of the procedure and the most important rights of third country nationals in an identical manner to the Dublin III Regulation, supplementing them with the applicant's obligations and the consequences of the lack of cooperation.
- With respect to the details of the procedure relating to the determination of the responsible Member State, the obligation of recording applications for international protection in an automated IT system represents a new element; through it, a wider range of information than before would become immediately available for the competent national authorities.
- The most significant modification is the so-called corrective allocation mechanism, on the basis of which if a Member State faces a disproportionately high number of asylum applications, i.e. the number of applications exceeds the reference number of the given Member State by 150% (including actually relocated third-country nationals), an automated system would be triggered. Based on this, another Member State that has not reached the reference number will be responsible for the assessment of the applications.
- The Proposal would allow a Member State not to participate temporarily (for up to 12 months) in the corrective allocation mechanism. At the same time, in this case, on the basis of a so-called equity mechanism, the Member State would be required to provide a solidarity contribution of EUR 250 000/person for applicants falling within its responsibility to the other Member State undertaking to relocate the persons concerned.

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<sup>4</sup> Proposal for a regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person [COM (2015) 450; 2015/0208 (COD)].

### 3. Subsidiarity assessment carried out in the European Affairs Committee

At the meeting of the European Affairs Committee held on 23 May 2016, the representative of the Ministry of Interior provided information about the goal and main elements of the Proposal. The European Affairs Committee established that the assessment of the principle of subsidiarity was legally possible because the eight-week time limit specified in Protocol No 2 had not yet expired.

In connection with the Proposal, as a preliminary, the European Affairs Committee emphasises that the efficiency of the procedures intended to determine the Member State responsible for examining applications for international protection might be served primarily not by allocating burdens arising from the large number of applications according to some considerations but by the reduction of the burdens. In this respect, the primary task is to secure the external borders of the European Union and to tackle the reasons for the wave of refugees outside the territory of the European Union.

At its meeting of 30 May 2016, the European Affairs Committee examined the enforcement of the principle of subsidiarity, which primarily covered the provisions of Chapter VII of the Proposal and considerations relating to the legal grounds, and expressed the following concerns in respect of the Proposal:

- The so-called corrective allocation mechanism to be introduced by Articles 34 to 36 of the Proposal envisages a fully automated procedure controlled by an IT system, which Member States are not allowed to influence. Furthermore, the mechanism does not set any upper limit for the number of acceptable applications, which represents a permanent ‘pull’ factor for the refugee flow to the European Union.
- In connection with the financial solidarity to be introduced by Article 37 of the Proposal, it is a question of why its extent exceeds – by orders of magnitude – the actual costs associated with the assessment of applications for international protection. By comparison, Article 10 of Council Decision (EU) 2015/1061<sup>5</sup> forms the basis of reference, which, in the case of the relocation of third country nationals, envisages a flat rate amount of EUR 6 000/person for the Member State acting as a relocation target. If we consider the flat rate fee of the above Council Decision proportional to the costs of transfer, by contrast, the financial solidarity of EUR 250 000/person suggested by the Proposal is grossly disproportionate, in particular with regard to the fact that the Proposal does not allow any flexibility or equity in respect of the amount either. The Proposal does not accept any force majeure circumstances (e.g. natural disaster) as a reason for suspension by the Member State. Financial solidarity is in fact a financial penalty and is clearly against solidarity. The method of payment, including the new executive powers granted to the Commission and the direct payment made to another Member State, assumes an exceptional procedure, which may also violate the budgetary autonomy of Member States.
- In accordance with Article 4(2) TFEU, shared competence between the Union and the Member States applies with regard to the areas of freedom, security and justice.

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<sup>5</sup> Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, pp. 80–94.

Therefore, the powers coming under Title V of Part Three of the TFEU have to be exercised in accordance with Article 5(3) TEU, i.e. the Union may act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level.

- In the event of shared competence, action by the Union is limited by necessity and proportionality. At the same time, the need for Chapter VII of the Proposal is clearly questionable and obviously unsuitable for achieving the desired goal, as it fits into a series of actions by the European Union adopted with regard to the relocation of applicants for international protection in the past almost one year, implementation of which is proving unsuccessful. The extent of financial solidarity is clearly contrary to the principle of proportionality for the reasons detailed above.
- Article 78 TFEU regulates procedures for the common refugee policy of the Union and the assessment of applications for international protection. By contrast, the Proposal extends beyond Article 78(2) TFEU, particularly in connection with the so-called financial solidarity, as it envisages the payment of a contribution of a magnitude that cannot be justified by the costs associated with the assessment of applications for international protection. Furthermore, Article 78(2) TFEU does not provide legal grounds for the establishment of a permanent allocation mechanism essentially without upper limits, especially in such a way that its application depends on a fully automated IT system, neglecting participation by the Member State.

#### **4. Position of the European Affairs Committee on the enforcement of the principle of subsidiarity**

In the Proposal:

- the so-called corrective allocation mechanism to be introduced by Articles 34 to 36 provides for a fully automated procedure controlled by an IT system, which Member States are not allowed to influence;
- the financial solidarity regulated in Article 37 does not recognise any equity, flexibility or objective grounds of excuse; its extent is clearly contrary to the principle of proportionality; and it would be implemented on the basis of a Commission Implementing Decision to be adopted at a later date;
- it extends beyond the authorisation granted in Article 78(2)(e) TFEU because it does not provide any legal grounds for either the introduction of the so-called financial solidarity or the establishment of an automated allocation mechanism without upper limits.

**Based on the foregoing, the European Affairs Committee establishes that the Draft 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 (recast) [COM (2016) 270; 2016/0133 (COD)] infringes the principle of subsidiarity.**

## Annex

### Procedures for the examination of the principle of subsidiarity and its possible consequences

The principle of subsidiarity as defined in Article 5 TEU:

*'(3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

*The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.*

*(4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

*The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of principles of subsidiarity and proportionality.'*

Examination of the enforcement of the principle of subsidiarity on the basis of Article 6 of Protocol No 2:

*'Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft European legislative act in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. (...)'*

The consequence of a reasoned opinion depends on how many Member-State parliaments decide within the set eight-week time limit that the principle of subsidiarity is infringed by the same European Union proposal.

In the procedure, the Parliament of each of the 28 Member States has two votes per country (the total number of votes therefore being 56). Reasoned opinions will have a substantive impact on the Union's decision-making, particularly in cases when – depending on the EU legislative procedure in question – one quarter, one third or a majority of the Parliaments of the Member States decide that the principle of subsidiarity is infringed.

In the event of a 'yellow card' procedure under Article 7 of Protocol No 2, if one third of the Parliaments of the Member States (19 votes) decide that the same proposal infringes the principle of subsidiarity, the draft must be reviewed. After the review, the proposer may decide to maintain, amend or withdraw the proposal. Since the entry into force of the Treaty of Lisbon, 'yellow card' procedures have taken place on three occasions. In the first case,<sup>6</sup> the proposal

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<sup>6</sup> <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do>

was withdrawn; in the second case,<sup>7</sup> the Commission maintained its proposal without changing it; while in the third case,<sup>8</sup> the Commission has yet to make a decision.

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<sup>7</sup> In respect of a Draft Council Regulation establishing the European Public Prosecutor's Office, the Hungarian Parliament established the infringement of the principle of subsidiarity in its Resolution No 87/2013 of 22 October 2013.

<sup>8</sup> With respect to the Draft Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, the Hungarian Parliament established the infringement of the principle of subsidiarity in its Resolution No 9/2016 of 10 May 2016 .

**European Affairs Committee  
of the Hungarian Parliament**

**To: Mr László Kövér  
President of the Hungarian Parliament**

**Dear Mr President,**

On the basis of Section 142(2) of Resolution No 10/2014 of 24 February 2014 on certain provisions of the Rules of Parliament, the European Affairs Committee of the Hungarian Parliament hereby submits its report on the **fulfilment of the conditions for accepting the reasoned opinion** in respect of the Draft 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.

Budapest, 30 May 2016

Dr Richárd Hörcsik  
Chairman of the Committee

## **Resolution of Parliament No**

**12/2016 of 17 June 2016**

**approving the report on the fulfilment of the conditions for accepting the reasoned opinion on the Draft 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<sup>9</sup>**

1. The Hungarian Parliament hereby approves the report of the European Affairs Committee on the fulfilment of the conditions for accepting a reasoned opinion on the Draft 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 (recast) [COM (2016) 270; 2016/0133 (COD)] (the 'Report'), and based on it, it establishes that the Draft Regulation infringes the principle of subsidiarity.
2. The Hungarian Parliament requests that the President of the Hungarian Parliament forward the reasoned opinion set out in the Report to the Presidents of the European Parliament, the Council and the Commission and also inform the Government about it at the same time.

**László Kövér**

President of the Hungarian Parliament

**Ádám Mirkóczki****Dr István Tiba**

Registrar of the Hungarian Parliament  
Hungarian Parliament

Registrar of the

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<sup>9</sup> Parliament adopted the Resolution at its session of 13 June 2016.