European Parliament
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Committee on Legal Affairs

24 October 2016

NATIONAL PARLIAMENT REASONED OPINION ON SUBSIDIARITY

Subject: Reasoned opinion of the National Council of the Slovak Republic on the proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (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 National Council of the Slovak Republic 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 matters relating to compliance with the subsidiarity principle.

ANNEX

The Committee of the National Council of the Slovak Republic for European Affairs

12th meeting of the Committee
CRD-1576-1/2016-VEZ

24.
Resolution
of the European Affairs Committee of the National Council of the Slovak Republic

of 7 September 2016

on the

proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016) 0270);

The European Affairs Committee of the National Council of the Slovak Republic

having regard to the Treaty on European Union, and in particular Article 5 thereof,

having regard to the Treaty on the Functioning of the European Union, in particular Article 78(2)(e),

having regard to the Declaration of 24 June 2015 of the National Council of the Slovak Republic on Solving Migration Challenges Currently Faced by the European Union,

having regard to the justified opinion of the European Affairs Committee of the National Council of the Slovak Republic for European affairs of 30 September 2015 regarding the 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) 0450),

Acting in accordance with Protocol No 2 on the Application of the Principle of Subsidiarity and proportionality,

A. Heard

the proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast);

B. Approves the justified opinion regarding the non-conformity with the Principle of Subsidiarity, as amended:

The proposal for a Regulation is not consistent with the Principle of Subsidiarity as it is set out under Article 5(3) of the Treaty on European Union: *'Under the Principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union l 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 reasons of the scale or effects of the proposed action, be better achieved at Union level.'*

Proposal of the Regulation relies on the provisions of Article 78(2)(e) of the Treaty on European Union, which sets out that: *'For the purposes of the provisions of Paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising, [...] criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection.'* Paragraph 1 of Article 78 states that: *'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement.'*

The proposal for a Regulation is part of the first package of legislative proposals concerning the reform of the common asylum policy. The fundamental principle declared by the proposed Regulation COM(2015)0450 will remain unchanged in that an applicant for asylum should request asylum in the first country that they enter, unless their family resides in another country. The revised proposal for a regulation introducing a new system for distributing asylum applications that automatically determines when the country is facing a disproportionately high number of asylum applications. It will also take into account the size and wealth of the country. If a country faces a disproportionately high number of applications exceeding the deficit reference value (more than 150% of the reference number), all new applicants in this country (regardless of nationality), after verification of the admissibility of their requests, will be relocated within the EU, until the number of requests falls below the referred level.

Based on the explanatory report to COM(2016)0270 it follows that migration crisis management may in this case apply the provisions of Article 78(3) of the Treaty on the European Union, when it states that: *'[...] [The proposal] aims to ensure the correct application of the Dublin system in times of crisis and to address the problem of secondary movements of third-country nationals between Member States [...]*. [...] The Dublin system must be reformed to be easier and more effective in practice and also to be able to cope with situations when asylum policies of Member States face undue pressure.' The use of Article 78(3) can also rely on the fact that the indicator for the issuance of the proposal for the initial crisis mechanism displacement (COM(2015)0450) was to provide structural solutions for dealing with crisis situations, and that proposal laid foundations for the issuance of the draft Regulation COM(2016)0270. Article 78(3) reads as follows: *'In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned.* It shall act after consulting the European Parliament.' The primary law of the EU therefore expects that the crises will be solved by adopting temporary measures rather than the introduction of a permanent crisis mechanism, as proposed by the Commission. The Principle of Subsidiarity does not allow for an EU intervention if matters can be effectively dealt with by Member

States at national, regional or local level, i.e. this principle clearly prefers actions by individual Member States. It is evident that by introducing a new permanent mechanism instead of adopting temporary measures in emergency situations, the draft regulation goes beyond the extent necessary to achieve its objective, and thus violates the principle of subsidiarity and proportionality.

The proposal for a Regulation is a recast of draft Regulation of 9 September 2015 COM(2015)0450, a proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and changes the Regulation of the European Parliament and of the Council (EU) No. 604/2013 of 26 June 2013 laying down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged by a third-country national or a stateless person in one of the Member States, while the draft regulation has not been adopted to this date, and thus it did not apply and the required analyses of the this proposal did not occur either. For this reason, the recast proposal overlaps, which in turn leads to legal uncertainty. As declared in Article 2 of the Treaty on European Union: *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.* These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' It is the values of democracy and rule of law that require legal certainty, which represents the possibility of anticipating a decision in a particular case, but also the development of legislation. For these reasons, we consider the Commission's process non-compliant with the fundamental values on which the Union is built.

In this case, it is appropriate that the Commission uses the capacity to withdraw its legislative proposal as a result of its right of initiative, which follows from Article 293 (2) of the Treaty on the European Union. This option is also confirmed by the Court of Justice. 'The Commission may withdraw or modify its proposal, if in the light of new assessment of interests of the Community it concludes that the adoption of given measures is unnecessary.[1]' Since the draft Regulation of 9 September 2015 COM(2015)0450 has not been adopted to date and became completely unnecessary following the issuance of draft Regulation COM(2016)0270, to preserve and promote legal certainty and non-duplicity of a legislative amendment, the Commission must withdraw the draft Regulation COM(2015)0450.

Practice has shown that the remedial allocation mechanism provided for under Chapter VII of the proposal in the form of mandatory distribution of persons does not effectively address migration pressure and it is not consistent with the values, rules and principles of international law and EU law. It takes no account of the fact that some Member States are not a target country for migrants. Their allocation against their will to Member States will not prevent secondary movement without restrictions on the free movement of persons and may also cause further security risks. **The proposed mechanism is unenforceable.**

The proposal also contains another major change concerning the establishment of a new computerised information system that would operate as a statistical system for applications submitted within Member States (Article 44 of the draft regulation). It would consist of a central system, a communication infrastructure and a national infrastructure. The introduction of a management system as well as data upload into the system would represent an additional burden for Member States. Given that this system is to serve the purposes of the unenforceable allocations criticised above, there is no need to create such a system.

[1] Fediol judgment / Commission (EU: C: 1988: 400)

Under the provisions of Article 37 of the draft regulation, a Member State would be able to temporarily withdraw from participation in the redistribution, but in this case, for each applicant for whom it would otherwise be responsible for under the mechanism for equitable distribution, be obligated to pay a solidarity contribution of EUR 250 000 to the Member State to which that person would ultimately be allotted. The provisions of this Article do not correspond with the Principle of Proportionality, which determines the form and nature of EU action. This means EU funds proposed to be appropriate and proportionate in view of the set objectives of the regulation. In other words, the least restrictive form of regulation, which still allows for the achievement of goals, shall be preferred. For these reasons, we consider the Principle of Proportionality to have been infringed by the given provisions of the draft regulation. In addition, the enforceability of this provision is still doubtful. Just imagine a case where they decide to 'withdraw; from their obligation to pay the solidarity contribution to all Member States. It is also difficult to assess the manner in which the Commission arrived at the amount of EUR 250 000.00. The 'solidarity contribution' mentioned above seems to be a disguised fine for countries refusing compulsory quotas. Authorisations of the relevant articles of the Treaty on the European Union do not give legal basis for the establishment and application of such solidarity contributions, or for the creation of a new automated information system. Therefore we consider the selected legal basis excessive and in excess of established authority.

C. Authorises

The Chairman of the Committee
to inform the Speaker of the National Council of the Slovak Republic and the Presidents of the European Parliament, European Commission and the Council of the European Union about the approved reasoned opinion.

Edita Pfundtner
Jozef Viskupič
Verifier

Ľuboš Blaha
Chairman of the Committee