



13.3.2019

NATIONAL PARLIAMENT REASONED OPINION ON SUBSIDIARITY

Subject: Reasoned opinion of the Italian Senate on the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (COM(2018)0633 – C8-0174/2016 – 2016/0131(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 Italian Senate 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.

SENATE OF THE REPUBLIC
XVIIIth PARLIAMENTARY TERM

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RESOLUTION OF THE 14th STANDING COMMITTEE
(European Union Policies)

(Rapporteur GIANNUZZI)

adopted at the sitting of 12 December 2018

ON THE

AMENDED PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL ON THE EUROPEAN UNION AGENCY FOR ASYLUM AND
REPEALING REGULATON (EU) No 439/2010 (COM (2018) 633 final)

pursuant to Senate Rule 144(1a) and (6)

Forwarded to the Presidency on 12 December 2018

SENATE TYPOGRAPHY

XVIIIth PARLIAMENTARY TERM – DRAFT LAWS AND REPORTS – DOCUMENTS

The Standing Committee,

having examined proposal COM (2018) 633 amending the proposal for a regulation of 4 May 2016 on the transformation of the current European Asylum Support Office (EASO) into a European Union Agency for Asylum (COM (2016) 271);

given that it forms part of a package, which includes, inter alia, the recast of the ‘Return Directive’ (COM (2018) 634) and a new proposal for a regulation on the European Border and Coast Guard (COM (2018) 631) which would provide the latter with a permanent operational staff of 10 000, and given that these proposals come in the wake of the two regulatory packages unveiled by the Commission on 4 May and 3 July 2016, respectively, which include not only the aforementioned proposal on the transformation of the European Asylum Support Office into a European Union Agency for Asylum, but also the reform of the Dublin III Regulation on determining the Member State responsible for examining an asylum application, the modification of the Eurodac system for the comparison of fingerprints, the reform of the ‘Reception Conditions Directive’, the ‘Qualification Directive’ and the ‘Asylum Procedures Directive’ and a proposal establishing a regulatory framework for resettlement in the European Union;

whereas the proposal for a regulation of May 2016 on the establishment of the European

Union Agency for Asylum (COM (2016) 271), which provides for a strengthening of the role of the current EASO and its transformation into an Agency, has been subject to modifications by the European legislator which have been formalised in a text adopted on 28 June 2017 during the trilogue between Parliament, the Council and the Commission;

whereas, in particular, the text of 28 June 2017 confirms the general scheme of the 2016 proposal, apart from a number of significant changes, including:

the assignment to the Agency of the task of formulating, in consultation with the Commission, recommendations to those Member States whose asylum and reception systems are not aligned with the common asylum system and risk compromising its effectiveness;

the assignment to the Agency of the task, in support of the Member States, of identifying applicants who require specific procedural safeguards or who have specific needs in terms of reception, or who are vulnerable, such as minors;

the amendment to Article 22 giving the Council rather than the Commission the possibility of adopting (on a proposal from the Commission) a decision requiring a Member State

to collaborate with the Agency in the implementation of the measures set out in the decision relating to a situation of disproportionate pressure or the failure to comply with the recommendations issued by the Commission in the event of the ineffectiveness of its asylum and reception system;

whereas, in this context, proposal COM (2018) 633 provides for a number of changes to the proposal of 2016, which for the most part replicate the agreement of June 2017. These changes are as follows:

the insertion of a new Article 16(a) which provides that a Member State may request greater support from the Agency, including the participation of the Agency in the entire administrative procedure of international protection (or parts of it) and in the applicable procedure under the new Dublin regulation. At the request of the competent national authority, the Agency will then be able to prepare decisions regarding applications for international protection, which would in any case be adopted by the Member State which would remain fully responsible for the procedure. The Agency will also be able to carry out legal research, producing reports and analyses and providing other legal support at the request of the courts or tribunals with full respect for judicial independence and impartiality;

an amendment to Article 16 identifying all the situations and conditions in which the Agency can provide operational and technical assistance, including, in paragraph 1(e), ‘upon the initiative of the Agency where a Member State’s asylum or reception systems are subject to disproportionate pressure, and with the agreement of the Member State concerned’ and, in 1 (f), ‘where the Agency provides operational and technical assistance in accordance with Article 22’;

an amendment to Article 21 extending the possibilities for the use by the Agency of technical and operational support teams, which would remain subject to an agreement with the Member State concerned, but no longer be limited to circumstances of disproportionate migration flows,

gives a negative opinion with respect to the principles of subsidiarity and proportionality, pursuant to Article 6 of Protocol No. 2 annexed to the Treaty on the Functioning of the European Union (TFEU), on the following grounds:

the proposal is rightly based on Article 78(1) and (2) TFEU, which envisages the ordinary legislative procedure for the adoption of measures relating to a common European asylum system. The wording of Article 78 indicates that the common asylum policy aims to harmonise the regulatory regime and, at the same time, make support available ‘for the benefit’ of countries confronted by an emergency, in order to help them comply with the aforementioned legislation.

Accordingly, this proposal would comply with subsidiarity and proportionality requirements if it were confined to pursuing the goals of the common asylum policy and strengthening the institutional mission of the European Asylum Agency, which is responsible for supporting the proper implementation and functioning of the Common European Asylum System, which cannot be achieved by Member States acting independently and individually.

However, the proposal also enables the Agency to take specific actions, both on its own initiative and at the behest of the Council, in the absence of an application by a Member State. Moreover, under Article 22 such initiatives may even be at odds with the wishes of the State concerned in respect of its own territory, thus foreshadowing a situation which would be contrary to the spirit of Article 78 TFEU which is aimed at providing relief to the Member enter their territory after crossing the external borders of the European Union.

In particular, the Committee emphasises that Article 16(1)(e), as amended by proposal COM (2018) 633, establishes that the Agency can provide operational and technical assistance ‘upon the initiative of the Agency where a Member State’s asylum or reception systems are subject to disproportionate pressure, and with the agreement of the Member State concerned’. The Agency is therefore expected to act on its own initiative, subject to the obligation to acquire the agreement of the State concerned, in order to deploy operational and technical actions within the territory of that State.

This provision appears above all to be inconsistent with Article 22 of the text agreed on 28 June 2017 (but also with the original text of 2016), because in the event of disproportionate pressure and the failure to act of a Member State, it is up to the Council (and in the 2016 text it was the Commission) to decide on the actions to be taken, while the Agency may only fine-tune such actions in agreement with the Member State.

Therefore, if Article 16(1)(e) refers to Article 22, the words ‘upon the initiative of the Agency’ should be deleted, as the initiative would lie with the Council (or the Commission). In this case, the provisions of subparagraph (e) should be merged with the following subparagraph, which explicitly refers to Article 22. In this way, the same subparagraph would refer to both cases provided for in Article 22 concerning the presence of disproportionate pressure and non-compliance with the Commission’s recommendations for the proper functioning of the common asylum system.

If, however, Article 16(1)(e) refers to Article 21, according to which ‘Migration management support teams may be deployed at the request of a Member State, or upon the initiative of the

Agency and with the agreement of the Member State concerned, to provide technical and operational reinforcement to that Member State', an explicit reference to Article 21 should be included and the reference to disproportionate pressure, which does not appear in this Article, should be deleted.

Regardless of how one construes subparagraph (e), i.e. in reference to Article 21 or 22, the possibility of concrete action by the Agency is envisaged, activated in the absence of a specific request of the Member State concerned and, in the case of Article 22, also including the obligation of the Member State to cooperate with such action.

Therefore, these specific provisions are not only likely to harm the sovereignty of a State domestically, but also clash with the spirit and purpose of Article 78 of the TFEU and a European policy aimed at supporting the action of Member States facing an immigration pressure at their borders, foreshadowing the paradoxical and far-fetched case of a Member State that does not want to ask for or accept aid even if it is in difficulties.