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<Commission>{JURI}Committee on Legal Affairs</Commission>

<Date>{21/01/2021}21 January 2021</Date>

<TitreType>NATIONAL PARLIAMENT REASONED OPINION ON SUBSIDIARITY</TitreType>

Subject: <Titre>Reasoned opinion of the National Council of the Slovak Republic on the proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]</Titre>

<DocRef>(COM(2020) 610 – C9‑0309/2020 – 2020/0279(COD))</DocRef>

Under Article 6 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, national parliaments may, within eight weeks from the date of transmission of a draft legislative act, send to 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 a reasoned opinion on the attached proposal for a regulation.

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

ANNEX

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

27th Meeting

CRD-76-1/2021-VEZ

**44.**

**Resolution**

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

of 13 January 2021

on

the proposal for a regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (COM(2020)610)

**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, and in particular Article 78(2)(d) and 79(2)(c) thereof;

Having regard to the reasoned opinion of the European Affairs Committee of the National Council of the Slovak Republic of 30 September 2015 on 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)450);

Having regard to the reasoned opinion 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)270);

And having regard to the actions for annulment from December 2015 brought by Slovakia and Hungary pursuant to Article 263 TFEU against Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece;

Acting in accordance with Protocol (No 2) on the application of the principle of subsidiarity and proportionality;

**A. Discussed**

the proposal for a regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund];

**B. Approves the reasoned opinion regarding the non-compliance with the principle of subsidiarity, as amended:**

The proposal for a regulation introduces a new solidarity mechanism described in the proposal as being flexible. As in the case of the 2016 proposal for a regulation (COM(2016)270), the current Regulation contains compulsory elements that require Member States to provide a number of contributions, listed in Article 45(1) and (2) of the proposal for a regulation. They include relocation, return sponsorship and the possibility of implementing capacity-building measures in the field of asylum, reception and return, operational support and related cooperation with third countries. Article 54 of the proposal for a regulation stipulates that Member States must provide a share of the contributions, calculated on the basis of a distribution key, based on 50% of total GDP and 50% of the size of the population, with the share of the benefiting Member State included in the distribution key, to ensure that all Member States apply the principle of fair sharing of responsibility. Neither the explanatory memorandum nor the proposal for a regulation itself provide an adequate legal basis for applying such a distribution key, which, outside of GDP and size of population, does not consider any other specific characteristics of the Member State in question. Ultimately, the Commission should be able to determine whether a contribution by a Member State is sufficient. If it is not, the Member State will then have to contribute in a manner defined in advance. It is likely that the Slovak Republic will again be faced with the issue of mandatory relocations, brought before the Court of Justice of the European Union through actions for annulment from December 2015, in accordance with Article 263 TFEU, and through its reasoned opinion 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)270). In its grounds, the Court concluded that in terms of criticism of mandatory relocations, according to established case-law, assessment of the future effects of a new set of rules can be challenged only if it appears manifestly incorrect in the light of the information available to the legislature at the time of the adoption of the rules in question.[[1]](#footnote-1) Given current practices and the demonstrably low number of relocations, the principle of subsidiarity is being infringed because the objectives of the proposal for a regulation can be achieved efficiently through less restrictive measures, which would interfere less with the sovereign right of Member States to decide on access of third-country nationals on their national territory.

One of the designated forms of solidarity contributions is return sponsorship, which facilitates the return of illegally staying third-country nationals (Article 55 of the proposal for a regulation). The concept of return sponsorship is positive insofar as it does not restrict Member States when applying their national legislation, for example if the return is not completed within eight months, and the persons concerned are transferred to the Member State providing sponsorship, which then assumes full responsibility for them, where the proposal for a regulation refers to the application of Directive 2008/115/EC (Return Directive). According to Articles 5 and 6 of the Return Directive, the decision to grant a permit to stay on a national territory pending the outcome of the relevant decision-making process **is at the discretion of the Member State and is not compulsory**. When viewed through the lens of current return success rates (less than 40%), the Slovak Republic regards return sponsorship as tantamount to a system of mandatory relocations (postponed relocations), which results in persons not ordinarily entitled to international protection entering Slovakia’s national territory. The proposal for a regulation completely disregards the fact that some Member States are not among the destination countries of migrants. Their relocation against their will to a Member State will not prevent secondary movement without restrictions on the free movement of persons and may also pose further security risks.

A further contentious issue is the relocation of applicants for international protection who have not applied at a national border but have been rescued in search-and-rescue operations following disembarkation. This is dealt with in Articles 47-49 of the proposal for a regulation. Wide-ranging powers coordinated by the Commission have been conferred on the Asylum Agency and the European Border and Coast Guard Agency, which is responsible for drawing up the list of persons eligible for relocation, indicating the Member States of relocation. According to recital 22 of the proposal for a regulation, the overall contribution of each Member State to the solidarity pool should be determined through indications by Member States of the measures by which they wish to contribute. Where Member States’ contributions are insufficient to provide for a sustainable solidarity response, the Commission should be empowered to adopt an implementing act setting out the total number of third-country nationals to be covered by relocation and the share of this number for each Member State, calculated according to a distribution key based on the population and the GDP of each Member State, as indicated above. Where the indications from Member States to take measures in the field of capacity or the external dimension would lead to a shortfall of greater than 30% of the total number of relocations identified in the Migration Management Report, the Commission should be able to adjust the contributions of these Member States, which should then contribute half of their share identified according to the distribution key either by way of relocation or, when so indicated, through return sponsorship.

The proposal for a regulation on the Asylum Agency, repealing Regulation (EU) No 439/2010 (COM(2016)271), does not give the Agency any powers of co-decision regarding the relocation of specific persons to specific Member States. Nor does Regulation (EU) 2016/1624 on the European Border and Coast Guard set out any such competences. Furthermore, Article 4(4) TFEU states: ‘In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; **however, the exercise of that competence shall not result in Member States being prevented from exercising theirs’.** The determination of the persons involved and the Member States to which they should be relocated clearly does not fall within the scope of this primary legislation. Moreover, the competences conferred on the Asylum Agency, the European Border and Coast Guard Agency and the Commission lack any relevant legal basis. Article 4(2) of the EC Treaty states: *‘The Union shall respect the equality of Member States before the Treaties as well as their* ***national identities****, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.* ***In particular, national security remains the sole responsibility of each Member State’***.Articles 47 to 49 of the proposal for a regulation completely disregard the fact that some Member States are not among the destination countries of migrants. Their relocation against their will to a Member State will not prevent secondary movement without restrictions on the free movement of persons and may also pose further security risks. Decisions allowing access of persons on national territory are clearly the competence of each Member State and are made on the basis of each Member State’s national asylum legislation. The principle of subsidiarity does not allow 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.

Recital 74 of the proposal states: *‘In order to provide for supplementary rules, the power to adopt* ***acts in accordance with Article 290 of the TFEU should be delegated to******the Commission*** *in respect of the identification of family members or relatives of an unaccompanied minor; the criteria for establishing the existence of proven family links; the criteria for assessing the capacity of a relative to take care of an unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State; the elements for assessing a dependency link; the criteria for assessing the capacity of a person to take care of a dependent person and the elements to be taken into account in order to assess the inability to travel for a significant period of time. In exercising its powers to adopt delegated acts, the Commission shall not exceed the scope of the best interests of the child as provided for in this Regulation’.* The text is also set out in Articles 15(6) and 24(3), while Article 68 of the proposal provides for the delegation of powers. These are the delegated acts laid down in Article 290 TFEU. Article 290(1) allows the legislator to delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain **non-essential elements of the legislative act**. However, although Article 290 gives the Commission this power, the delegation is subject to strict conditions, e.g. **the essential elements of an area shall be reserved for the legislative act and accordingly must not be the subject of a delegation of power**, and the objectives, content, scope and **duration of the delegation of power must be explicitly defined in the legislative acts**. The European Parliament or the Council may decide to revoke the delegation. In the light of recital 74, Article 15(6) and Article 24(3) of the proposal for a regulation, it is clear to see that questions concerning the identification of family members or related unaccompanied minors, or the criteria for assessing the ability of a person to care for a dependent person, or situations to be assessed in relation to a long-term inability to travel cannot be deemed to be non-essential elements of the legislative act. Taking one example, in legislative practice, delegated acts are used to adapt legislation in the area of technology and scientific progress. Delegated acts put the Commission in a strong position, giving it powers about which the Council, i.e. the Member States, do not have the opportunity to voice their opinion. Therefore, the Council will not be able to intervene in decisions made by the Commission in key areas in this regard. **Based on the foregoing, it can be concluded that the Articles 15(6) and 24(3) of the proposal for a regulation do not comply with Article 290 TFEU, and infringe the principle of proportionality as laid down in Article 5(4) TEU and Protocol (No 2) on the application of the principles of subsidiarity and proportionality**.

Article 53 of the proposal for a regulation allows the Commission to adjust the solidarity contributions of the Member States (that have indicated their contributions) so as to ensure that half of their share is covered by relocations or sponsored returns in the case of an influx of migrants to one Member State. This provision clearly violates primary legislation, in particular Article 78(3) TFEU: *‘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****’.* Primary law does not give the Commission the authority to adopt measures to manage migratory pressures. Based on the foregoing, we believe that the proposal for a regulation infringes not only primary legislation, but also the principle of proportionality, and goes beyond the scope of what is required to achieve the proposal’s objectives.

**C. Authorises**

the Chair of the Committee

to inform the Speaker of the National Council of the Slovak Republic and the Presidents of the European Parliament, the Commission and the Council of the approved reasoned opinion.

Marián Kéry Tomáš Valášek

Peter Osuský Committee Chair

Verifier

1. Judgment of the Court (Grand Chamber) of 6 September 2017 in Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v Council. [↑](#footnote-ref-1)