European Parliament
2019-2024

Committee on Legal Affairs

5.2.2021

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 asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (COM(2020)0610 – C9-0309/2020 – 2020/0279(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.

ITALIAN SENATE
XVIIIth PARLIAMENTARY TERM

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RESOLUTION
OF THE 14TH STANDING COMMITTEE

(European Union policies)

(*Rapporteurs*: GINETTI and LOREFICE)

Adopted at the sitting of 19 January 2021

ON

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] (COM(2020) 610)

AMENDED PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A COMMON PROCEDURE FOR INTERNATIONAL PROTECTION IN THE UNION AND REPEALING DIRECTIVE 2013/32/EU (COM(2020) 611)

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL INTRODUCING A SCREENING OF THIRD COUNTRY NATIONALS AT THE EXTERNAL BORDERS AND AMENDING REGULATIONS (EC) NO 767/2008, (EU) 2017/2226, (EU) 2018/1240 AND (EU) 2019/817 (COM(2020) 612)

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ADDRESSING SITUATIONS OF CRISIS AND FORCE MAJEURE IN THE FIELD OF MIGRATION AND ASYLUM (COM(2020) 613)

AMENDED PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ESTABLISHMENT OF 'EURODAC' FOR THE COMPARISON OF BIOMETRIC DATA FOR THE EFFECTIVE APPLICATION OF REGULATION (EU) XXX/XXX [REGULATION ON ASYLUM AND MIGRATION MANAGEMENT] AND OF REGULATION (EU) XXX/XXX [RESETTLEMENT REGULATION], FOR IDENTIFYING AN ILLEGALLY STAYING THIRD-COUNTRY NATIONAL OR 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 REGULATIONS (EU)

2018/1240 AND (EU) 2019/818 (COM(2020) 614)

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

Forwarded to the Presidency on 25 January 2021

The Standing Committee,

following consideration of regulation proposals COM(2020), 610, 611, 612, 613 and 614 reforming the Common European Asylum System and enforcing the new Pact on Migration and Asylum (COM(2020) 609), concerning, respectively, the asylum procedure at the external borders, pre-entry screening, situations of crisis and the Eurodac system;

having regard to the government reports submitted pursuant to article 6 of Law No 234 of 24 December 2012, concerning the proposals COM(2020) 610 (Dublin Regulation), 611 (international protection), 612 (pre-entry screening), 613 (situations of crisis) and 614 (Eurodac) and the hearing of the Minister of the Interior, which took place on 12 January 2021;

concludes that the principles of subsidiarity and proportionality have not been complied with, for the following reasons:

the phenomenon of migratory flows is, from a structural standpoint, a cross-border one, difficult to handle for individual Member States. A proper handling of such flows requires total and more thorough competence at European Union level; the actions of the individual Member States must comply with the principles set forth under article 80 of the Treaty on the Functioning of the European Union, which states that 'The policies of the Union […] shall be governed by the principle of solidarity and fair sharing of responsibility between the Member States […]', and solidarity must strike the right balance with shared responsibilities through mandatory instruments and procedures;

the 14th Committee takes the view, above all, that the 'package solution' needs to be retained for the proposals under consideration, in order to give a uniform overview of their many facets and to assess their actual scope, with specific reference to the required balance between the responsibilities ascribed to the states of first entry and the solidarity system involving the other Member States of the European Union;

indeed, the proposals show a manifest asymmetry between the mandatory procedures that the states of first entry must implement at the external borders, including pre-entry ones, which aim to prevent secondary movements, and the flexible solidarity solutions, whose compulsoriness for the other Member States is not so certain;

from this standpoint, the proposals for reforming the current European system do not alter the issues currently stemming from the enforcement of the principle of responsibility of the state of first entry (which still stands), nor do they therefore provide 'added value' to the action taken at EU level – itself a crucial element for ensuring compliance with the principle of subsidiarity – which can only be guaranteed in the presence of mechanisms capable of effectively sharing the burdens borne by the states of first entry, including the actual compulsoriness of relocation of migrants to other Member States;

in particular, proposal COM(2020) 610, while abrogating and replacing the Dublin Regulation, retains the first entry criterion for determining the Member State that is responsible for considering international protection applications, unlike the resolution of the European Parliament of 16 November 2017, which states that entry into any Member State is to be considered entry into the European Union and which sets out innovative criteria – regardless of the State of first entry – when it comes to identifying the responsible State;

in its resolution of 17 December 2020, concerning the Dublin III Regulation, the European Parliament considers that the current regulation '[…] imposes a disproportionate

responsibility on a minority of Member States, in particular when high numbers of arrivals occur; considers that owing to their geographical location the first country of entry criterion in the Dublin III Regulation puts an unprecedented and disproportionate burden on frontline countries in terms of registration and reception of asylum seekers; points out that the Dublin III Regulation, as designed and implemented, has failed to guarantee its main objective, namely swiftly determining the Member State responsible for an asylum application, and thus to ensure a fair distribution of responsibility between Member States, and effective and swift access to asylum procedures', while also stressing that '[…] the inappropriate application of the hierarchy of criteria, in particular the excessive use of the first country of entry criterion and the ineffective execution of transfers, has increased the disproportionate responsibility borne by certain Member States, especially frontline Member States; takes the view that the EU therefore needs a sustainable solidarity mechanism which establishes fair rules for the allocation of responsibility between Member States in accordance with article 80 of the TFEU, and in full respect of the fundamental right to safety and the protection of asylum seekers';

as a matter of fact, the new solidarity mechanism the proposals envisage is totally unfit for sharing the responsibility burdens of the states of first entry, and could be alternatively formulated as follows: *(a)* relocation of applicants who are not subject to the border procedure for the examination of an application for international protection; *(b)* return sponsorship in relation to illegally staying third-country nationals; *(c)* relocation of beneficiaries of international protection who have been granted international protection over the past three years; *(d)* capacity-strengthening measures in terms of asylum, reception and repatriation, operational support and cooperation with third countries;

furthermore, relocations are expected to be ordered via provisional legal instruments (execution orders) lasting one year; no system of incentives or sanctions is in place for non-compliant Member States other than the traditional litigation procedures, which are hardly persuasive when it comes to migration policies;

as for the principle of proportionality, the 'pre-entry' system appears to be inappropriate: when actually enforced, it risks excessively affecting the national legal system and the jurisdictional protections that must be guaranteed pursuant to constitutional principles and those relating to international law and European law;

indeed, the 'pre-entry' set forth under proposals COM(2020) 611 and 612 results in a sort of legal fiction – which is also incompatible with the actual handling and running of maritime borders – of a 'non-entry' of illegal migrants into European territory. This, in turn, calls for a raft of measures, in terms of mandatory procedures at the external borders, including pre-entry screening procedures, and brings about the need for closed reception centres in the countries of first entry, which consequently risk becoming hotspots for the rest of Europe, at a time when the socio-economic repercussions of the pandemic could – worryingly – further drive migration. Said procedures, which might be incompatible with the European Convention on Human Rights, would be entirely borne and performed by the states of first entry, with no mandatory burden-sharing mechanism in place, thus totally departing from the 'spirit of Valletta' of September 2019, which defined a solidarity system and relocation quotas for migrants reaching European territory via sea rescue operations, regardless of their status as asylum seekers;

from a legal standpoint, article 4(1) of proposal COM(2020) 612 – which states that people undergoing screening are not authorised to enter the territory of a Member State – creates, as previously mentioned, a sort of *fictio juris* (legal fiction), based on which a foreigner, despite being physically present on the national territory, is not actually deemed so

until the screening process is over. This entails a problem: that of whether – in legal terms – holding someone in screening centres for the entire duration of the screening process could be considered detention. Broadly speaking, such a system would strip the access to a state's territory of its most intrinsic meaning, namely that of accessing a rights-based legal system, hence a legal system that abides by such rights;

it is also worthwhile shedding light on the definition of 'locations situated at or in proximity to the external borders' that are used for screening activities, and on the five-day detention arrangements implemented in those locations, including with reference to foreign asylum seekers;

the requirement of performing said pre-entry screening in no more than ten days can lead to capacity-related issues in the current facilities, with organisational and financial repercussions on the relevant Member States;

furthermore, the last paragraph of article 6(7) of proposal COM(2020) 612 provides that experts, liaison officers, personnel of the European Border and Coast Guard Agency and of the European Union Agency for Asylum merely have the option of providing assistance and support to the screening activities performed by the relevant national authorities. Such a system is therefore unfit for sharing the greater burden stemming from the proposed rules and disproportionately weighs on the individual Member States where the external borders lie;

another element that fails to comply with the principle of proportionality is the setting of a 20% threshold for granting international protection; below that threshold, the border procedure must be activated, which means that relocation procedures cannot be green-lighted, especially in the event of arrivals at maritime external borders. In fact, almost all maritime migrants fall within the criteria set forth under article 40(1)(c), (f) or (i) of proposal COM(2020) 611, and would consequently have to undergo external border procedures, thus being excluded from the relocation programme;

nor is the regulation of the return sponsorships mechanism consistent with the principle of proportionality: it entails an increase in costs and bureaucratic procedures for the Member State of first entry that benefits from the sponsorship; plus, it can hardly be put in place over the expected eight-month period or if no repatriation agreements have been reached with the main African countries. Moreover, during the first eight months following the entry, the sponsor Member State must fulfil all repatriation-related procedures directly on the territory of the Member State of first entry, and this is hardly beneficial for the State bearing the brunt of the migratory flow;

in this regard, a key element of the new pact on migration and asylum for stepping up repatriation activities and making them more effective is the external dimension, and as such, it should go hand in hand with all the other proposals in the asylum and migration package. The approach to relations with third countries – which greatly relies on striking readmission and legal migration agreements – should be addressed promptly and dynamically at the European Union level, with no further delays, and should also provide for the due financial and political instruments, with a specific focus on our southern neighbours.