Courtesy translation

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

12th Meeting
CRD-1576-1/2016-VEZ

24.
R e s o l u t i o n

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

Delivered on 7 September 2016

Regarding 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)

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

With regard to the Treaty on European Union, particularly Article 5,

With regard to the Treaty on the Functioning of the European Union, particularly Article 78 (2) e),

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

With regard to the Reasoned Opinion of the Committee of the National Council of the Slovak Republic for European Affairs of 30 September 2015 on the proposal for a Regulation of the European Parliament and of the Council establishing a crisis mechanism for relocation and changes of the European Parliament and of the Council (EU). 604/2013 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),

acting in accordance with the Protocol no.2 on the application of the principles of subsidiarity and proportionality,

A. Discussed

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 reasoned opinion on the non-compliance with the principle of subsidiarity as follows:**

The proposal for a regulation is not in accordance with the principle of subsidiarity, as set out in Article 5, para. 3 of the Treaty on European Union, which states that: *"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 Article 78(2)(e) of the Treaty on the Functioning of the European Union is the legal basis for this proposal stating that: *"For the purposes 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: ... (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection."* Para. 1 of the article 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 to reform the Common European Asylum System. The basic principle declared by the proposed regulation COM (2015) 450 is maintained, and that asylum applicants should apply for asylum in the first country of entry, unless their family is not already situated in another country. The recast proposal for the regulation is introducing a new system for the distribution of asylum applications that automatically determines when a country is facing disproportionately high number of asylum applications. The system will be based on the size and wealth of the country. When a country will be faced with a disproportionately high number of applications, which will exceed the deficit reference value (more than 150% of the reference number), all new applicants in this country (regardless of nationality), will be relocated within the EU after the verification of the admissibility of their applications, until the number of applications falls below the above mentioned level.

The explanatory memorandum to COM (2016) 270 indicates that the resolution of the crisis situation due to migration, in this case, is based on Art. 78 para. 3 of the Treaty on the Functioning of the European Union, when the explanatory memorandum provides that*: "The proposal aims at ensuring the correct application of the Dublin system* ***in times of crisis*** *and at tackling secondary movements of third-country nationals between Member States, the Dublin system must be reformed, both to simplify it and enhance its effectiveness in practice, and to be equal to the task of dealing with situations when Member States' asylum systems are faced with* ***disproportionate pressure****. "* Following Art. 78 par. 3 can also rely on the fact that the indicator for the issuance of a proposal of a regulation for the initial crisis relocation mechanism (COM (2015) 450 was to provide structural solutions for dealing with crisis situations, and this proposal laid the foundation for the issuance of the proposal of the regulation COM (2016) 270. The Article 78(3) of the Treaty on the Functioning of the European Union providing that, "*In the event of one or more Member States being confronted with 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*." **EU primary law itself presumes, therefore, that these crisis situations will be solved by adopting provisional measures rather than introducing of permanent measures (mandatory distribution key) as proposed by the Commission.** As noted above, under the principle of subsidiarity, in areas which do not fall

within its exclusive competence, the Union shall act only if and insofar 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. It is apparent that by introducing a permanent mandatory distribution key instead of adopting provisional measures in emergency situations, **the draft regulation goes beyond the extent necessary to achieve the objective and thus violates the principles of subsidiarity and proportionality.**

The presented proposal of the regulation is a recast proposal of the regulation of 9 September 2015 COM (2015) 450, the proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation of the European Parliament and of the Council (EU) No 604/2013 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, the above **stated draft Regulation has not been adopted to date, therefore it also has not been applied and the necessary analysis of the functioning of this proposal have not been done.** For this reason, the recast proposal of the Regulation is a duplicate Regulation, 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. "*

The values of democracy and the rule of law, exactly contain the requirement for **legal certainty**, which is to anticipate the decision in a particular case, but also the development of the legislation. For these reasons, we consider the Commission's process for non-complying with the fundamental values on which the Union is founded.

In this case, it is appropriate, for the Commission to use the opportunity to withdraw its legislative proposal as a result of its right of initiative, which follows Article 293 para.2 of the Treaty on the Functioning of the European Union. This possibility is also confirmed by the Court of Justice. *"The Commission may withdraw or modify its proposal ... if it by the virtue of the reassessment interests concludes, that the adoption of the measures is unnecessary".*[1] Since the draft Regulation of 9 September 2015 COM (2015) 450 has not been adopted to date and become fully unnecessary with the release of the draft Regulation COM (2016) 270, it is desirable, in order to preserve and promote legal certainty and not duplicating legislative amendment, that the Commission proceeds with the withdrawal of the draft Regulation COM (2015) 450.

The practice has shown that the **use of the corrective allocation mechanism** provided in Chapter VII of the presented proposal, in the form of mandatory distribution of persons **does not effectively address the migration pressure**, and is not consistent with the values, rules and principles of international law and EU law. It does not take into account the fact that some Member States are not the target country for migrants. Their allocation to Member States against their will, above all, does not prevent secondary movements without restrictions on the free movement of persons, and can also cause safety hazards. **The proposed mechanism is unenforceable.**

The proposal also contains another major change regarding the establishment of a new **automated information system,** that should operate as a statistical system for applications submitted within the Member States (Article 44 of the draft regulation). It shall consist of a central system, a communication infrastructure and national infrastructures. It is to be

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

expected that the introduction and administration of such a management system, as well as the recording of data into the system, would be an additional burden for the Member States. Given that this system should serve the purposes of the above criticized unenforceable allocations, we do not see any reason to create such a system.

A Member State should be able, in accordance with Article 37 of the draft regulation, temporarily not to participate in the corrective allocation mechanism, but in this case it would have to pay a solidarity contribution for each applicant, which would be in their responsibility based on the mechanism for equitable distribution. The solidarity contribution in the amount of 250 000 EUR has to be paid to the Member State, in which that person will be ultimately allocated. The provisions of this article **do not correspond with the principle of proportionality**, which determines what should be the form and nature of the EU actions. This means, that EU proposed funds have to be appropriate and proportionate in view of the objectives set adjustments. In other words, the priority always is the least restrictive form of regulation, which still allows the achievement of the set goals. For these reasons, the principle of proportionality has been violated by the provision of the draft proposal. Moreover, the enforceability of this provision is again doubtful, just imagine the case, where all Member States decide to "redeem" of its obligation and would pay the solidarity contribution. It is also difficult to assess, how the Commission came up with the amount of the stated 250 000 EUR. The stated "solidarity contribution" seems to be a disguised fine for the country refusing the mandatory quotas. Authorizations of the relevant articles of the Treaty on the Functioning of the EU do not set a legal basis for the establishment and application of such "solidarity contributions", as well as the creation of a new automated information system. **We therefore consider the chosen legal basis for overran,** exceeding the established authorizations.

C. Authorises

The Committee Chairman

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

Edita Pfundter
Jozef Viskupič
Verifier

Ľuboš Blaha
Chairman