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Dear Chair,

The Commission would like to thank the Országgyűlés for its Opinion on the five proposals for Regulations of the European Parliament and of the Council that are part of the New Pact on Migration and Asylum {COM(2020) 610-611-612-613-614 final}¹.

The New Pact on Migration and Asylum, covers all the elements for a comprehensive European approach to migration. It sets out improved and faster procedures throughout the asylum and migration system and balances the principles of fair sharing of responsibility and solidarity. This is crucial for rebuilding trust between Member States and confidence in the capacity of the European Union to manage migration.

¹ 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 final); 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 final), the 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 final); 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 final); 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 final).

The Commission takes the concerns expressed by the Országgyűlés seriously. In response to these comments, the Commission would like to refer to the attached annex.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Országgyűlés in its reasoned Opinion and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

*Ylva Johansson
Member of the Commission*

Annex

The Commission has carefully considered each of the issues raised by the Országgyűlés in its reasoned Opinion and is pleased to offer the following clarifications.

1. On the position of the Országgyűlés with regard to the proposal COM(2020) 610 final on the application of the principle of subsidiarity.

The Commission takes note of the Országgyűlés' position on the proposal for a Regulation on Asylum and Migration Management, namely as regards the legal basis of the proposal and the principles of necessity, proportionality and subsidiarity outlined therein.

The Commission considers that the legal basis is appropriate and recalls that the proposed Regulation refers to the Treaty on the Functioning of European Union generally, and in particular to Article 78(2)(e), and Article 79(2), (a), (b), and (c).

The distribution key was subject to extensive discussions held in the Council in relation to the 2016 Commission's proposal on the Dublin Regulation.² It is based on Gross Domestic Product and population size, which are representative factors for determining each Member State's fair share with regard to mandatory solidarity contributions to Member States under pressure and, under certain circumstances, to Member States subject to disembarkations following Search and Rescue operations.

The Commission considers that the mandatory solidarity mechanism proposed fulfils the conditions of necessity and proportionality. Member States' contributions are meant to support the benefitting Member States, according to the needs identified by the Commission. The proposal also includes a strong element of flexibility where Member States have a choice of the measures through which they contribute. Member States can choose between relocation and capacity measures in the case of solidarity measures following disembarkations from search and rescue operations; Member States can choose between relocation and/or return sponsorship, and capacity measures in the case of situations of migratory pressure. The respect of the principles of necessity and effectiveness of solidarity measures is ensured by a correction mechanism that applies when a certain threshold of contributions to relocation (and return sponsorship in the case of Member States under pressure) is not met. Therefore, the correction mechanism is only applied in specified situations. Moreover, even when the correction mechanism is applied, Member States always retain a choice between the types of measures through which they contribute (relocation or return sponsorship).

This makes the system proportional and tailored to the needs of both the Member States receiving and those providing support. It ensures maximum flexibility while ensuring that Member States contribute towards the needs identified by the Commission to address the

² 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 final)

situation of the relevant Member State(s). In the context of return sponsorship, it is proposed that after a period of eight months in case of migratory pressure and four months in case of crisis, if the return has not been carried out, despite the support provided, the returnee is transferred to the sponsoring Member State, which will have to carry out the return. This will ensure the successful return of irregular migrants from the Union as soon as possible, in a spirit of cooperation and partnership among Member States. The rationale and key elements of this process are therefore not comparable to those of relocation, stipulated in Article 45(1) (a) and (b).

The Commission underscores that Member States cannot individually establish common rules on solidarity among themselves to avoid that a disproportionate burden of migratory pressure falls upon an individual Member State. The ad-hoc bilateral solidarity solutions implemented voluntarily by Member States cannot reply to the challenges the Union as a whole is confronted with when it comes to migration. Sustainable measures are needed and, for this, action by the Union is required. In other words, these objectives could not be sufficiently achieved by the Member States alone and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Union level. Therefore, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, the Regulation does not go beyond what is necessary in order to achieve that objective. The Regulation establishes the key principles of a comprehensive approach based on a common framework, underpinned by a monitoring and governance structure necessary to ensure its implementation.

2. On the position of the Országgyűlés on the proposal COM(2020) 611 final on the application of the principle of subsidiarity.

The Commission takes note of the position of the Országgyűlés with regard to the amended proposal for an Asylum Procedure Regulation. The proposal contained in document COM(2020) 611 final amends the proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU presented by the Commission in 2016 (COM(2016) 467 final).

The objective of the proposal presented in 2016 was to establish a common procedure for granting and withdrawing international protection, which all Member States would apply in their national systems, ensuring the timeliness and effectiveness of the procedure. The aim was to have applications made by third-country nationals and stateless persons for international protection examined in national procedures governed by the same rules, regardless of the Member State where the application was lodged. This would ensure equality in the treatment of applications for international protection, clarity and legal certainty for the individual applicant.

Building on the objectives of the 2016 proposal, the amended proposal for an Asylum Procedure Regulation and the proposal for a Regulation introducing a screening, establish a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, to return. A seamless process

requires more harmonised rules, notably at the new pre-entry phase, which includes a screening and is connected to the asylum and return border procedures.

It is also necessary to further harmonise the national procedures for granting and withdrawing international protection, notably the issuance of asylum and return decisions. Negative asylum decisions and return decisions should be subject to the same effective remedy. While the effect of the return decision should be suspended for as long as an applicant has a right to remain or is allowed to remain for the purpose of an appeal, applicants should not be entitled to remain on Member States' territory during a second or further level of appeal, unless a court or tribunal would allow them to do so. This would prevent misuse of the system, as applicants would not be able to delay procedures for preventing their removal from EU territory. In addition, for decisions issued in the framework of a border procedure there should be only one level of appeal.

As Member States are not in a position individually to establish a common procedure for granting and withdrawing international protection that would safeguard applicants' rights while reducing incentives for asylum shopping, secondary movements, and abusive claims, action by the Union is required. The objectives outlined above cannot be sufficiently achieved by Member States and therefore, by reason of the scale and effects of this Regulation, can be better achieved at Union level. Therefore, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.

In accordance with the principle of proportionality, stipulated in this Article, this Regulation does not go beyond what is necessary in order to achieve the objective. All elements of the proposal are limited to what is necessary to set up and enable such a common procedure, to streamline and simplify it, to ensure equality of treatment in terms of rights and guarantees for applicants and avoid discrepancies in national procedures, which have the undesired consequence of encouraging unauthorised movements. The aim of these changes is to strike the right balance between the right of applicants to an effective remedy and the need to ensure that the asylum systems of the Member States are not abused by applicants, third-country nationals or stateless persons who only aim at preventing their removal from the Union.

As regards the legal basis, Articles 78(2)(d) and 79(2)(c) of the Treaty on the Functioning of the European Union provide for the adoption of measures for common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, as well as for illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation. The procedure for granting and withdrawing international protection includes the appeal stage (effective remedy).

Finally, as regards the border procedure, the Commission notes that under the current Asylum Procedures Directive, its use is limited to a number of clearly defined cases and it should not be considered as the general asylum procedure in a Member State. The same logic, providing that the border procedure be applied only in certain well-defined cases, is valid also for the proposal amending the Asylum Procedure Regulation.

3. On the position of the Országgyűlés on the proposal COM(2020) 612 final on the application of the principle of subsidiarity (Screening proposal).

In order to ensure compliance with EU law and the Charter of Fundamental Rights, it is proposed that each Member State establish an independent monitoring mechanism and put in place adequate safeguards to ensure its independence. The proposed monitoring mechanism is not a complaint mechanism but an inbuilt control mechanism designed to support the national authorities in carrying out their tasks in a way which is fully compliant with fundamental rights and enable Member States to quickly identify and address any possible shortcomings. In accordance with the principles of subsidiarity and proportionality, Member States can choose to entrust the task of monitoring to already existing independent monitoring bodies, if they can under national law fulfil the tasks set out under Article 7. The Fundamental Rights Agency shall issue general guidance to Member States on the setting up of such a mechanism and its independent functioning. Furthermore, Member States may request the Fundamental Rights Agency to support them in developing their national monitoring mechanism, including the safeguards for independence of such mechanisms, as well as the monitoring methodology and appropriate training schemes. Member States may also invite relevant national, international and non-governmental organisations and bodies to participate in the monitoring.

The proposal (Article 6 and recital 20 thereof) sets out that the Member States should determine appropriate locations for the screening at or in proximity to the external border, taking into account geography and existing infrastructure and submit third country nationals to a screening process. For cases covered under Article 5 (screening within the territory) the screening location should be within the territory. During the screening, all persons concerned should be guaranteed a standard of living complying with the Charter of Fundamental Rights, and particular attention should be paid to individuals with vulnerabilities. Nevertheless, the proposal does not contain specific rules on the type of facilities that may be used for conducting the screening. This falls under Member States' responsibility to decide Member States may request financial support from EU funds to adjust or develop the necessary infrastructure.

The proposal sets out that the Member States should apply measures pursuant to national law to prevent persons who are screened at or in proximity to the border from entering the territory during the screening. This may include detention in individual cases, subject to the national law regulating that matter. Such national law provisions, which foresee deprivation of liberty in view of preventing illegal entry, already exist in a number of Member States (notably as regards persons refused entry in transit zones who cannot be returned immediately). Such national law measures are covered by Article 5(1)(f)(first limb) of the European Charter of Human Rights and they are different from the rules on the ordering of detention in the asylum procedure or in the return procedure.

4. On the position of the Országgyűlés on the proposal COM(2020) 613 final on the application of the principle of subsidiarity (CRISIS).

The Commission takes note of the position of the Országgyűlés with regard to this proposal, namely as regards the legal basis of the proposal and as regards the principle of subsidiarity.

The Commission upholds that Article 78, second paragraph, points (c), (d) and (e) and Article 79, second paragraph, point (c) of the Treaty on the Functioning of the European Union are the appropriate legal bases for the crisis proposal, as the proposal contains a number of provisions related to the proposals for an Asylum Procedures Regulation and for a Regulation on Asylum and Migration Management. It also contains provisions on the granting of immediate protection status in situations of crisis. The Országgyűlés' found that the proposal for a crisis regulation is contrary to the principles of necessity and proportionality because "the form of the proposed measures gives the European Commission additional rights, the compatibility of which with the Treaties may be questioned". It is important to note that the proposed Regulation provides for certain derogations to the proposal for a Regulation on Asylum and Migration Management and to the proposed Asylum Procedure Regulation. This instrument aims at putting in place a set of rules to enable the Member States and the Union to deal with the specific situations of crisis caused by a mass influx of third country nationals onto the territory of a Member State or to address specific situations of force majeure. In procedural terms, the proposal for the Crisis regulation only establishes derogations from the asylum and return procedures in the Union. These provisions would be directly applicable and would provide the necessary degree of uniformity and effectiveness needed in the application of EU procedural rules on asylum in a situation of crisis and force majeure.

The Commission is well placed to establish whether a Member State is confronted with a crisis situation and determine whether this situation is of such scale and nature that renders the Member State's asylum, reception or return system non-functional and may have serious consequences for the functioning of the Common European Asylum System or the Common Framework for asylum and migration management at EU level as set out in the proposal for Regulation on Asylum and Migration Management. In accordance with the proposal for a Regulation on Asylum and Migration Management, the Commission will assess a Member State's reasoned request for the application of the specific rules for compulsory solidarity and determine whether there is a situation of crisis. Likewise, the Commission will assess a Member State's reasoned request for the application of derogations from the Asylum Procedure Regulation proposal. The Commission's assessment should be based on substantiated information, collected in particular through the EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint), by the European Asylum Support Office (EASO) pursuant to Regulation (EU) No 439/2010, the European Border and Coast Guard Agency pursuant to Regulation (EU) 2019/1896 and the Migration Management report referred to in the proposed Regulation on Asylum and Migration Management.

As regards the observation that in the crisis proposal, the purpose of the procedure conducted at the border does not seek to prevent the entry of persons who are not eligible for international protection, the aim is rather to ensure that the majority of applications are examined on the merits at the border as soon as possible. In fact, the proposal widens the possibility to apply the border procedure to a broader category of persons. Accordingly, Member States would continue to apply the border procedure to all those cases provided by the proposed Asylum Procedures Regulation (including threat to the national security or public order, applicants coming from a country for which the EU average recognition rate is 20% or lower) but they may decide to apply the border procedure also for deciding on the merits of applications made by third country nationals coming from a country for which the EU-wide recognition rate is 75% or lower. In addition, in a situation of crisis, in view of the possible strain on the asylum system, the proposal provides that Member States have the possibility to not authorise the entry of applicants subject to a border procedure for a longer period of time than the ones set in the proposed Asylum Procedure Regulation. Also to note that the screening of third-country nationals according to the rules laid down in the proposal for a Screening Regulation would continue to apply, with the possibility to extend the five-day deadline by another five days.

5. On the position of the Országgyűlés with regard to the proposal COM(2020) 614 final on the application of the principle of subsidiarity (EURODAC).

The Commission takes note of the position of the Országgyűlés with regard to the Eurodac Amended Proposal, namely as regards the legal basis of the proposal. The legal basis is a reflection of the purposes of the Regulation, which have been enlarged and provisionally agreed by the co-legislators in 2018.

As regards the respect of the principle of subsidiarity, since its set up, the Eurodac system has proven in practice that the objectives set out in the Regulation are better achieved at Union level. Eurodac has provided indispensable technical support to the EU wide response to the issues related to the transnational movements of applicants for international protection. The extension of the objectives of the Regulation, namely to the control of irregular immigration to the Union, reinforces the need for an EU wide database capable of providing the necessary information to Member States.

As regards the establishment of a specific category for those persons who are disembarked following search and rescue (SAR) operations, the distinction is relevant because Member States of disembarkation cannot apply to those persons the same tools applied to irregular crossings by land or air. Those Member States are fulfilling a humanitarian obligation and face specific challenges.. Also, the establishment of such a category in Eurodac will provide for a better picture of the scale of the phenomenon.

Finally, the Országgyűlés argues that the collection of data required for the purposes of Regulation on Asylum and Migration Management is neither necessary nor proportionate because the regulation would change the foundations of the Union's asylum system. The Eurodac proposal amending the 2016 proposal builds on the provisional agreement between co-legislators, complements these changes and aims at

transforming Eurodac into a common European database to support EU policies on asylum, resettlement and irregular migration. It should therefore support the application of the various measures and rules foreseen in the proposal for a new Regulation on Asylum and Migration Management (e.g. relocation, shift of responsibility).