

6. Sixth plea in law: breach of the principle of proportionality

The contested decision is manifestly contrary to the principle of proportionality, since it is manifestly neither appropriate nor necessary for attaining the aim pursued.

<sup>(1)</sup> OJ 2015 L 248, p. 80.

---

**Action brought on 3 December 2015 — Hungary v Council of the European Union**

**(Case C-647/15)**

(2016/C 038/56)

*Language of the case: Hungarian*

**Parties**

*Applicant:* Hungary (represented by: M.Z. Fehér, Agent)

*Defendant:* Council of the European Union

**Form of order sought**

In its application, Hungary claims that the Court should:

- annul Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece <sup>(1)</sup> (‘the contested decision’);
- in the alternative, in the event that the first head of claim is not upheld, annul the contested decision in so far as it refers to Hungary;
- order the Council to pay the costs.

**Pleas in law and main arguments**

1. The Hungarian Government submits that Article 78(3) TFEU does not provide the Council with an adequate legal basis for the adoption of the contested decision. Article 78(3) TFEU does not empower the Council to adopt a legislative act, nor, therefore, to adopt the measures established in the contested decision, specifically those which involve a binding exception in respect of a legislative act, in the present case Regulation (EU) No 604/2013. <sup>(2)</sup> In view of its content, the contested decision constitutes a legislative act — given that it establishes an exception in respect of Regulation No 604/2013 — with the result it could not be adopted on the basis of Article 78(3) TFEU, which solely empowers the Council to adopt acts through a non-legislative procedure, that is to say, non-legislative acts. In the event that, despite the foregoing, it is held that Article 78(3) TFEU may constitute the basis for the adoption of a legal act which entails an exception in respect of a legislative act, the Hungarian Government submits that that exception cannot go so far as to affect the essence of that legislative act and render nugatory its fundamental provisions, as the contested decision does.
2. A measure established for a period of 24 months — and in certain cases, 36 months — the effects of which, moreover, go beyond even that period, is not compatible with the concept of ‘provisional measures’ referred to in Article 78(3) TFEU. The contested decision exceeds the power granted to the Council by Article 78(3) TFEU, since, in determining its period of validity, account was not taken of the period necessary for the adoption of a legislative act on the basis of Article 78(2) TFEU.
3. In adopting the contested decision, the Council infringed Article 293(1) TFEU, since it departed from the Commission’s proposal without reaching unanimity.

4. The contested decision establishes an exception in respect of a legislative act and itself constitutes, in view of its content, a legislative act, with the result that, in order to adopt it — even assuming that it were possible to do so on the basis of Article 78(3) TFEU — the Council would have had to respect the right of the national parliaments to issue an opinion on legislative acts, recognised in Protocols 1 and 2 annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.
5. After consulting the European Parliament, the Council substantially amended the text of the proposal, despite which it did not consult the European Parliament again.
6. At the time of the approval by the Council, the linguistic versions of the draft decision in the official languages of the Union were not available.
7. Furthermore, the contested decision is unlawful because its adoption is contrary to Article 68 TFEU and the conclusions reached by the European Council at its meeting on 25 and 26 June 2015.
8. The contested decision infringes the principles of legal certainty and legislative clarity, since it fails to explain various aspects of how its provisions are to be applied and what relation those provisions are to have to the provisions of Regulation No 604/2013. Those unclear aspects include the issue of the application of procedural rules and guarantees in respect of the adoption of the relocation decision, as well as the fact that the contested decision does not clearly establish the selection criteria for the purpose of relocation and fails to regulate adequately the status of applicants in the Member State of relocation. The contested decision is contrary to the Geneva Convention relating to the Status of Refugees,<sup>(3)</sup> since it deprives applicants of their right to remain in the territory of the Member State in which they made their application and allows their relocation to another Member State without it being necessary to show the existence of a material link between the applicant and the Member State of relocation.
9. The contested decision infringes the principles of necessity and of proportionality. Given that, in contrast with the Commission's initial proposal, Hungary is no longer included among the beneficiary Member States, the provision in the contested decision for the relocation of 120 000 applicants for international protection is groundless. In view of the fact that, in the contested decision, provision is no longer made for any relocation from Hungary, the figure of 120 000 applicants proposed initially is now an arbitrary figure, unconnected to the situation set out in the Commission's proposal and which it was actually intended to address. It is unacceptable — particularly in the case of a provisional measure adopted on the basis of Article 78(3) TFEU — that, as regards almost half of the applicants that fall within its scope, a definitive relocation decision be taken in the light of subsequent circumstances.
10. In the alternative, the Hungarian Government submits that the contested decision infringes the principle of proportionality in respect of Hungary, since — despite the well-known fact that a large number of irregular migrants have entered Hungary and a large number of applications for international protection have been made there — obligatory quotas are imposed upon it as a host Member State. The contested decision does not comply, as regards Hungary, with Article 78(3) TFEU, since the requirement laid down in that provision, according to which such measures may be adopted for the benefit of Member States concerned by a sudden inflow of nationals of third countries, is not met by a measure that, as regards one such Member State, merely imposes obligations.

---

<sup>(1)</sup> OJ 2015 L 248, p. 80.

<sup>(2)</sup> 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 (OJ 2013 L 180, p. 31).

<sup>(3)</sup> Geneva Convention of 28 July 1951 relating to the Status of Refugees, as supplemented by the New York Protocol of 31 January 1967.