



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOT

delivered on 26 July 2017¹

Cases C-643/15 and C-647/15

Slovak Republic,

Hungary

v

Council of the European Union

(Actions for annulment — Decision (EU) 2015/1601 — Provisional measures in the area of international protection for the benefit of the Italian Republic and the Hellenic Republic — Emergency situation characterised by a sudden inflow of nationals of third countries to certain Member States — Relocation of those nationals to other Member States — Relocation quotas — Article 80 TFEU — Principle of solidarity and of fair sharing of responsibility between Member States — Article 78(3) TFEU — Legal basis — Concept of ‘legislative act’ — Article 289(3) TFEU — Whether conclusions adopted by the European Council are binding on the Council of the European Union — Article 15(1) TEU and Article 68 TFEU — Breach of essential procedural requirements — Amendment of the European Commission’s proposal — Requirements for a new consultation of the European Parliament and a unanimous vote within the Council — Article 293 TFEU — Principles of legal certainty and of proportionality)

1. By their applications, the Slovak Republic (C-643/15) and Hungary (C-647/15) seek annulment of 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.²
2. That decision was adopted by the Council of the European Union on the basis of Article 78(3) TFEU, which provides that ‘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 [European] Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament’.
3. The decision was adopted in the context of the migration crisis that affected the European Union from 2014, then increased in 2015, in particular in July and August of that year, and of the catastrophic humanitarian situation to which that crisis gave rise, in particular in ‘front line’ Member States such as the Italian Republic and the Hellenic Republic, which faced a massive inflow of migrants from third countries such as the Syrian Arab Republic, the Islamic Republic of Afghanistan, the Republic of Iraq and the State of Eritrea.

¹ Original language: French.

² OJ 2015 L 248, p. 80, ‘the contested decision’.

4. In order to deal with that migration crisis and the pressure which it placed on the asylum regimes in the Italian Republic and the Hellenic Republic, the contested decision provides for the relocation from those two Member States to the other Member States, over a period of two years, of 120 000 persons in clear need of international protection. The decision is accompanied by two annexes, which initially allocated 66 000 persons to be relocated from Italy (an allocation of 15 600) and Greece (an allocation of 50 400) on the basis of compulsory allocations fixed for each of the other Member States.³

5. Article 2(e) of the contested decision defines relocation as ‘the transfer of an applicant from the territory of the Member State which the criteria laid down in Chapter III of Regulation (EU) No 604/2013 [4] indicate as responsible for examining his or her application for international protection to the territory of the Member State of relocation’, which, according to Article 2(f) of the contested decision, is ‘the Member State which becomes responsible for examining the application for international protection pursuant to [the Dublin III] Regulation ... of an applicant following his or her relocation in the territory of that Member State’.

6. The temporary relocation mechanism provided for in the contested decision takes its place alongside other measures which had already been taken at Union level in order to deal with the migration crisis, including the European programme for the ‘resettlement’⁵ of 22 504 persons in need of international protection, agreed upon on 20 July 2015 in the form of a ‘resolution’ between the Member States and the States associated with the Dublin system, and Decision (EU) 2015/1523, adopted by the Council on 14 September 2015,⁶ which provides for the relocation from Greece and Italy, over a period of two years, of 40 000 persons in clear need of international protection to the other Member States on the basis of distribution determined by consensus.⁷

7. It should also be pointed out that, on 9 September 2015, the Commission submitted not only the proposal for what would become the contested decision,⁸ but also a proposal for a regulation amending the Dublin III Regulation.⁹ That proposal provides for a ‘permanent’ relocation mechanism, that is to say, a relocation mechanism which, unlike the mechanism provided for in Decision 2015/1523 and in the contested decision, is not limited in time. That proposal has thus far still not been adopted.

3 The remaining allocation of 54 000 applicants referred to in Article 4(1)(c) of the contested decision (also known as ‘the reserve’) to be relocated in a second phase, beginning on 26 September 2016, benefits either by default in the Italian Republic or the Hellenic Republic or in another Member State in an emergency situation within the meaning of Article 78(1) TFEU, and is to be allocated according to the mechanism provided for in Article 4(2) and (3) of the contested decision. Following the insertion of paragraph 3a into Article 4 of the contested decision by Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 (OJ 2016 L 268, p. 82), that reserve is to be allocated to the ‘one for one’ mechanism established by the EU-Turkey Statement of 18 March 2016, in accordance with which voluntary admissions to the territory of the Member States of Syrian nationals from Turkey may be imputed to that Member State in the form of resettlements.

4 Regulation 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, ‘the Dublin III Regulation’).

5 Article 2(a) of Regulation No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC (OJ 2014 L 150, p. 168), contains a definition of the concept of ‘resettlement’, which is essentially the process whereby, on a request from the United Nations High Commissioner for Refugees (UNHCR) based on a person’s need for international protection, third country nationals are transferred from a third country and established in a Member State where they are permitted to reside with ‘refugee status’, ‘subsidiary protection status’ or any other status which offers similar rights and benefits.

6 Council Decision of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ 2015 L 239, p. 146).

7 Initially, consensus on the allocation of those persons between Member States was reached only in respect of 32 256 persons, as certain Member States, like Hungary, refused to commit themselves and the Slovak Republic committed itself in respect of only 100 persons. See Resolution of 20 July 2015 of the Representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40 000 persons in clear need of international protection; Annex B.2 to the Council’s defence.

8 Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary (COM(2015) 451 final).

9 Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation No 604/2013 (COM(2015) 450 final).

8. As regards the genesis of the contested decision, I shall mention the following elements.
9. The Commission's initial proposal provided for the relocation of 120 000 applicants for international protection, from Italy (15 600 persons), Greece (50 400 persons) and Hungary (54 000 persons), to the other Member States. Annexes I to III to that proposal included three tables distributing those applicants from each of those Member States among the other Member States, with the exception of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of Denmark, in the form of allocations determined for each of those Member States.
10. On 13 September 2015, the Commission communicated that proposal to the national parliaments.
11. On 14 September 2015, the Council communicated the proposal to the Parliament for consultation.
12. On 17 September 2015, the Parliament adopted a legislative resolution approving the proposal, having regard, in particular, to the 'exceptional situation of urgency and the need to address the situation with no further delay', while asking the Council to consult the Parliament again if it intended to substantially amend the Commission proposal.
13. During the various meetings held within the Council between 17 and 22 September 2015, the Commission's initial proposal was amended on certain points.
14. In particular, at those meetings, Hungary stated that it rejected the notion of being classified as a 'frontline Member State' and that it did not wish to be among the Member States benefiting from relocation on the same basis as the Italian Republic and the Hellenic Republic. Accordingly, in the final version of the proposal, all reference to Hungary as a beneficiary Member State, including in the title of the proposal, was deleted. Also, Annex III to the initial proposal, concerning the distribution of 54 000 applicants who according to the initial version would be resettled from Hungary was deleted. On the other hand, Hungary was included in Annexes I and II as a Member State of relocation of applicants for international protection from Italy and Greece respectively and allocations were therefore attributed to it in those annexes.
15. On 22 September 2015, the Commission proposal as thus amended was adopted by the Council by a qualified majority. The Czech Republic, Hungary, Romania and the Slovak Republic voted against the adoption of that proposal and the Republic of Finland abstained.
16. The contested decision is an expression of the solidarity which the Treaty envisages between Member States.
17. The present actions provide me with the opportunity to recall that solidarity is among the cardinal values of the Union and is even among the foundations of the Union. How would it be possible to deepen the solidarity between the peoples of Europe and to envisage ever-closer union between those peoples, as advocated in the Preamble to the EU Treaty, without solidarity between the Member States when one of them is faced with an emergency situation? I am referring here to the quintessence of what is both the *raison d'être* and the objective of the European project.
18. It is therefore appropriate to emphasise at the outset the importance of solidarity as a founding and existential value of the Union.

19. Already asserted in the Treaty of Rome,¹⁰ the requirement of solidarity remains at the heart of the process of integration pursued by the Treaty of Lisbon. Although surprisingly absent from the list in the first sentence of Article 2 TEU of the values on which the Union is founded,¹¹ solidarity is, on the other hand, mentioned in the Preamble to the Charter of Fundamental Rights of the European Union¹² as forming part of the ‘indivisible, universal values’ on which the Union is founded. Furthermore, Article 3(3) TEU states that the Union is to promote not only ‘solidarity between generations’ but also ‘solidarity among Member States’. Solidarity therefore continues to form part of a set of values and principles that constitutes ‘the bedrock of the European construction’.¹³

20. More specifically, solidarity is both a pillar and at the same time a guiding principle of the European Union’s policies on border checks, asylum and immigration, which form the subject matter of Chapter 2 of Title V of the FEU Treaty, devoted to the area of freedom, security and justice.¹⁴

21. That may be seen from Article 67(2) TFEU, which states that the Union is to ‘frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards nationals of third countries’. In addition, Article 80 TFEU provides that ‘the policies of the Union set out in [that] Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to [that] Chapter shall contain appropriate measures to give effect to this principle’.¹⁵

22. Given the de facto inequality between Member States because of their geographic situation and their vulnerability in the face of massive migration flows, the adoption of measures on the basis of Article 78(3) TFEU and their effective application is even more pressing. From that aspect, measures such as those provided for in the contested decision make it possible to confer a practical content on the principle of solidarity and fair sharing of responsibility between Member States laid down in Article 80 TFEU.

10 See Labayle, S., ‘Les valeurs de l’Union’, doctoral thesis in public law submitted on 12 December 2016, which states that ‘the requirement of solidarity, referred to on many occasions throughout the Treaty of Rome, constitutes ... a central characteristic of the Treaty. It is clear on reading the Treaty that solidarity is among the key guidelines of the project of European integration and in 1957 is already addressed to the Member States as well as to individuals’ (point 282, pp. 117 and 118).

11 Ibid., point 431, p. 165.

12 ‘The Charter’.

13 See Favreau, B., ‘La Charte des droits fondamentaux: pourquoi et comment?’, *La Charte des droits fondamentaux de l’Union européenne après le traité de Lisbonne*, Bruylant, Brussels, 2010, pp. 3 to 38, in particular p. 13. See also Bieber, R., and Maiani, F., ‘Sans solidarité point d’Union européenne, Regards croisés sur les crises de l’Union économique et monétaire et du Système européen commun d’asile’, *Revue trimestrielle de droit européen*, Dalloz, Paris, 2012, p. 295. After pointing out that the concept of ‘solidarity’ is not defined anywhere in the Treaties, those authors observe that ‘the Treaties confer on that concept a scope that varies according to the context — sometimes an objective or parameter for EU action, sometimes a basic value, sometimes a criterion of the obligations to which the Member States have subscribed by acceding to the European Union. The common denominator that links those various emanations of solidarity in the context of the European Union is the recognition of the existence of a “common interest”, separate from and separable from the sum of the individual interests’. Last, for a collection of contributions relating to the principle of solidarity, see Boutayeb, C., *La solidarité dans l’Union européenne – Éléments constitutionnels et matériels*, Dalloz, Paris, 2011.

14 See, in particular, on this topic, ‘Searching for Solidarity in EU Asylum and Border Policies, a collection of short papers following the Odysseus Network’s First Annual Policy Conference’, 26-27 February 2016, Université libre de Bruxelles. See also Küçük, E., ‘The principle of solidarity and fairness in sharing responsibility: more than window dressing?’, *European Law Journal*, Sweet and Maxwell, London, 2016, pp. 448 to 469, and Bast, J., ‘Deepening supranational integration: interstate solidarity in EU migration law’, *European Public Law*, No 22, Issue 2, Wolters Kluwer Law and Business, Alphen aan den Rijn, 2016, pp. 289 to 304.

15 At the international level, solidarity is also a cardinal value of asylum policy. The fourth recital of the Preamble to the Convention of 1951 relating to the Status of Refugees, signed in Geneva on 28 July 1951, supplemented by the Protocol relating to the Status of Refugees of 31 January 1967 (‘the Geneva Convention’), thus provides that ‘the grant of asylum may place unduly heavy burdens on certain countries, and ... a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be obtained without international cooperation’.

23. The particular feature of the contested decision is that it establishes a relocation mechanism on the basis of allocations assigned to the Member States which are binding in nature. With that decision, solidarity between Member States has a specific content and a binding nature. That essential and innovative characteristic of that decision explains the politically sensitive nature of the present cases, since it has crystallised the opposition on the part of Member States which advocate freely consented solidarity based solely on voluntary commitments.

24. That opposition, together with the finding of a very incomplete application of the contested decision, to which I shall return below,¹⁶ may give the impression that, behind what is by common consent called the ‘2015 migration crisis’, another crisis is concealed, namely the crisis of the European integration project, which is to a large extent based on a requirement for solidarity between the Member States which have decided to take part in that project.¹⁷

25. From another side, it is just as possible to consider that, in adopting a firm response to that migration crisis, the Union has shown that it had the necessary tools and that it was prepared to use them. It remains to ascertain, as the present actions invite me to do, that, in taking measures such as those contained in the contested decision, the Union complied with the legal framework laid down in the Treaties.

I. Procedure before the Court and forms of order sought

26. In Case C-643/15, the Slovak Republic asks the Court to annul the contested decision and to order the Council to pay the costs.

27. In Case C-647/15, Hungary asks the Court to annul the contested decision or, in the alternative, in the event that its first head of claim is not upheld, to annul that decision insofar as it concerns Hungary, and to order the Council to pay the costs.

28. In Cases C-643/15 and C-647/15, the Council asks the Court to dismiss the actions as unfounded and to order the Slovak Republic and Hungary, respectively, to pay the costs in the cases concerning them.

29. By decision of the President of the Court of 29 April 2016, the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of Sweden and the Commission were granted leave to intervene in support of the form of order sought by the Council in Cases C-643/15 and C-647/15.

30. By that decision of the President of the Court, the Republic of Poland was granted leave to intervene, in Case C-643/15, in support of the form of order sought by the Slovak Republic and, in Case C-647/15, in support of the form of order sought by Hungary.

¹⁶ Suffice it to say at this point that, according to the information provided by the Council at the hearing before the Court on 10 May 2017, the number of relocations from Italy and Greece stood at 18 129 on 8 May 2017.

¹⁷ See, in that regard, Labayle, S., *op. cit.*, who observes, in regard to the discrepancies which have appeared between Member States in the management of that migration crisis, that while it is necessary to ‘be wary of any tendency to dramatise, ... nonetheless the fear of the danger that the work patiently built up over more than half a century will disintegrate cannot be ignored. Such a gradual undermining of the foundations threatens the entire edifice and reinforces the need for absolute vigilance with respect to the matter. Failure by its own Member States to respect the founding principles of the Union introduces a potential factor of the disintegration of elements which are essential to its continuity and to the logic of its functioning’ (point 1 182, p. 477). See also Chassin, C.-A., ‘La crise des migrants: l’Europe à la croisée des chemins’, *Revue Europe*, No 3, LexisNexis, 2016, pp. 15 to 21, in particular point 43, p. 21, which states that ‘the migrant crisis is ... a human crisis, but also a moral crisis, for the European Union: beyond the short-term answers, it underlines the fragility of the European construction’.

II. The actions

31. In support of the form of order which it seeks, the Slovak Republic relies on six pleas in law, alleging, respectively, (i) infringement of Article 68 TFEU and Article 13(2) TEU, and breach of the principle of institutional balance; (ii) infringement of Article 10(1) and (2) TEU, Article 13(2) TEU, Article 78(3) TFEU, Articles 3 and 4 of Protocol (No 1) on the role of the national parliaments in the European Union and Articles 6 and 7 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaties,¹⁸ and breach of the principles of legal certainty, representative democracy and institutional balance; (iii) breach of essential procedural requirements governing the legislative process and infringement of Article 10(1) and (2) TEU, Article 13(2) TEU, and breach of the principles of representative democracy, institutional balance and sound administration (in the alternative); (iv) breach of essential procedural requirements laid down in Article 78(3) TFEU and Article 293 TFEU, and of Article 10(1) and (2) TEU, Article 13(2) TEU, and breach of the principles of representative democracy, institutional balance and sound administration (partly in the alternative); (v) infringement of Article 78(3) TFEU owing to non-fulfilment of the conditions of its applicability (in the alternative); and (vi) breach of the principle of proportionality.

32. In support of the form of order which it seeks, Hungary relies on 10 pleas in law.

33. The first two pleas allege infringement of Article 78(3) TFEU, in that that provision does not provide the Council with an adequate legal basis for the adoption of measures that entail a binding exception to the provisions of a legislative act, which are applicable for a period of 24 months, or indeed of 36 months in some cases, and the effects of which extend beyond that period, which is not compatible with the concept of ‘provisional measures’.

34. The third to sixth pleas allege breach of essential procedural requirements, in that (i) when adopting the contested decision, the Council infringed Article 293(1) TFEU by departing from the Commission’s proposal without a unanimous vote (third plea); (ii) the contested decision contains a derogation from the provisions of a legislative act and is itself a legislative act by virtue of its content, so that, even on the assumption that it would have been possible to adopt the contested decision on the basis of Article 78(3) TFEU, it would have been necessary, when adopting it, to respect the right of the national parliaments to issue an opinion on legislative acts, laid down in Protocol (No 1) and Protocol (No 2) (fourth plea); (iii) after consulting the Parliament, the Council substantially amended the text of the proposal without again consulting the Parliament on the matter (fifth plea); and (iv) when the Council adopted the contested decision, the proposal for a decision was not available in all the language versions corresponding to the official languages of the Union (sixth plea).

35. The seventh plea alleges infringement of Article 68 TFEU and of the European Council conclusions of 25 and 26 June 2015.¹⁹

36. The eighth plea alleges breach of the principles of legal certainty and legislative clarity, since on a number of points it is unclear how the provisions of the contested decision should be applied or how they interrelate with the provisions of the Dublin III Regulation.

37. The ninth plea alleges breach of the principles of necessity and proportionality, in that, as Hungary is no longer among the Member States that benefit from the temporary relocation mechanism, there is no reason why the contested decision should provide for the relocation of 120 000 seeking international protection.

¹⁸ ‘Protocol (No 1)’ and ‘Protocol (No 2)’ respectively.

¹⁹ EUCO 22/15.

38. The 10th plea, which is submitted in the alternative, alleges breach of the principle of proportionality and infringement of Article 78(3) TFEU in respect of Hungary, since the contested decision attributes a mandatory allocation to it, even though Hungary is recognised as a Member State whose territory has been entered by a large number of irregular migrants who have made applications for international protection there.

III. My assessment

A. Preliminary observations

39. Since the legal basis of an act determines the procedure to be followed when that act is adopted,²⁰ it is appropriate to examine, in the first place, the pleas alleging that Article 78(3) TFEU was inadequate as a legal basis for the adoption of the contested decision. I shall examine, in the second place, the pleas alleging breach of essential procedural requirements purportedly committed when that decision was adopted and, in the third place, the substantive pleas.

40. In addition, under those three heads, I shall first of all examine the pleas of the Slovak Republic and Hungary which overlap in whole or in part and then, if necessary, the pleas specific to each of the applicants.

B. The pleas alleging that Article 78(3) TFEU is inadequate as a legal basis for the adoption of the contested decision

41. The Slovak Republic (second and fifth pleas) and Hungary (first and second pleas) contend that Article 78(3) TFEU cannot constitute an adequate legal basis for the adoption of the contested decision.

42. However, the positions argued by those two Member States differ: while Hungary acknowledges that the Italian Republic and the Hellenic Republic were in an ‘emergency situation characterised by a sudden inflow of nationals of third countries’, within the meaning of Article 78(3) TFEU, at the time of the adoption of the contested decision, but at the same time denies that the contested decision was the appropriate measure in order to address that situation, the Slovak Republic maintains that such an emergency situation, within the meaning of that provision, did not exist (second part of the fifth plea).

43. In order to challenge the choice of the legal basis of the contested decision, those two Member States maintain, in the first place, that although the contested decision was adopted according to a non-legislative procedure and therefore constitutes a non-legislative act, it should nonetheless be classified as a legislative act because of its content, since it amends legislative acts. However, Article 78(3) TFEU does not permit the adoption of legislative acts.

44. In the second place, the Slovak Republic and Hungary dispute the provisional nature of the contested decision.

45. In the third place, the Slovak Republic, unlike Hungary, maintains that Article 78(3) TFEU did not provide an adequate legal basis for the adoption of the contested decision, since the condition of the existence of an ‘emergency situation characterised by a sudden inflow of nationals of third countries’ was not satisfied.

²⁰ See, to that effect, judgment of 10 September 2015, *Parliament v Council* (C-363/14, EU:C:2015:579, paragraph 17).

1. The Slovak Republic's second plea and Hungary's first plea, relating to the legislative nature of the contested decision

46. The Slovak Republic and Hungary claim that even though it was adopted according to the non-legislative procedure and is therefore formally a non-legislative act, the contested decision must nonetheless be classified as a legislative act because of its content and its effects, since it amends — and, moreover, does so fundamentally — a number of legislative acts of EU law. Article 78(3) TFEU provides no legal basis for the adoption of legislative acts, since it gives no indication that the measures adopted on the basis of that provision should be adopted in a legislative procedure.

47. As expressly confirmed in recital 23 of the contested decision, that decision derogates from a number of legislative acts of the Union. Although the contested decision classifies those amendments as mere derogations, the distinction between a derogation and an amendment is artificial, since in practice the effects of a derogation and those of an amendment are the same in that, in both cases, the application of a normative provision is excluded and, de facto, its effectiveness is therefore affected.

48. More specifically, the Slovak Republic contends that the Council has infringed Article 78(3) TFEU, on the ground that the contested decision derogates from provisions set out in legislative acts and such amendments can be made only by a legislative act. Article 78(3) TFEU, which mentions neither the ordinary legislative procedure nor the special legislative procedure, does not permit the adoption of legislative acts. It follows that the form of the contested decision does not correspond to its content.

49. In adopting the contested decision on the basis of Article 78(3) TFEU, the Council not only infringed that provision but also undermined the rights of the national parliaments and the Parliament. Both the former and the latter ought, under primary law, to have participated in the amendments of the legislative acts from which the Council derogated by the contested decision. Indeed, the Slovak Republic observes that those acts were adopted according to the ordinary legislative procedure.

50. The Slovak Republic therefore maintains that, in adopting the contested decision, the Council infringed not only Article 78(3) TFEU, but also Article 10(1) and (2) TEU, Article 13(2) TEU, Articles 3 and 4 of Protocol (No 1) and Articles 6 and 7 of Protocol (No 2), and breached the principles of legal certainty, representative democracy and institutional balance.

51. Hungary agrees with the Slovak Republic that a legal act adopted on the basis of Article 78(3) TFEU which, on the basis of a reading *contrario* of Article 289(2) and (3) TFEU, does not constitute a legislative act, cannot amend in a binding manner, even on a provisional basis, legislative acts in force that were adopted in ordinary or special legislative procedures, such as the Dublin III Regulation. Because of its content, the contested decision is therefore without doubt a legislative act. Since that decision derogates from the provisions of the Dublin III Regulation, it could not be adopted on the basis of Article 78(3) TFEU, which, because it confers on the Council the power to adopt acts only in the framework of a non-legislative procedure, authorises it only to adopt non-legislative acts.

52. In Hungary's submission, Article 78(3) TFEU might at most serve as the legal basis for the adoption of measures supplementing legislative acts adopted on the basis of Article 78(2) TFEU, but consistent with those measures, or measures that facilitate their implementation in the light of the emergency situation.²¹

²¹ Hungary mentions, by way of examples, the grant of financial and technical assistance and the making available of professionals.

53. Hungary makes clear that, on the assumption that the Court should decide that it is possible to adopt, on the basis of Article 78(3) TFEU, an act that derogates from a legislative act adopted on the basis of Article 78(2) TFEU, such a derogation could not go so far as to affect the substance of such a legislative act or so far as to render its fundamental provisions devoid of meaning. However, that is the case of the contested decision, since it amends, in particular, the most essential element of that regulation, namely the designation of the Member State responsible for examining an application for international protection. Thus, the contested decision introduces a derogation from the provisions of that regulation to a degree that is unacceptable in the context of a non-legislative act. That constitutes an abuse of the ordinary legislative procedure provided for in Article 78(2) TFEU.

54. Last, in its reply and in its response to the statements in intervention, Hungary maintains, referring to points 151 to 161 of the Opinion of Advocate General Wathelet in the case of *Council v Front Polisario*,²² that the requirement to consult the Parliament, as provided for in Article 78(3) TFEU, may be regarded as ‘participation’ by the Parliament, within the meaning of Article 289(2) TFEU, with the consequence that the special legislative procedure applies and that the contested decision should therefore be classified as a legislative act.

55. However, even if that were so, Article 78(3) TFEU would not authorise the Council to derogate from an essential provision of a legislative act adopted on the basis of Article 78(2) TFEU.

56. I find those various arguments unconvincing. I am of the view that Article 78(3) TFEU could serve as the legal basis for a non-legislative act, such as the contested decision, that derogates, on a temporary basis and within a well defined framework, from certain provisions of legislative acts.

57. I shall begin by answering the argument put forward by Hungary in its reply,²³ namely that the contested decision might be regarded as a legislative act in spite of the fact that Article 78(3) TFEU does not mention that the measures adopted on that basis are to be adopted following a special legislative procedure. Hungary relies, in that regard, on the assertion that, in accordance with the requirement in Article 289(2) TFEU, the contested decision was indeed adopted by the Council ‘with the participation of the ... Parliament’.

58. It seems essential to answer that point of law unambiguously, insofar as the adoption of a legislative act has certain requirements that do not apply to the adoption of a non-legislative act. I am thinking, in particular, about the participation of the national parliaments provided for in Articles 3 and 4 of Protocol (No 1) and also in Articles 6 and 7 of Protocol (No 2), and also of the requirement that the Council is to sit in public when it deliberates and votes on a draft legislative act, which arises from Article 16(8) TEU and Article 15(2) TFEU.

59. The typology of the normative instruments of the Union resulting from the Treaty of Lisbon established, for the first time, a distinction between legislative acts and non-legislative acts, on the basis of what are above all institutional and procedural considerations.²⁴

60. Article 289(3) TFEU defines the category of ‘legislative acts’ as covering ‘legal acts adopted by legislative procedure’. The ‘legislative procedure’ consists either in the ‘ordinary legislative procedure’ or in a ‘special legislative procedure’. As provided in Article 289(1) TFEU, it is the joint adoption of a legal act by the Parliament and the Council on a proposal from the Commission that characterises the ordinary legislative procedure.

²² C-104/16 P, EU:C:2016:677.

²³ Unlike Hungary, the Slovak Republic points out in its reply that the Council and the Slovak Republic are agreed that the contested decision is non-legislative in nature (paragraph 29).

²⁴ See Ritleng, D., ‘Les catégories des actes de l’Union — Réflexions à partir de la catégorie de l’acte législatif’, *Les catégories juridiques du droit de l’Union européenne*, Bruylant, Brussels, 2016, pp. 155 to 174, in particular p. 159.

61. In the words of Article 289(2) TFEU, a special legislative procedure is a procedure which, ‘in the specific cases provided for by the Treaties’, consists in ‘the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament’.²⁵ The special legislative procedure is therefore characterised by the fact that it involves, in varying degrees, the Council and the Parliament in the adoption of an act of the Union.

62. In most cases in which a special legislative procedure is envisaged, such an act must be adopted by the Council acting unanimously, after the European Parliament has given its consent,²⁶ or indeed, more usually, after the Parliament has been consulted.²⁷ In a few cases it is the Parliament that must adopt the act after the Council has given its consent.²⁸

63. It follows from those provisions that the framers of the Treaty took a purely formal approach,²⁹ according to which legislative acts are to be classified as such if they are adopted according to the ordinary legislative procedure or according to a special legislative procedure.

64. It is therefore irrelevant to seek, as the applicants suggest, to classify the contested decision as a legislative act on the basis of its content.

65. The argument developed by Hungary raises the question whether it is necessary that a provision of the Treaty should indicate expressly that it permits the adoption of an act according to a special legislative procedure in order for such an act to be considered to constitute a legislative act.

66. To my mind, that question must be answered in the affirmative, in order to afford a sufficient degree of certainty and legal certainty to the classification of the acts of the Union that was established by the framers of the Treaty.

67. It must be stated, in that regard, that the Treaty contains numerous provisions relating to the adoption of Union acts that expressly state that a particular act is to be adopted following a ‘special legislative procedure’, even though the details of that procedure may differ as regards the nature and the degree of involvement of the Council and the Parliament. The practical effect of such a reference is to make clear that, whatever the details may be, the procedure in question is indeed a ‘legislative procedure’ and that it will therefore result in the adoption of a legislative act. The requirement for that reference also follows from the actual wording of Article 289(2) TFEU, according to which a special legislative procedure is to apply only ‘in the specific cases provided for by the Treaties’.

68. Conversely, procedures which follow similar lines to those of special legislative procedures, but which are not expressly classified as such by the Treaty, must be considered to be non-legislative procedures, which therefore result in the adoption of non-legislative acts.³⁰

²⁵ See Ritleng, D., *op. cit.*, who observes that ‘the legislative act is the act the adoption of which involves the European Parliament and the Council, playing equal roles in the context of the ordinary legislative procedure or unequal roles in the context of a special legislative procedure. Thus an institutional criterion is established, marking the advent of a legislative power consisting of the Parliament and the Council’ (p. 161).

²⁶ See, in particular, Article 86(1) TFEU.

²⁷ See, in particular, Article 77(3) TFEU.

²⁸ See, in particular, Article 223(2) TFEU.

²⁹ See Craig, P., and De Búrca, G., *EU Law — Text, Cases and Materials*, 6th Edition, Oxford University Press, Oxford, 2015, p. 114.

³⁰ See, in particular, to that effect, Lenaerts, K., and Van Nuffel, P., *European Union Law*, 3rd Edition, Sweet and Maxwell, London, 2011, p. 677, paragraph 16-038.

69. Admittedly, it is possible to take the view that a distinction between legislative acts and non-legislative acts arising from such ‘legal nominalism’³¹ will raise problems of consistency³² and that the framers of the Treaty did not complete the task of classifying the legislative act of the Union.³³

70. It is equally possible to consider — and this is my preferred solution — that, on the other hand, by opting for an exclusively formal approach to the legislative act, the framers of the Treaty made it possible to identify with certainty the legal bases that authorise the institutions of the Union to adopt legislative acts. The incompleteness, indeed, according to some, the evident inconsistency of the classification made by the framers of the Treaty must thus be seen as the consequence of their intention to afford certain acts the status of legislative act and to deny that status to other acts.

71. Such an examination of the wording of the provisions of the Treaty for the purposes of classifying an act of the Union as a legislative act or as a non-legislative act is, moreover, consistent with the finding of the Court that ‘it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure’.³⁴

72. Specifically, the interpretation which I advocate means that the contested decision does not have the status of a legislative act.

73. Indeed, it must be observed that although Article 78(3) TFEU provides for the adoption of measures by the Council acting after consulting the Parliament, it does not expressly state that such measures are to be taken in the framework of a special legislative procedure. Those measures, which are adopted in the framework of a non-legislative procedure, are, on the basis of a reading *a contrario* of Article 289(3) TFEU, non-legislative in nature. There is a clear contrast in that regard with Article 78(2) TFEU, which expressly states that the measures adopted on the basis of that article are to be adopted in accordance with a legislative procedure, in fact the ordinary legislative procedure.

74. Having made that clear, I must now address the concern at the heart of the arguments developed by the Slovak Republic and by Hungary, that is to say, whether and to what extent Article 78(3) TFEU authorises the Council to adopt a non-legislative act that derogates from provisions set out in legislative acts of the Union.

75. I consider, as do the Council and the interveners that support the form of order sought by it, that Article 78(3) TFEU permits the adoption of measures which, in order to address a clearly identified emergency situation, derogate temporarily and on specific points from legislative acts in asylum matters.

76. That provision of the Treaty has the specific objective of allowing the Union to react rapidly and effectively to an emergency situation characterised by a sudden inflow of nationals of third countries. Given that Article 78(2) TFEU covers the various aspects of the common European asylum system and that the measures adopted on the basis of that provision are legislative acts, it is inevitable that the provisional measures adopted, in connection with the same system, on the basis of Article 78(3) TFEU entail a temporary derogation from certain provisions of those legislative acts. The concept of ‘provisional measures’, within the meaning of Article 78(3) TFEU, cannot therefore, contrary to what the applicants suggest, be understood as being limited to supplementary measures, of an operational or financial nature, without excessively restricting the scope of that legal basis and therefore its

³¹ To employ the expression used by Ritleng, D., *op. cit.*, p. 170.

³² See Craig, P., and De Búrca, G., *op. cit.*, p. 114.

³³ See Ritleng, D., *op. cit.*, p. 174.

³⁴ See, in particular, judgment of 19 July 2012, *Parliament v Council* (C-130/10, EU:C:2012:472, paragraph 80).

practical effect. The concept of ‘provisional measures’ must therefore, in my view, be interpreted broadly, as Article 78(3) TFEU authorises the Council to adopt all the measures which it deems necessary in order to deal with an emergency situation characterised by a sudden inflow of nationals of third countries.

77. In order to be considered to be properly based on Article 78(3) TFEU, measures must not be intended to definitively eliminate, replace or amend provisions in legislative acts adopted on the basis of Article 78(2) TFEU.

78. That certainly does not apply to the contested decision, which, in accordance with its nature as a provisional measure intended to respond to a very specific emergency situation, merely provides for temporary derogations, in a strictly defined framework, from a number of provisions of legislative acts of the Union. Contrary to the applicants’ contention, such derogations cannot therefore be seen as amending those acts in a lasting and general fashion.

79. I must make clear, in that regard, that the derogations included in the contested decision apply only for a period of two years, that they concern only a limited number of 120 000 nationals of third countries who have submitted applications for international protection in Italy or in Greece, whose nationality is among those referred to in Article 3(2) of the contested decision, who will be relocated from one of those two Member States and who arrived or will arrive in those Member States between 24 March 2015 and 26 September 2017.

80. As the Council points out, after the final date of application of the contested decision, on 26 September 2017, the effects of the derogations will automatically expire and the general rules will begin to apply again, without the need for any intervention whatsoever on the part of the EU legislature.

81. As I have already stated, those ad hoc temporary derogations cannot be assimilated to a permanent amendment of the substantive rules contained in legislative acts of the Union in asylum matters, which could be adopted only on the basis of Article 78(2) TFEU.

82. To my mind, therefore, the adoption of the contested decision on the basis of Article 78(3) TFEU did not entail any abuse of the ordinary legislative procedure provided for in Article 78(2) TFEU.

83. It is appropriate, in that regard, to clarify the relationship between those two provisions of the Treaty.

84. When read in conjunction with Article 80 TFEU, Article 78(3) TFEU constitutes a specific legal basis for provisional measures which implement the principle of solidarity in emergency situations characterised by a sudden inflow of nationals of third countries.

85. The procedure provided for in Article 78(3) TFEU is characterised by the urgent need to act in a crisis situation. It is for that reason that it is not based on the ordinary legislative procedure.

86. As the Council points out, the measures provided for in Article 78(2) and (3) TFEU each have an autonomous legal basis in the Treaty and are applied in different situations with different objectives, without there being any need to define a hierarchy between them.

87. It is appropriate to emphasise the complementary nature of the legal bases consisting of Article 78(2)(e)³⁵ and Article 78(3) TFEU. The concurrent or successive use of those legal bases allows the Union, in particular, to take effective action in the event of migration crisis. Their complementary nature is illustrated by the Proposal of 9 September 2015 for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending the Dublin III Regulation.

88. In its proposal, the Commission clearly explains how the measures set out in that proposal and the emergency relocation programmes based on Article 78(3) TFEU interact.

89. As the Commission explains, ‘the proposal establishing a crisis relocation mechanism has to be distinguished from the proposals adopted by the Commission on the basis of Article 78(3) TFEU for the benefit of certain Member States confronted with a sudden inflow of nationals of third countries on their territories’.³⁶ The Commission goes on to state that ‘while the measures proposed by the Commission on the basis of Article 78(3) TFEU are provisional, the proposal establishing a crisis relocation mechanism introduces a method for determining for a temporary period in crisis situations which Member State is responsible for examining applications for international protection made in a Member State confronted with a crisis situation, with a view to ensur[ing] a fairer distribution of applicants between Member States in such situations and thereby facilitate the functioning of the Dublin system even in times of crisis’.³⁷

90. It is therefore a matter, in the latter case, and unlike what is provided for in the contested decision, of a permanent mechanism establishing a method of determining which Member State is to be responsible for examining the applications for international protection submitted in a Member State in a crisis situation. That permanent mechanism is of general application, in that its application is not targeted at certain Member States currently in a crisis situation, but may benefit any Member State confronted with such a situation.

91. The conditions for triggering the relocation mechanism are laid down in the proposal for a regulation. As the Commission states in that proposal, the beneficiary Member State must thus be ‘confronted with a crisis situation jeopardising the application of the Dublin Regulation due to extreme pressure characterised by a large and disproportionate inflow of third-country nationals or stateless persons, which places significant demands on its asylum system’.³⁸

92. The complementary nature of the measures adopted on the basis of Article 78(2)(e) TFEU and those adopted under Article 78(3) TFEU is further explained by the Commission as follows: ‘the establishment of a crisis relocation mechanism is without prejudice to the possibility for the Council to adopt, on a proposal from the Commission, provisional measures for the benefit of a Member State confronted by an emergency situation as characterised by Article 78(3) TFEU. The adoption of emergency measures on the basis of Article 78(3) TFEU will remain relevant in exceptional situations where an emergency response, possibly encompassing a wider migratory support, is needed, should the conditions for using the crisis relocation mechanism not be met’.³⁹

³⁵ This provision authorises the Parliament and the Council, acting in accordance with ordinary legislative procedure, to adopt ‘criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection’.

³⁶ See the Proposal for a Regulation, p. 3.

³⁷ Ibid.

³⁸ See that proposal, p. 4.

³⁹ Ibid.

93. As regards the legal basis chosen, the Commission states in its proposal that that proposal ‘*amends* [the Dublin III] Regulation ... and should therefore be adopted on the same legal basis, namely Article [78(2)(e) TFEU], in accordance with the ordinary legislative procedure’.⁴⁰ The Proposal for a Regulation amends the Dublin III Regulation by adding Section VII, entitled ‘Crisis relocation mechanism’. Insofar as it amends that regulation, the proposal is therefore correctly based on Article 78(2)(e) TFEU and therefore subject to the ordinary legislative procedure.

94. In addition, the Commission states that ‘the crisis relocation mechanism contained in this proposal entails *permanent derogations*, to be activated in specific situations of crisis to the benefit of specific Member States, notably from the principle laid down in Article 3(1) of [the Dublin III] Regulation ... according to which an application for international protection shall be examined by the Member State which the criteria set out in Chapter III indicate as being responsible. In place of this principle, the proposal establishes, for well prescribed crisis circumstances, a mandatory distribution key for determining the responsibility for examining applications’.⁴¹

95. What the contested decision and the proposal for a regulation have in common is that they provide the Union with the tools to be able to respond to migrant crisis situations. However, whereas the former, as a measure adopted on the basis of Article 78(3) TFEU, is temporary and targeted at Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the latter establishes a relocation mechanism of unlimited duration, which is not limited to a predetermined number of nationals of third countries and which does not identify one or more Member States in advance as being beneficiaries of that mechanism.

96. It follows from those factors that, whereas Article 78(3) TFEU is the legal basis that allows the Union to respond on a provisional basis and in an emergency to a sudden inflow of nationals of third countries, Article 78(2)(e) TFEU makes it possible to provide the Union with a framework designed to respond on a permanent basis and generally to a structural problem, namely the fact that Article 3(1) of the Dublin III Regulation is inadequate in the event of sudden migration pressure on the frontline Member States.

97. It follows from the foregoing that, to my mind, Article 78(3) TFEU may serve as the basis for provisional measures, such as those set out in the contested decision, which are intended to respond to an emergency situation even if they contain derogations from particular provisions of legislative acts of the Union, provided that those derogations are strictly defined in terms of their subject matter and the period during which they will apply.

98. The Slovak Republic’s second plea and Hungary’s first plea must therefore be rejected as unfounded.

2. The first part of the Slovak Republic’s fifth plea and Hungary’s second plea, alleging that the contested decision is not provisional

99. The Slovak Republic and Hungary maintain that Article 78(3) TFEU does not provide an adequate legal basis for the adoption of the contested decision, since that decision is not provisional, contrary to the requirements of that provision.

⁴⁰ Ibid., emphasis added.

⁴¹ Ibid., emphasis added.

100. Under Article 13(1) and (2) of the contested decision, that decision is to apply from 25 September 2015 until 26 September 2017, that is for a period of 24 months. Furthermore, Article 13(3) of that decision provides that it is to apply to persons arriving on the territory of the Italian Republic and the Hellenic Republic during that period, and also to applicants for international protection having arrived on the territory of those Member States from 24 March 2015 onwards.

101. It follows from those provisions that the temporal scope of the contested decision is precisely defined. It makes provision without possible ambiguity for an emergency mechanism of fixed duration, and its provisional nature cannot therefore in my view be disputed.

102. As Article 78(3) TFEU no longer refers to a maximum period of six months, as Article 64(2) of the EC Treaty did, it must be inferred that the provisional measures adopted on that basis may apply during a longer period.

103. Contrary to the Slovak Republic's and Hungary's contention, the fact that the effects of the contested decision may, owing to the lasting links between the applicants for international protection and the Member States of relocation, be felt beyond the period referred to in that decision is in my view irrelevant. Such more or less long term effects are inherent in the international protection that may be obtained in the Member State of relocation. If the argument put forward by the Slovak Republic and Hungary were to be followed, no relocation mechanism could be put in place on the basis of Article 78(3) TFEU.

104. Furthermore, as Article 78(3) TFEU does not prescribe a specific period, but provides only for the adoption of provisional measures, I consider that the Council was entitled, without infringing that provision and without exceeding the wide discretion which that provision confers on it, to establish a temporary relocation mechanism that would apply for 24 months. It is appropriate, in that regard, to note the desire expressed by the Commission in its proposal for a decision, that the duration of the provisional measures 'should not be too short [so that they can] have a real impact in practice and provide genuine support for [the Italian Republic and the Hellenic Republic] ... to cope with the influx of migrants'.⁴² Furthermore, the choice of a period of application of 24 months is also justified in the light of the foreseeable period necessary to prepare for the implementation of the relocation procedure in all Member States, a fortiori if, as the Hellenic Republic correctly emphasised at the hearing, the unprecedented nature of that procedure is taken into account.

105. In addition, the theory advanced by the Slovak Republic and by Hungary that the duration and the effects of a measure adopted on the basis of Article 78(3) TFEU could not exceed the period necessary for the adoption of a legislative act based on Article 78(2) TFEU finds no support in the wording of those two provisions. Furthermore, insofar as it is impossible to determine in advance the period that would be necessary for the adoption of a legislative act establishing a permanent relocation mechanism on the basis of Article 78(2) TFEU, the theory advanced by the Slovak Republic and by Hungary seems to me to be impossible to put into practice. That uncertainty may be illustrated by the fact that although the proposal for a regulation establishing a permanent relocation mechanism was submitted on 9 September 2015, or on the same day as the proposal that gave rise to the contested decision, it has still not been adopted, and that it is impossible to be certain that it will be adopted before 26 September 2017, the date of expiry of the contested decision, or indeed at a later date.

⁴² See that proposal, p. 4.

106. The other arguments put forward by the Slovak Republic and by Hungary are not such as to alter my assessment. Thus, the fact that the contested decision may be adjusted according to circumstances is not inconsistent with its provisional nature, nor is the possibility, provided for in Article 4(5), that the contested decision may be extended for a maximum period of 12 months.⁴³

107. It follows from the foregoing that the first part of the Slovak Republic's fifth plea and Hungary's second plea must be rejected as unfounded.

3. The second part of the Slovak Republic's fifth plea, alleging that the contested decision does not satisfy the conditions for the application of Article 78(3) TFEU

108. The Slovak Republic contends in three aspects that the contested decision does not satisfy the condition for the application of Article 78(3) TFEU, namely that the Member State benefiting from the provisional measures must be confronted by 'an emergency situation characterised by a sudden inflow of nationals of third countries'.

109. In the first place, according to the Slovak Republic, the inflow of nationals of third countries into Italy and Greece at the time of the adoption of the contested decision or immediately before its adoption was reasonably foreseeable and cannot therefore be described as 'sudden'. The statistics for 2013-2014 and the first months of 2015 indicate that the number of nationals of third countries heading for Italy and Greece had increased continuously and that, from the period 2013-2014, that increase was considerable. In addition, so far as Italy is concerned, current data for 2015 indicate rather a year-on-year drop in the number of migrants.

110. To my mind that argument cannot succeed.

111. I shall begin by pointing out, generally, and by reference to the 'Annual Brief 2015' of Frontex, that in 2015 the number of irregular entries by nationals of third countries at the external borders of the Union reached more than 1.8 million, whereas that number was 285 532 in 2014, representing an increase of 546%. As the main points of entry of those nationals into the Union, Greece and Italy were exposed to a particularly intense migration pressure.

112. Article 78(3) TFEU provides a specific legal basis in order to respond to the emergency situations in migration matters with which one or more Member States are confronted, by providing for the adoption of provisional measures, which, as the Commission observed in its proposal for a decision, are 'exceptional in nature', in that 'they can only be triggered when a certain threshold of urgency and severity of the problems created in the Member States(s)' asylum system(s) by a sudden inflow of nationals of third countries is met'.⁴⁴

113. Like the Council and the interveners which have submitted observations in its support, I observe that the huge extent of the increase of the inflow of nationals of third countries in 2015 and, in particular, in July and August of that year, is an objective fact reflected by the Frontex data mentioned in recital 13 of the contested decision. Those data show, for Italy, that there were 42 356 irregular border crossings in July and August 2015, an increase of 20% over May and June 2015. As regards Greece, that figure reached 137 000 during July and August 2015, an increase of 250%.

⁴³ Article 4(5) of the contested decision envisages the possibility of an extension by up to 12 months in the specific context of the mechanism for the partial suspension of the resettlement obligations laid down in that provision. However, the mechanism can no longer be triggered and the extension is envisaged for the only Member State (the Republic of Austria) to have benefited from it only until 11 March 2017. The contested decision will therefore definitively expire on 26 September 2017.

⁴⁴ See that proposal, p. 1.

114. As indicated in recital 13 of the contested decision, the Council took into account the fact that a large part of those migrants were, owing to their nationality, likely to be granted international protection.

115. Furthermore, it follows from recital 14 of the contested decision that, according to Eurostat and European Asylum Support Office (EASO) figures, between January and July 2015, a steep increase was observed in the number of persons who applied for international protection in Italy and Greece, which fully confirms the finding that there was an exponential increase in the pressure on the asylum systems of the Italian Republic and the Hellenic Republic.

116. I would add that it follows from recital 16 of the contested decision that the Council also took into account the fact that the emergency situation affecting the Italian Republic and the Hellenic Republic would in all likelihood continue owing to instability and conflicts in the immediate neighbourhood of those two Member States. Evidence of constant pressure on the asylum systems of the Italian Republic and the Hellenic Republic, contributing to the constant undermining of those systems, made it all the more necessary for the Union to adopt an immediate response, in the form of provisional measures adopted on the basis of Article 78(3) TFEU, to an emergency situation characterised by a sudden and massive inflow of nationals of third countries into the territory of those Member States.⁴⁵

117. The suddenness of the inflow of nationals of third countries is thus apparent from objective data. Those data highlight a phenomenon of a rapid increase in the number of nationals of third countries arriving in Italy and Greece over a brief period. The inability of those two Member States to cope with that phenomenon characterises the existence of an emergency situation which the contested decision is intended to address.

118. Whether that inflow of nationals of third countries was or was not foreseeable, what matters in order to justify the use of Article 78(3) TFEU is that such an inflow, by its rapidity and degree, made an immediate reaction on the part of the Union, by the adoption of provisional measures to relieve the considerable pressure then being applied to the Italian and Greek asylum systems indispensable, as indicated in recital 26 of the contested decision.

119. The fact that the tendency for the number of nationals of third countries arriving irregularly in Italy and Greece to increase became apparent before 2015 is also immaterial. As I have already stated, what matters is the finding that there was a sudden increase in that number, as shown by the objective data referred to above, the accuracy of which is not disputed by the applicants.

120. In the second place, the Slovak Republic maintains that Article 78(3) TFEU means that the Member State is confronted with an emergency situation which is specifically attributable to a sudden inflow of nationals of third countries, which is clear from the use of the word 'characterised'. However, the Slovak Republic observes that, at least in the case of the Hellenic Republic, that causal link does not seem to exist. In fact, it is established that the Greek (and also the Italian) asylum and migration system has long been confronted with significant problems without there being any direct causal link with the migration phenomenon characteristic of the period during which the contested decision was adopted.

121. To my mind, that argument must be rejected.

⁴⁵ See, along the same lines, the Proposal for a decision, in which the Commission states that 'Italy's and Greece's geographical situation, with the ongoing conflicts in the region of their immediate neighbourhood still makes them more vulnerable than the other Member States in the immediate future with unprecedented flows of migrants expected to continue to reach their territories. These external factors of increased migratory pressure add to the existing structural shortcomings in their asylum systems, putting further into question their ability to deal in an adequate manner with this situation of high pressure' (p. 3).

122. Admittedly, as the Council observes, there is a discrepancy between the language versions of Article 78(3) TFEU, in that, in 15 versions, the word ‘characterised’ is used, while in nine versions the word ‘caused’ appears. In both cases, however, the condition that there must be a close relationship between the emergency situation requiring the adoption of provisional measures and the sudden inflow of nationals of third countries is expressed. However, as is apparent from recitals 13 and 26 of the contested decision, it was indeed the sudden inflow of nationals of third countries during 2015, and in particular in July and August 2015, that contributed to unbearable pressure, characteristic of an emergency situation, being placed on the Italian and Greek asylum systems.

123. It is immaterial, in that regard, that the Italian and Greek asylum systems had already been weakened. As the Council correctly observes, it is likely that the strong pressure experienced by the Italian and Greek asylum systems would have seriously disrupted any asylum system, even one not suffering from structural weaknesses.

124. In the third place, according to the Slovak Republic, the contested decision could not be adopted on the basis of Article 78(3) TFEU, since it was intended to resolve not an existing or imminent emergency situation affecting the Italian Republic and the Hellenic Republic, but, at least in part, hypothetical future situations which, at the time of the adoption of the contested decision, could not have been claimed to be sufficiently likely to arise.

125. The Slovak Republic maintains that the period of application, of two, or indeed three years, of the contested decision is too long for it to be possible to assert that, throughout that period, the measures adopted would respond to the emergency situation, whether present or imminent, affecting the Italian Republic and the Hellenic Republic. Thus, during that period, the emergency situation may no longer exist in those Member States. Furthermore, the relocation mechanism for the reserve of 54 000 additional persons provided for in Article 4(3) of the contested decision, read with Article 4(1)(c) of that decision, is intended to address wholly hypothetical situations in other Member States.

126. The Republic of Poland supports that point of view and maintains that Article 78(3) TFEU refers to a pre-existing and current crisis situation which requires the adoption of immediate corrective measures and not, as the contested decision does, to crisis situations that may arise in the future but the incidence, nature and degree of which are uncertain or difficult to foresee.

127. Unlike the Slovak Republic and the Republic of Poland, I consider that the fact that the contested decision refers to future events or situations does not mean that it is incompatible with Article 78(3) TFEU.

128. In fact, I would recall that it is apparent from recitals 13 and 26 of the contested decision that the adoption of that decision is primarily inspired by the need to respond to an emergency situation that manifested itself in particular in July and August 2015 in Italy and Greece. The fact that the contested decision contains a number of provisions that enable it to be adapted to developments in that situation must not conceal the fact that the decision is intended to resolve a problem that arose before it was adopted.

129. Be that as it may, I consider that Article 78(3) TFEU does not preclude the contested decision from containing several provisions that enable it to be adapted to developments in migration flows. That provision confers a wide discretion on the Council in the choice of the measures to be taken in order to provide an adequate response to an emergency situation characterised by the sudden inflow of nationals of third countries. As such an emergency situation is capable of continuing, developing and affecting other Member States, the Council was correct to envisage the possibility of adapting its action and, in particular, the characteristics and procedures of the application of the temporary relocation mechanism.

130. Thus, the need to respond to an emergency situation by means of provisional measures, expressed by the legal basis that is Article 78(3) TFEU, does not preclude either the adaptation of a measure such as the contested decision to the evolution of the situation or the adoption by the Council of implementing acts. Responding to the emergency does not exclude the developing and adapted nature of the response, provided that it retains its provisional nature.

131. From that aspect, provisions such as the second subparagraph of Article 1(2) and Article 4(3) of the contested decision, under which the Commission may submit proposals to the Council if it considers that an adaptation of the relocation mechanism is justified by the evolution of the situation on the ground or that a Member State is confronted with an emergency situation characterised by a sudden inflow of nationals of third countries due to a sharp shift of migration flows, are perfectly compatible with Article 78(3) TFEU.

132. The Council was also entitled, without thereby affecting the legality of the contested decision, to reproduce, in the first sentence of Article 9 of that decision, the circumstances in which provisional measures, distinct from the contested decision, may be taken on the basis of Article 78(3) TFEU and the consequences that may ensue as regards the application of the contested decision.

133. Last, as the Council correctly observes, the fact that provision is made in the contested decision for the adoption of implementing measures⁴⁶ and that the adoption of such measures is to depend on future events or situations cannot render the contested decision illegal. As is apparent from recital 28 of the contested decision, the exercise by the Council of such implementing powers is necessary in order to enable the temporary relocation mechanism to be adapted quickly to rapidly evolving situations.

134. The second part of the Slovak Republic's fifth plea is therefore unfounded.

135. It follows from the foregoing that the pleas put forward by the Slovak Republic and by Hungary, alleging that Article 78(3) TFEU is inadequate as a legal basis for the adoption of the contested decision, should all be rejected as unfounded.

C. The pleas relating to the regularity of the procedure leading to the adoption of the contested decision and alleging breach of essential procedural requirements

1. The Slovak Republic's first plea and Hungary's seventh plea, alleging infringement of Article 68 TFEU

136. The Slovak Republic and Hungary maintain that, since the contested decision exceeds the guidance defined by the European Council in its conclusions of 25 and 26 June 2015, according to which the distribution of the persons relocated was to be decided 'by consensus' in a manner 'reflecting the specific situations of Member States',⁴⁷ the Council infringed Article 68 TFEU and breached the essential procedural requirements.

137. In the words of Article 15(1) TEU, 'the European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions'.

138. Under Article 68 TFEU, 'the European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice'.

⁴⁶ See Article 4(2), (4) and (6), and Article 11(2) of the contested decision.

⁴⁷ See point 4(b) of those conclusions.

139. I observe that, although the conclusions of the European Council of 25 and 26 June 2015 do in fact contain a provision to the effect that the Member States should decide ‘by consensus’ on the distribution of persons in clear need of international protection, and do so in a manner ‘reflecting the specific situations of Member States’,⁴⁸ that provision relates to the temporary and exceptional relocation, over two years, from Italy and Greece, of 40 000 persons. In fact, that measure for the relocation of 40 000 persons was the subject matter of Decision 2015/1523, which therefore specifically responds to the guidance given by the European Council.

140. According to the Slovak Republic and Hungary, a new emergency relocation measure, such as that provided for in the contested decision, could not be proposed, and a fortiori could not be adopted, unless the European Council had first taken a position in that sense.

141. The Slovak Republic thus contends that, by adopting the contested decision without the mandate resulting from the conclusions of the European Council of 25 and 26 June 2015 being amended or extended, the Council encroached on the functions and powers of the European Council. It therefore infringed Article 68 TFEU and Article 13(2) TEU and breached the principle of institutional balance. In addition, in Hungary’s submission, Article 15 TEU should be interpreted as meaning that the conclusions of the European Council are binding on the institutions of the Union.

142. Pursuant to Article 13(2) TEU, ‘each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them’. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the Union, which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions.⁴⁹

143. To my mind, neither the Commission nor the Council exceeded the powers conferred on them, respectively, by Article 78(3) TFEU by proposing and then adopting the contested decision.

144. In particular, the conclusions of the European Council of 25 and 26 June 2015 cannot have the effect of prohibiting the Commission from proposing, and then the Council from adopting, a provisional binding mechanism for the relocation of applicants for international protection that supplements Decision 2015/1523.

145. I would point out, in that regard, that the provisional measures that can be adopted by the Council on the basis of Article 78(3) TFEU are adopted on a proposal from the Commission. That power to initiate legislation, conferred on the Commission generally by Article 17(2) TEU, could be called in question if it were accepted that it depended on the prior adoption of conclusions by the European Council. That applies a fortiori when a provision of the Treaty, such as Article 78(3) TFEU, confers on the Commission the power to propose an immediate response by the Union to an emergency situation. In the exercise of its power of initiative, the Commission, which, in accordance with Article 17(1) TEU, ‘shall promote the general interest of the Union and take appropriate initiatives to that end’, must be able to determine the subject matter, objective and content of its proposal.⁵⁰

⁴⁸ Ibid.

⁴⁹ See, in particular, judgment of 14 April 2015, *Council v Commission* (C-409/13, EU:C:2015:217, paragraph 64 and the case-law cited).

⁵⁰ See, to that effect, judgment of 14 April 2015, *Council v Commission* (C-409/13, EU:C:2015:217, paragraph 70). In my view, that case-law must also apply to non-legislative acts.

146. As the Italian Republic and Grand Duchy of Luxembourg submit, in essence, the contested decision addresses a new emergency situation that arose in July and August 2015. The adoption of a temporary mechanism for the relocation of 120 000 applicants for international protection, on the basis of Article 78(3) TFEU, did not need to be specifically referred to in advance in conclusions of the European Council. Apart from the fact that such a requirement is not apparent from the wording of that provision, it would have the effect of destroying the ability to respond that the institutions of the Union must demonstrate when Member States are faced with an emergency situation.

147. Nor must the conclusions of the European Council of 25 and 26 June 2015 be construed as having effects going beyond the adoption of the measure having the specific object of giving effect to those conclusions, namely Decision 2015/1523, which concerns the voluntary relocation of 40 000 persons.

148. In any event, even on the view that Decision 2015/1523 did not exhaust the recommendations made in the conclusions of the European Council of 25 and 26 June 2015, I do not detect in the steps taken by the Commission and the Council, on the basis of Article 78(3) TFEU, for the purpose of the adoption of the contested decision, any fundamental variation from the guidance defined by the European Council in its conclusions of 25 and 26 June 2015.

149. In fact, the European Council states, in point 2 of its conclusions, that work should be taken forward ‘further to the Commission’s European Agenda on Migration’. That agenda provides for the activation of the emergency mechanism provided for in Article 78(3) TFEU. In addition, the European Council calls, in point 3 of those conclusions, for ‘wider efforts’ to be deployed ‘to better contain the growing flows of illegal migration’, in particular by developing the aspect relating to relocation. The Commission and the Council therefore followed the line of action recommended by the European Council by proposing and then adopting the contested decision on the basis of Article 78(3) TFEU.

150. Last, insofar as the basis of the challenge mounted by the Slovak Republic and by Hungary is that the contested decision was adopted by a qualified majority, it should be observed that, since Article 78(3) TFEU allows the Council to adopt measures by a qualified majority, the European Council cannot, in the absence of a provision to the contrary in the Treaty, alter that voting rule by imposing on the Council a rule requiring a unanimous vote. It is clear from the Court’s case-law that, as the rules regarding the manner in which the EU institutions of the Union arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or the institutions themselves, the Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by the Treaties.⁵¹

151. It follows from the foregoing that the Slovak Republic’s first plea and Hungary’s seventh plea must be rejected as unfounded.

2. The third part of the Slovak Republic’s third plea and the first part of its fourth plea, and Hungary’s fifth plea, alleging breach of essential procedural requirements in that the Council did not comply with the obligation to consult the Parliament laid down in Article 78(3) TFEU

152. The Slovak Republic and Hungary claim that, since the Council made substantial amendments to the Commission’s initial proposal and adopted the contested decision without again consulting the Parliament, it breached the essential procedural requirements laid down in Article 78(3) TFEU, and that the contested decision should therefore be annulled. The Slovak Republic maintains that, in doing so, the Council also infringed Article 10(1) and (2) TEU and Article 13(2) TEU and breached the principles of representative democracy, institutional balance and sound administration.

⁵¹ See, in particular, judgment of 10 September 2015, *Parliament v Council*, C-363/14, EU:C:2015:579, paragraph 43 and the case-law cited).

153. In that regard, the Slovak Republic and Hungary mention the following substantial amendments.

154. Both Member States observe that, in the contested decision, Hungary is no longer among the Member States that benefit from the relocation mechanism, but is among the Member States of relocation, which entailed the deletion of Annex III to the initial proposal and Hungary's inclusion in Annexes I and II to the contested decision.

155. The fundamental amendment lies in the fact that, although the total number of 120 000 persons remained the same, the number of 54 000 persons included in that total number which, as initially envisaged, related to persons to be relocated from Hungary, was transformed into a 'reserve' which had not been envisaged in the Commission's initial proposal. Consequently, the structure and a number of essential elements of that proposal were profoundly altered, such as the title and its scope *ratione personae*, the list of beneficiary Member States and Member States of relocation and the number of persons to be relocated in each of the Member States. That gave rise to amendments incorporated in Articles 1 and 3 and also in Article 4(1)(c) of the contested decision.

156. The Slovak Republic mentions other amendments to the Commission's initial proposal. It thus states that, contrary to the situation in that proposal, the contested decision provides, in Article 4(3), that other Member States may benefit from the relocation mechanism if they satisfy the conditions set out in that provision. Furthermore, Article 13(3) of the contested decision provides that that decision is to apply retroactively to applicants having arrived from 24 March 2015 onwards, or a period of six months preceding the adoption of the decision, whereas in its initial proposal the Commission had limited that retroactive effect to one month.

157. Likewise, Article 4(5) and (6) of the contested decision contains substantial amendments by comparison with the Commission's initial proposal as regards the arrangements for the temporary suspension of a Member State's participation in the relocation process. The Slovak Republic claims that the contested decision provides that the power to decide on such suspension is vested in the Council, whereas the Commission had proposed that that power be entrusted to it. The contested decision also limits the suspension to 30% of applicants allocated to the Member State concerned, whereas the Commission's initial proposal did not include such a restriction. In addition, whereas the Commission's initial proposal provided that a Member State whose participation was suspended would be required to pay financial compensation, such an obligation does not appear in the text of the contested decision.

158. Last, the Slovak Republic observes that, whereas recital 25 of the Commission's initial proposal indicated the distribution key on the basis of which the figures relating to the persons to be relocated to each Member State had been determined, the contested decision does not mention such a key and therefore does not disclose the criteria on which the allocations to each Member State were made.

159. The applicants take issue with the Council for having failed to consult the Parliament again after making those fundamental amendments, even though, in its resolution of 17 September 2015, the Parliament had requested the Council to consult it again if it intended to substantially amend the Commission's proposal.

160. Although the Presidency of the Union regularly informed the Parliament, in particular the Parliament's Civil Liberties, Justice and Home Affairs Committee ('the LIBE Committee'), of how the Council's dossier was progressing, that cannot replace a formal resolution of the Parliament adopted in plenary session.

161. Hungary refers to two letters sent by the President of the Parliament's Legal Affairs Committee to the President of the Parliament, in which it is stated, in particular, that that committee had also reached the conclusion that the Council had substantially amended the Commission's initial proposal by removing Hungary from the group of beneficiary Member States and that the Parliament should therefore have been consulted again. Nonetheless, for political reasons, that committee recommended that the Parliament should not intervene in the present cases before the Court.

162. The Council objected to those two letters being used in these proceedings and, in particular, requested the Court to adopt a measure of inquiry in order to verify their authenticity. In my view, those two letters should not be taken into account by the Court, which is ultimately responsible, independently of what is stated in those letters, to decide whether the Council fulfilled its obligation to consult the Parliament in accordance with the requirements of Article 78(3) TFEU.

163. The Court has held that 'due consultation of the Parliament in the cases provided for by the Treaty constitutes an essential formal requirement breach of which renders the measure concerned void'.⁵² I would also point out that, according to the settled case-law of the Court, 'the requirement to consult the ... Parliament ... in the cases provided for by the Treaty, means that it must be freshly consulted whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, except in cases in which the amendments substantially correspond to the wishes of the Parliament itself'.⁵³

164. It is therefore necessary to examine whether the amendments to which the applicants refer concern the very essence of the text considered as a whole.

165. In that regard, it must be stated that the Commission's initial proposal, like the amended proposal, provided, in order to cope with an emergency situation characterised by a sudden inflow of nationals of third countries, for a temporary mechanism for the relocation of 120 000 persons, providing, in a binding manner, for the distribution of those persons among the Member States over a specific period. Hungary's withdrawal from the Member States benefiting from that mechanism does indeed constitute a legal amendment, but does not affect the fundamental characteristics of that mechanism.

166. Following Hungary's withdrawal, the Commission's initial proposal necessarily received a number of amendments, in particular as regards the reserve of 54 000 persons. However, those adjustments do not affect the fundamental structure of the contested decision. Furthermore, the other amendments to which the Slovak Republic refers do not strike me as being of such a kind as to affect the hard core of the initial proposal, as I have previously emphasised.

167. All in all, the various amendments which the Commission made to its proposal did not therefore affect the very essence of the contested decision considered as a whole and therefore did not require a fresh consultation of the Parliament.

168. I would add that it may be asked why a fresh consultation of the Parliament should be necessary where the main amendment which the Council made to the Commission's initial proposal is not the result of a choice freely made by the Council but is limited to taking note of a new circumstance beyond its control which, moreover, it is required to take into account.

⁵² See, in particular, judgment of 10 June 1997, *Parliament v Council* (C-392/95, EU:C:1997:289, paragraph 14 and the case-law cited).

⁵³ See, in particular, judgment of 10 June 1997, *Parliament v Council* (C-392/95, EU:C:1997:289, paragraph 15 and the case-law cited).

169. In this instance, it must be emphasised that the Council was not in a position to require Hungary to remain a beneficiary of the temporary relocation mechanism, as envisaged in the Commission's initial proposal. The Council could therefore only take note of Hungary's stated intention not to be included among the Member States for whose benefit that mechanism was to be applied.

170. Furthermore, unless consultation of the Parliament must be regarded as a purely formal step, the *raison d'être* of the consultation of the Parliament is to arrive, where appropriate, at amendments by the Council of the text submitted which will accord with the Parliament's intention. In the present case, however, the Council had no choice other than to take note of Hungary's withdrawal, by adjusting its decision to that circumstance beyond its control.

171. All in all, I consider that, in order to determine whether or not the Parliament should have been consulted again, a factor over which the Council has no control cannot be regarded as an essential element of legislation. What occurred in this instance is not the result of a political compromise, but the result of the refusal expressed by a Member State to benefit from a provisional measure adopted on the basis of Article 78(3) TFEU. While the Council may compel the Member States, on the basis of that provision, read in conjunction with Article 80 TFEU, to show solidarity and to accept their share of responsibility in order to cope with an emergency situation, it cannot in my view require a Member State to benefit from that solidarity.

172. In any event, even on the assumption that it might be considered that the text eventually adopted, considered as a whole, differs in essence from the text on the basis of which the Parliament adopted its legislative resolution of 17 September 2015, I consider that, having regard to the emergency circumstances in which a measure based on Article 78(3) TFEU, such as the contested decision, was adopted, the Parliament was duly consulted throughout the procedure, concerning both the Commission's proposal and the amendments made thereto.

173. It is apparent from the observations submitted to the Court, in particular by the Council and the Grand Duchy of Luxembourg, that the Parliament, on the occasion of numerous formal and informal contacts, was informed by the Council of virtually all the amendments made to the initial text and that it had no objections to them.

174. More specifically, the Council states, without being contradicted, that on 14 September 2015 at 12 noon it decided to consult the Parliament concerning the Commission's proposal. On the same day the Secretary-General of the Council communicated, for the attention of the President of the Parliament, a formal consultation letter in which the Council undertook to keep the Parliament fully informed of developments in the case within the Council. On 16 September 2015, Mr Jean Asselborn, the Luxembourg Minister for Immigration and Asylum, President of the Council, attended the extraordinary plenary sitting of the Parliament. Addressing the Parliament, he presented the results of the meeting of the 'Justice and Home Affairs' Council held on 14 September 2015. On that occasion, he announced that Hungary had stated that it refused to be regarded as a frontline Member State and to benefit from the solidarity mechanism, and also that, in spite of Hungary's withdrawal, the number of 120 000 persons to be relocated would be maintained.

175. As the Grand Duchy of Luxembourg correctly observes, the Parliament was therefore put in a position to take that circumstance into account when adopting its legislative resolution on 17 September 2015. It was therefore able to take note, at the stage of its formal consultation, of Hungary's withdrawal from the group of beneficiaries of the temporary mechanism for the relocation of 120 000 persons. If that new circumstance had seemed to the Parliament to stand in the way of the adoption of the contested decision, it would thus have been in a position to express its opinion in that regard.

176. The fact that the Parliament's legislative resolution of 17 September 2015 does not reflect Hungary's withdrawal and that no other resolution formalises the consultation of the Parliament on the amendments made to the Commission's proposal following that Member State's withdrawal is not in my view decisive.

177. I consider that the particular characteristics of the legal basis that is Article 78(3) TFEU argue in favour of relative flexibility when ascertaining whether the Parliament was duly consulted again following Hungary's withdrawal and the amendments of the initial text that are the consequence of that withdrawal.

178. I note, moreover, that the situation of urgency was fully taken into account by the Parliament in the context of its consultation. In fact, the Parliament's legislative resolution of 17 September 2015 was adopted according to the emergency procedure provided for in Article 154 of the Parliament's Rules of Procedure. It should also be observed that the Parliament highlighted, in that resolution, 'the exceptional situation of urgency and the need to address the situation with no further delay'.

179. Admittedly, in that resolution, the Parliament 'asks the Council to consult the Parliament again if it intends to substantially amend the Commission proposal'. However, I consider that, given the exceptional nature of the emergency situation and the requirement for rapidity in the adoption of a response to the migration crisis which was emphasised by the Parliament itself, there is no need to require that a new consultation was carried out in a strictly defined formal and procedural framework.

180. Furthermore, the Council provides information about the way in which the Parliament was duly informed between 17 September 2015, the date of its legislative resolution, and 22 September 2015, the date of the adoption of the contested decision.

181. Thus, within the framework of the informal contacts announced in the consultation letter, the Presidency of the Council prepared for the Parliament a consolidated version of the text of the proposal, containing all the changes made by the Council up to 21 September 2015 at 10 p.m. That text was communicated to the Parliament on 22 September 2015 at 9 a.m. On the same day, the LIBE Committee, which is undisputedly the Parliamentary Committee with competence in asylum matters, held a meeting during which the Presidency of the Council presented the text of the amended Commission proposal. In that regard, the Presidency of the Council was able to incorporate in its presentation the most recent amendments made to the text during the extraordinary meeting of the Committee of Permanent Representatives (Coreper) held on the same morning. The Parliament was also informed of the agenda of the meeting of the Council scheduled to take place at 2.30 p.m. on the same day, and also of the Presidency's intentions and the foreseeable development of the file during that meeting of the Council. Thereafter, the LIBE Committee discussed the text as thus amended, in preparation for the extraordinary meeting of the Council.

182. It follows from those elements that the Council closely involved the Parliament in the drafting of the contested decision. Given the situation of urgency, recognised and taken into account by the Parliament itself, and the necessary flexibility that must guide the procedure in such a situation, it must be accepted that the Parliament was duly consulted, as required by Article 78(3) TFEU.

183. I therefore propose that the Court should reject the third part of the Slovak Republic's third plea and the first part of its fourth plea, and Hungary's fifth plea, as unfounded.

3. The second part of the Slovak Republic's fourth plea and Hungary's third plea, alleging breach of essential procedural requirements in that the Council did not act unanimously, contrary to Article 293(1) TFEU

184. The Slovak Republic and Hungary maintain that, in adopting the contested decision, the Council breached the essential procedural requirement prescribed in Article 293(1) TFEU, in that it amended the Commission's proposal without complying with the requirement for unanimity laid down in that provision. The Slovak Republic submits that, in so doing, the Council also infringed Article 13(2) TEU and breached the principles of institutional balance and sound administration.

185. According to the applicants, the requirement for unanimity laid down in Article 293(1) TFEU applies to any amendment of the Commission's proposal, including where there is a minor amendment, and independently of whether the Commission has explicitly or implicitly accepted the amendments made to its proposal during the discussions within the Council.

186. The applicants also claim that there is nothing to indicate that, during the procedure leading to the adoption of the contested decision, the Commission withdrew its proposal and submitted a new proposal drafted in identical terms to those of the text that subsequently became the contested decision. On the contrary, it follows from the minutes of the Council's sitting of 22 September 2015 that the Commission neither lodged a new proposal nor made a preliminary declaration concerning the amended proposal as finally adopted by the Council. Yet the Commission is required to adhere actively and explicitly to the amendments concerned before it can be considered to have altered its proposal within the meaning of Article 293(2) TFEU. Furthermore, the present case is different from that at issue in the judgment of 5 October 1994, *Germany v Council*.⁵⁴

187. Last, the applicants deny that the two Members of the Commission who were present at the various meetings held within the Council were duly authorised by the College of Commissioners to approve the text as finally adopted by the Council.

188. I do not share the position supported by the applicants.

189. As I have previously stated, the FEU Treaty confers on the Commission a power of legislative initiative. Article 293(1) TFEU allows that power to be guaranteed insofar as it provides that, except in the cases referred to in the provisions of the FEU Treaty mentioned by it, where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously.⁵⁵

190. Furthermore, Article 293(2) TFEU states that 'as long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act'.

191. In the context of the procedure leading to the adoption of the contested decision, I consider that nothing was done to undermine the Commission's power of initiative, which Article 293 TFEU is intended to preserve. I observe, moreover, that the Commission itself has asserted, in the context of the present proceedings, that its institutional powers were respected.

192. It follows from the explanations provided to the Court by the Commission that the Commission set itself the priority objective, at its meeting of 16 September 2015, of having the Council adopt, during its sitting on 22 September 2015, a binding and immediately applicable decision concerning the relocation of 120 000 persons in clear need of international protection. In order to achieve that

⁵⁴ C-280/93, EU:C:1994:367.

⁵⁵ See judgment of 14 April 2015, *Council v Commission* (C-409/13, EU:C:2015:217, paragraphs 71 and 72).

priority objective, Mr Frans Timmermans, First Vice-President of the Commission, and Mr Dimitris Avramopoulos, the Member of the Commission responsible for migration, home affairs and citizenship, were, according to the information supplied by the Commission, given the necessary margin of discretion in respect of the other aspects of the proposal.

193. As the Commission states, Article 13 of its Rules of Procedure permits it to ‘instruct one or more of its Members to adopt, with the agreement of the President, the definitive text of any instrument or of any proposal to be presented to the other institutions, the substance of which has already been determined in discussion’. I observe that the applicants adduce no evidence to support their assertions that the two Members of the Commission were not duly authorised by the College of Commissioners to approve, on behalf of the Commission, the amendments to the initial proposal. In those circumstances, and having regard to the explanations provided by the Commission, it may in my view be presumed that the First Vice-President of the Commission and the Commissioner responsible for asylum and immigration were duly authorised by the College of Commissioners to take part in full, on behalf of the Commission, in the procedure that led to the adoption of the contested decision.

194. The Commission’s power of initiative was preserved in the context of the procedure that led to the adoption of the contested decision, insofar as it must be considered that the Commission, in accordance with the possibility afforded by Article 293(2) TFEU, amended its proposal.

195. It should be emphasised, in that regard, that the Court attaches no importance to the form taken by the amended proposal. It has held that ‘such amended proposals are part of the [Union] legislative process, which is characterised by a certain flexibility, necessary for achieving a convergence of views between the institutions’.⁵⁶

196. The need to accept a certain flexibility in the decision-making process in order to facilitate the search for political compromises is all the more acute in a context of urgency such as that which characterises the implementation of Article 78(3) TFEU.

197. It follows that what matters, in order to ensure that the Commission’s power of initiative has been respected, is to ascertain whether the Commission gave its consent to the amendments made to its proposal. As the Council correctly observes, it follows from a reading of the combined provisions of Article 293(1) and (2) TFEU that the requirement for a unanimous vote by the Council applies only in a situation where the Commission objects to an amendment of its proposal.

198. However, it is apparent from the file that the First Vice-President of the Commission and the Member of the Commission responsible for asylum and immigration actively and continuously participated in seeking a political compromise within the Council. To that end, those two Members of the Commission accepted the Council’s amendments to the initial proposal. At the time of acting, the Council therefore had before it a Commission proposal amended in accordance with the political compromise accepted by two Members of the Commission, duly authorised to that effect by the Commission, in accordance with the requirements of Article 293(2) TFEU.⁵⁷

199. In the light of the foregoing, I propose that the Court should reject the second part of the Slovak Republic’s fourth plea and Hungary’s third plea as unfounded.

⁵⁶ See, in particular, judgment of 5 October 1994, *Germany v Council* (C-280/93, EU:C:1994:367, paragraph 36 and the case-law cited).

⁵⁷ See, along the same lines, judgment of 11 September 2003, *Austria v Council* (C-445/00, EU:C:2003:445, paragraphs 16 and 17 and also paragraphs 44 to 47).

4. The second part of the Slovak Republic's third plea and Hungary's fourth plea, alleging breach of essential procedural requirements, in that the right of the national parliaments to issue an opinion in accordance with Protocol (No 1) and Protocol (No 2) was not respected

200. The Slovak Republic, by way of alternative plea, and Hungary claim that, at the time of the adoption of the contested decision, the right of the national parliaments to issue an opinion on any draft proposal for a legislative act, as provided for in Protocol (No 1) and Protocol (No 2), was not respected.

201. Since, in the applicants' submission, the contested decision constitutes, by its content, a legislative act, insofar as it amends legislative acts of the Union, that decision ought to have been adopted by the legislative procedure, so that the right of the national parliaments to issue an opinion on the proposal for that act had to be respected. Communication of the draft to the national parliaments for their information, as was done on 13 September 2015, was therefore not sufficient. In any event, as the draft was adopted by the Council, in its amended version, on 22 September 2015, the eight-week period within which the national parliaments are to issue an opinion under Article 4 of Protocol (No 1) and Article 6 of Protocol (No 2) was not observed.

202. In addition, the exception in urgent cases as provided for in Article 4 of Protocol (No 1), which enables the eight-week period to be shortened, is not applicable since no document issued by the Council refers to the need that, owing to the urgent nature of the case, the national parliaments must issue their opinions within a shorter period.

203. Like the Council, I consider that, since, as I have previously demonstrated, the contested decision is a non-legislative act, it was not subject to the requirements linked with the participation of the national parliaments which are attached to the adoption of a legislative act, as provided for in Protocol (No 1) and Protocol (No 2).

204. The second part of the Slovak Republic's third plea and Hungary's fourth plea must therefore be rejected as unfounded.

5. The first part of the Slovak Republic's third plea, alleging breach of essential procedural requirements, in that the Council failed to fulfil the requirement that the deliberations and the vote within the Council be held in public

205. The Slovak Republic maintains, in the alternative, that if the Court should find that the contested decision was adopted according to a legislative procedure and is therefore a legislative act, it follows that the Council breached an essential procedural requirement by adopting the contested decision in private in the exercise of its non-legislative activities, since Article 16(8) TEU and Article 15(2) TFEU provide that the meetings of the Council are to be held in public when it considers and votes on a draft legislative act.

206. I consider, as does the Council, that since, as I have already demonstrated, the contested decision is a non-legislative act, that decision is not subject to the conditions attached to the adoption of a legislative act, including the requirement that the Council deliberate and vote in public.

207. The first part of the Slovak Republic's third plea must therefore be rejected as unfounded.

6. Hungary's sixth plea, alleging breach of essential procedural requirements in that, when adopting the contested decision, the Council did not comply with the language rules of Union law

208. Hungary claims that the Council breached an essential procedural requirement in that it adopted the contested decision although the text of the decision put to the vote was not available in all the official languages of the Union.

209. More specifically, the Council did not comply with the language rules of Union law and, in particular, with Article 14(1) of its Rules of Procedure,⁵⁸ since the texts representing the successive amendments to the Commission's initial proposal, including the text of the contested decision as finally adopted by the Council, were distributed to the delegations of the Member States only in English.

210. The Slovak Republic raised the same plea in its reply. To my mind, in the context of the action brought by that Member State, that plea must be considered to be out of time and therefore inadmissible.

211. Article 14 of the Rules of Procedure of the Council, entitled 'Deliberations and decisions on the basis of documents and drafts drawn up in the languages provided for by the language rules in force', provides:

'1. Except as otherwise decided unanimously by the Council on grounds of urgency, the Council shall deliberate and take decisions only on the basis of documents and drafts drawn up in the languages specified in the rules in force governing languages.

2. Any member of the Council may oppose discussion if the texts of any proposed amendments are not drawn up in such of the languages referred to in paragraph 1 as he or she may specify.'

212. The Council maintains that that provision of its Rules of Procedure must be understood as meaning that, although paragraph 1 requires that the documents and drafts that constitute the 'basis' of the Council's deliberations, in this instance the Commission's initial proposal, be made available to the Member States in all the official languages of the Union, paragraph 2 of that provision lays down a simplified procedure for amendments, which do not necessarily have to be available in all the official languages of the Union. Only where a Member State objects does the language version indicated by that Member State also have to be submitted to the Council before it can continue to deliberate.

213. I consider that the explanation thus provided by the Council of the way in which Article 14 of its Rules of Procedure must be understood⁵⁹ is convincing, in that it constitutes a balanced and flexible approach that can ensure the effectiveness of the Council's works, especially in the context of the urgency that characterises the provisional measures adopted on the basis of Article 78(3) TFEU. Furthermore, that explanation coincides with the conduct of the procedure that led to the adoption of the contested decision.

214. In the present case, as the Council states, without being contradicted, the Commission made its proposal for a decision available to all the delegations of the Member States in all the official languages of the Union. Furthermore, the Council indicates, without being challenged by the applicants, that all the amendments requested orally by various Member States, set out in working

⁵⁸ Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure (OJ 2009 L 325, p. 35).

⁵⁹ It should be emphasised that the explanation provided by the Council in the context of these proceedings is consistent with its comments on its Rules of Procedure: 'Article 14(2) [of the Council's Rules of Procedure] enables any member of the Council to oppose discussion if the text of any proposed amendments is not drawn up in all the official languages' (see Comments on the Council's Rules of Procedure, pp. 48 and 49).

documents drafted in English and distributed to the delegations, were read by the President of the Council and simultaneously interpreted into all the official languages of the Union. According to the Council, no Member State raised any objection under Article 14(2) of the Rules of Procedure of the Council.

215. Last, and in any event, as the Council correctly observes, it follows from the case-law of the Court that, even on the assumption that, in adopting the contested decision, the Council infringed Article 14 of its Rules of Procedure, a procedural irregularity of that nature could entail annulment of the act ultimately adopted only if, were it not for that irregularity, the procedure could have led to a different result.⁶⁰ In fact, Hungary has put forward no material of such a kind as to show that, if the amendments to the Commission's initial proposal had been drawn up in all the official languages of the Union, the procedure could have led to a different result.

216. Consequently, Hungary's sixth plea must be rejected as unfounded.

217. It therefore follows from the examination of the pleas in law put forward by the Slovak Republic and by Hungary relating to the legality of the procedure leading to the adoption of the contested decision and alleging breach of essential procedural requirements that those pleas must all be rejected as unfounded.

D. The substantive pleas

1. The Slovak Republic's 6th plea and Hungary's 9th and 10th pleas, alleging breach of the principle of proportionality

218. Both the Slovak Republic and Hungary maintain, relying on arguments that differ on certain points, that the contested decision breaches the principle of proportionality.

219. According to settled case-law, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.⁶¹

220. With regard to judicial review of observance of that principle, it has consistently been held that the institutions of the Union must be allowed a broad discretion in the areas which entail political choices on their part and in which they are called upon to undertake complex assessments. In such situations, the legality of a measure adopted in one of those areas can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.⁶²

221. There is no doubt in my mind that that case-law is applicable in the present case, insofar as the contested decision reflects the political choices made by the Council in order to address an emergency situation, and the response which it thus provided to the phenomenon of a sudden inflow of nationals of third countries to the territory of the Union is the result of complex assessments for which the Court cannot substitute itself.

⁶⁰ See, in particular, judgment of 25 October 2005, *Germany and Denmark v Commission* (C-465/02 and C-466/02, EU:C:2005:636, paragraph 37).

⁶¹ See, in particular, judgment of 4 May 2016, *Poland v Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 78 and the case-law cited).

⁶² See, in particular, to that effect, judgments of 4 May 2016, *Poland v Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 79 and the case-law cited), and of 9 June 2016, *Pesce and Others* (C-78/16 and C-79/16, EU:C:2016:428, paragraph 49 and the case-law cited).

222. I recall that the objective pursued by the contested decision is, in accordance with Article 1(1) of that decision, read with recitals 12 and 26, to support the Italian Republic and the Hellenic Republic in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries to their territories, by adopting provisional measures in the area of international protection in order to relieve the considerable asylum pressure on those two Member States.

223. Only if the contested decision were found to be manifestly inappropriate for attaining the objective which it pursues, or to exceed the limits of what is necessary to attain that objective, could that decision be annulled.

224. It is now necessary to examine the content of the pleas whereby the Slovak Republic and Hungary seek to challenge the proportionality of the contested decision.

a) The appropriateness of the contested decision for attaining the objective which it pursues

225. The Slovak Republic, supported by the Republic of Poland, claims that the contested decision is not appropriate for attaining the objective which it pursues, since the pressure on the Italian and Greek asylum systems is the consequence of the serious structural weaknesses in those systems in terms of lack of reception capacity and of capacity to process applications for international protection. The temporary relocation mechanism provided for in the contested decision is not capable of redressing such structural defects.

226. I do not agree with that argument.

227. I consider that by removing the processing of numerous applications for international protection from the competence of the Italian Republic and the Hellenic Republic, the contested decision automatically helps to relieve the considerable pressure on the asylum systems of those two Member States following the migration crisis in the summer of 2015. The fact that the main objective of the contested decision is not to redress the structural defects in those asylum systems cannot obscure that finding.

228. Moreover, it should be emphasised that the contested decision most certainly does not ignore the problem of improving the functioning of the asylum systems of the Italian Republic and the Hellenic Republic.

229. In fact, the contested decision provides, in Article 8(1), that '[the Italian Republic and the Hellenic Republic] shall, bearing in mind the obligations set out in Article 8(1) of Decision ... 2015/1523, and by 26 October 2015, notify to the Council and the Commission an updated roadmap taking into account the need to ensure appropriate implementation of this Decision'. In accordance with Article 8(1) of Decision 2015/1523, that roadmap must provide 'adequate measures in the area of asylum, first reception and return, enhancing the capacity, quality and efficiency of [the Italian Republic's] and [the Hellenic Republic's] systems in these areas'. Recital 18 of the contested decision states, in that regard, that Decision 2015/1523 'sets out an obligation for [the Italian Republic] and [the Hellenic Republic] to provide structural solutions to address exceptional pressures on their asylum and migration systems, by establishing a solid and strategic framework for responding to the crisis situation and intensifying the ongoing reform process in these areas'. By requiring the updating of the roadmaps drawn up by the Italian Republic and the Hellenic Republic in application of Decision 2015/1523, the contested decision represents the continuation of the latter decision. The aim pursued here is to require those two Member States to manage their asylum systems in order to enable them, after the period of application of the contested decision, to better cope with any increase in the inflow of migrants to their territories.

230. In application of the contested decision, the Italian Republic and the Hellenic Republic are therefore under an obligation, in parallel with the relocations from their territories, to correct the structural weaknesses in their asylum systems. Failure by one of those two Member States to comply with that obligation may, in accordance with Article 8(3) of the contested decision, entail the suspension of the application of that decision with regard to that Member State for period of up to three months, which may be extended once.

231. Furthermore, it must be borne in mind that the contested decision is not the only measure adopted by the Union in order to take pressure off the Italian and Greek asylum systems. As the Grand Duchy of Luxembourg has pointed out, that decision must be seen as forming part of a set of measures, one of the most important of which in operational terms is certainly the establishment of 'hotspots'.⁶³

232. Last, as I have already indicated, I share the Council's view that it is likely that the great pressure experienced by the Italian and Greek asylum systems would have seriously disrupted any asylum system, even one with no structural weaknesses. It therefore seems to me to be wrong to maintain, as does the Slovak Republic, that the pressure on the asylum systems of Italy and Greece is solely the consequence of the structural weaknesses in those two systems.

233. In the light of those factors, I consider that it is not apparent, still less is it manifestly apparent, that the relocation of a significant number of persons in clear need of international protection, in such a way as to relieve the Italian and Greek asylum systems of the processing of the corresponding applications, is an inappropriate measure for contributing in a real and effective manner to the objective of relieving the considerable pressure on those two asylum systems.

234. According to the Slovak Republic and Hungary, the inappropriateness of the contested decision for attaining the objective which it pursues is also confirmed by the small number of relocations carried out pursuant to that decision.

235. As the Council correctly states, proportionality must be assessed in the light of the information available to it when it adopted the contested decision.

236. It is important, in that regard to bear in mind the case-law of the Court, according to which, in the context of an action for annulment, the legality of a measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted and cannot depend on retrospective considerations of its efficacy.⁶⁴ The Court has also held that where the legislature of the Union is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears to be manifestly incorrect in the light of the information available to the legislature at the time of the adoption of the rules in question.⁶⁵

237. As is apparent from a number of recitals of the contested decision, the Council relied on a detailed analysis of the causes and effects of the crisis situation that arose in the summer of 2015, on the basis of the figures available to it at the time of the adoption of that decision.

⁶³ The 'hotspots' are intended, in particular, to assist the frontline Member States, such as the Italian Republic and the Hellenic Republic, to fulfil their obligations with respect to the checking, identification, registration of testimony and fingerprinting of arrivals.

⁶⁴ See, in particular, judgment of 17 May 2001, *IECC v Commission* (C-449/98 P, EU:C:2001:275, paragraph 87 and the case-law cited).

⁶⁵ See, in particular, judgment of 9 June 2016, *Pesce and Others* (C-78/16 and C-79/16, EU:C:2016:428, paragraph 50 and the case-law cited).

238. As the Council observes, the low effectiveness of the measures provided for in the contested decision⁶⁶ may be explained by a set of factors which it could not foresee at the time of the adoption of that decision, in particular the '*laissez passer*' policy applied by a number of Member States, which led to the disorderly movement of a large number of migrants to other Member States; the slow pace of the relocation procedures; the uncertainty created by the numerous cases of refusal on public order grounds put forward by certain relocation Member States; and the insufficient cooperation of certain Member States in the implementation of the contested decision.

239. On the latter point, I would add that the applicants' argument amounts, all in all, to an attempt to take advantage of their failure to implement the contested decision. I would point out that, by failing to comply with their relocation obligations, the Slovak Republic and Hungary have contributed to the fact that the objective of 120 000 relocations laid down in the contested decision is to date still far from being attained.

240. It must be pointed out, in that regard, that, according to the updated figures of 10 April 2017,⁶⁷ Hungary has not relocated any person from Italy and Greece, while the Slovak Republic has relocated only 16 persons from Greece and none from Italy. Those figures correspond to 0% and 2%, respectively, of the relocation quotas allocated to Hungary and the Slovak Republic by the contested decision. I would observe, moreover, that neither the Slovak Republic nor Hungary has requested that the mechanism for the temporary suspension of their obligations provided for in Article 4(5) of the contested decision be applied to it.

241. While it is clear to me that the appropriateness of the contested decision for attaining the objective which it pursues cannot be disputed by the applicants on the basis of the weakness of its application or of its ineffectiveness in practice, there is, on the other hand, one thing which to my mind is indisputable, namely that that decision can succeed in resolving the emergency situation that justified its adoption only on condition that all the Member States, in the same spirit of solidarity as that which constitutes its *raison d'être*, make an effort to implement it.

242. It should be borne in mind, in that regard, that the non-application of the contested decision also constitutes a breach of the obligation concerning solidarity and the fair sharing of burdens expressed in Article 80 TFEU. To my mind there is no doubt that, in an action for failure to fulfil obligations on this matter, the Court would be entitled to remind the offending Member States of their obligations, and to do so in no uncertain terms, as it has done in the past.⁶⁸

⁶⁶ As at 10 April 2017, the number of resettlements from Italy and Greece stood at 16 340. See the Commission's Eleventh report of 12 April 2017 on relocation and resettlement, COM(2017) 212 final, Annex 3. According to the information provided by the Council at the hearing before the Court on 10 May 2017, the number of relocations from Italy and Greece came to 18 129 as at 8 May 2017.

⁶⁷ See the Commission's Eleventh report on relocation and resettlement, Annex 3.

⁶⁸ See, in particular, judgment of 7 February 1973, *Commission v Italy* (39/72, EU:C:1973:13), where the Court held that, 'in permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before [Union] law and creates discriminations at the expense of their nationals ... This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the [Union] legal order' (paragraphs 24 and 25). See also judgment of 7 February 1979, *Commission v United Kingdom* (128/78, EU:C:1979:32, paragraph 12).

b) The necessity of the contested decision in the light of the objective which it seeks to attain

1) The arguments put forward by the Slovak Republic

243. The Slovak Republic maintains that the objective pursued by means of the contested decision could be achieved just as effectively by measures that could have been taken in the context of existing instruments that were less restrictive for Member States as regards their impact on the sovereign right of each Member State to decide freely on the admission of nationals of third countries to their territory and also the right of Member States, proclaimed in Article 5 of Protocol (No 2), that the financial and administrative burden should be the lightest possible.

244. As regards, in the first place, less restrictive measures that might have been taken, the Slovak Republic first of all mentions Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.⁶⁹ That directive was intended to respond to the same situations of massive inflows of migrants as the contested decision by providing temporary protection, as stated in recitals 8, 9 and 13 and Article 1 of that directive, while being less restrictive than the contested decision in a number of aspects. Furthermore, Article 26 of Directive 2001/55 expressly establishes a procedure for the relocation of persons benefiting from temporary protection.

245. That directive is less harmful to the interests of the Member States, since it provides for the return of the persons concerned when the temporary protection comes to an end. In addition, Article 25 of that directive provides, in a spirit of solidarity, that the Member States are to indicate, in figures or in general terms, their capacity to receive such persons, and that they are to determine the number of persons to be received, having due regard to their sovereignty.

246. The Republic of Poland, which supports the Slovak Republic in this argument, submits that Directive 2001/55 is based on the principle of voluntary agreement and that the transfer is carried out with the consent of the person being relocated and the Member State of relocation. In addition, the status of temporary protection provided for in that directive confers fewer rights than the status of international protection that the contested decision seeks to afford, in particular as regards the period of protection, thus imposing significantly fewer burdens on the Member State of relocation.

247. Next, the Slovak Republic maintains that the Italian Republic and the Hellenic Republic could have triggered what is known as the ‘EU civil protection’ mechanism provided for in Article 8a of Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union,⁷⁰ that could have provided them with the necessary material assistance. The Slovak Republic also claims that the Italian Republic and the Hellenic Republic could have sought assistance from the Frontex agency in the form of ‘rapid intervention’. The Slovak Republic submits, in that regard, that the effectiveness of the borders of the frontline Member States whose borders are the external borders of the Union is directly linked to the state of the asylum and migration systems of the Member States concerned.

248. Likewise, in accordance with Article 2(1)(f) and Article 9(1) and (1b) of Regulation No 2007/2004, in order to relieve the burdens on their asylum systems, the Italian Republic and the Hellenic Republic could, in the Slovak Republic’s submission, have asked the Frontex agency to provide the necessary assistance to arrange the return operations.

⁶⁹ OJ 2001 L 212, p. 12.

⁷⁰ OJ 2004 L 349, p. 1.

249. Furthermore, the Slovak Republic claims that it was not necessary to adopt other measures on the basis of Article 78(3) TFEU, having regard to Decision 2015/1523, which leaves it to the Member States to decide, in a spirit of solidarity, the extent to which they will participate in the common commitment and which is therefore less harmful to their national sovereignty. In addition, since the contested decision was adopted only eight days after Decision 2015/1523, it was impossible to conclude in such a brief period that the latter decision was insufficient. At the time of the adoption of the contested decision, the Council had no reason to consider that the reception capacities provided for in Decision 2015/1523 would be quickly achieved and that it would therefore be necessary to provide additional capacity in the context of the contested decision.

250. Last, Article 78(3) TFEU also made it possible to adopt less restrictive measures in order to attain the objective pursued, for example by providing assistance to facilitate return and registration or financial, material, technical and personnel support to the Italian and Greek asylum systems. The Member States could also take bilateral initiatives, on a voluntary basis, in order to provide such support.

251. In the second place, the relocation of applicants as provided for in the contested decision inevitably entails a financial and administrative burden. Since it was not necessary to bear such a burden, that decision constitutes a superfluous and premature measure, contrary to the principle of proportionality and to Article 5 of Protocol (No 2).

252. In answer to those arguments, it is appropriate to underline the particularly delicate context in which the contested decision was adopted, namely the emergency situation characterised by a sudden inflow of nationals of third countries in July and August 2015. The institutions of the Union were required to react as quickly as possible and effectively to the considerable pressure on the Italian and Greek asylum systems.

253. I consider, as does the Council, that although at least some of the alternative solutions suggested by the Slovak Republic could contribute to the attainment of the objective pursued by the contested decision, that finding, having regard to the broad margin of discretion that must be afforded to the Council, cannot suffice to establish that that decision is manifestly disproportionate and to call its legality into question. In my view, the Council, at the time of the adoption of the contested decision, was entitled to consider that there was no alternative measure that would enable the objective pursued by the contested decision to be attained as effectively, while restricting to a lesser degree the sovereignty of the Member States or their financial interests.

254. I am of the view, as is the Federal Republic of Germany, that the principle of solidarity and the fair sharing of responsibility between the Member States, expressly enshrined in Article 80 TFEU as regards the Union policies on border control, asylum and immigration, plays a major role in the interpretation of Article 78(3) TFEU. Accordingly, it seems to me to be consistent with the latter provision, read in the light of Article 80 TFEU, that a provisional measure such as the contested decision should allocate between the Member States, in a binding fashion, the burdens which it imposes.

255. The Hellenic Republic observes, moreover, that the need to adopt a programme for the mandatory relocation of applicants for international protection from Greece and Italy, on the basis of quotas per Member State, can be explained by the unprecedented migratory flows in those two Member States in 2015, especially in July and August 2015. The actions that were progressively decided upon up to the adoption of the contested decision proved insufficient to alleviate to a significant degree the burden resulting in Greece and Italy from the admission of such a large number of migrants and the processing of their applications for international protection. I do not have convincing material that would disprove the assertion thus made by the Hellenic Republic.

256. It follows that, having regard to the figures relating to the 2015 migration crisis mentioned in the recitals of the contested decision and to the panel of measures suggested by the Slovak Republic in order to respond to that crisis, I do not think that the temporary relocation mechanism put in place by that decision may be regarded as manifestly exceeding what is necessary in order to provide an effective response to that crisis.

257. As regards, first of all, the alternative measure consisting in the implementation of Directive 2001/55, that directive is, as the Court observed in its judgment of 21 December 2011, *N. S. and Others*,⁷¹ an example of the solidarity between Member States provided for in Article 80 TFEU.⁷² As is apparent from recital 20 of that directive, one of the objectives of that directive is to provide a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx.

258. Although it appears that the application of such a solidarity mechanism, like that provided for in the contested decision, is to be confined to wholly exceptional situations involving a mass influx of displaced persons,⁷³ I note that the two mechanisms differ on one essential point. In fact, unlike the mechanism provided for in Directive 2001/55, the temporary relocation mechanism put in place by the contested decision entails a mandatory allocation of a specific number of applicants for international protection among the Member States. Given the emergency context in which the contested decision was adopted and the fact that it was impossible to obtain commitments from the Member States to take specific numbers of the applicants for international protection, the Council in my view made the appropriate choice by opting for a rapid and binding response in order to deal with the migration crisis confronting the Union. In any event, such a choice cannot be described as manifestly inappropriate.

259. In that regard, the assertion, which to a large extent crystallises the opposition to the contested decision shown by certain Member States, that the objective pursued by that decision ought to have been achieved solely by means of voluntary commitments on the part of the Member States to receive a certain number of applicants does not bear scrutiny. The genesis of the contested decision shows that it was because consensus could not be reached between all Member States on a voluntary distribution among them of the applicants for international protection that it was decided to opt for a mandatory relocation mechanism, that is to say, one based on binding quantitative allocations. On that point, I am of the view that the institutions of the Union, which are often the targets of complaints of impotence and inactivity, cannot be criticised for having chosen to impose on the Member States quotas of applicants to be relocated rather than simply abandoning the project for a relocation mechanism.

260. I conclude that the adoption of the contested decision, rather than the implementation of Directive 2001/55, is the result of a political choice by the three institutions that participated in the procedure leading to the adoption of the contested decision and that none of the arguments put forward by the Slovak Republic is in my view capable of demonstrating that that choice must be regarded as manifestly incorrect in the light of the principle of proportionality.

261. As regards, next, the argument that the adoption of the contested decision was not necessary given the previous adoption of Decision 2015/1523, I observe that the Commission clearly stated, in its proposal for a decision, that, since the point at which agreement had been reached within the Council on 20 July 2015 on the content of what would become Decision 2015/1523, concerning the

⁷¹ C-411/10 and C-493/10, EU:C:2011:865.

⁷² Paragraph 93 of that judgment.

⁷³ See, to that effect, judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 93).

relocation of 40 000 persons from Italy and Greece, ‘the migratory situation in the Central and Eastern Mediterranean ha[d] intensified. The flows of migrants and refugees ha[d] more than doubled over the summer months giving impetus to trigger a new emergency relocation mechanism to alleviate pressure faced by [the Italian Republic], [the Hellenic Republic] and also Hungary’.⁷⁴

262. That finding that the migratory situation had deteriorated, making the adoption of an additional relocation mechanism necessary, is expressed in recital 12 of the contested decision, which is worded as follows: ‘During recent months, the migratory pressure at the southern external land and sea borders has again sharply increased, and the shift of migration flows has continued from the central to the eastern Mediterranean and towards the Western Balkans route, as a result of the increasing number of migrants arriving in and from Greece. In view of the situation, further provisional measures to relieve the asylum pressure from [the Italian Republic and the Hellenic Republic] should be warranted’. That finding is substantiated by figures which are set out in recital 13 of the contested decision.

263. Whereas the voluntary relocation mechanism for 40 000 persons put in place by Decision 2015/1523 is intended, as may be seen from recitals 10, 11 and 21 of that decision, to cope with the flow of migrants witnessed in 2014 and the first months of 2015, the mandatory relocation mechanism provided for in the contested decision is intended, as may be seen from the statistics provided in recitals 12, 13 and 26 of that decision, to respond to the pressure resulting from the flow of migrants in July and August 2015.

264. Those factors seem to me to demonstrate to the requisite standard that the Commission did not make a manifest error of assessment in considering that, following the sudden flow of nationals of third countries to the territory of the Union in July and August 2015, and having regard to the latest figures available to it, an additional provisional measure for the relocation of 120 000 persons was necessary.

265. As regards the Slovak Republic’s argument that the strengthening of the surveillance of the external borders of the Union would constitute an alternative measure to the contested decision, it is sufficient in my view to emphasise that such a measure, while indeed useful, could not replace a relocation mechanism whose primary purpose is to cope with a flow of nationals of third countries which has already happened. That measure intended to strengthen the surveillance of the external borders of the Union is in my view not appropriate, as such, for decreasing the pressure on the Italian and Greek asylum systems following the sudden flow of nationals of third countries in the summer of 2015. That measure must therefore be considered to be complementary to and not capable of replacing that provided for in the contested decision.

266. The same applies to the measure consisting in providing financial, material, technical and personnel support to the Italian and Greek asylum systems.

267. On that point, the Council states, without being contradicted, that financial support was provided by the Union from the beginning of the migratory crisis, in the form of a payment of EUR 9.2 billion in 2015 and 2016. Furthermore, the contested decision itself provides, in Article 10, that financial support is to be provided for each person relocated in accordance with that decision.

⁷⁴ See that Proposal for a Decision, p. 2.

268. In addition, the different follow-up reports drawn up by the Commission mention operational support measures involving agencies such as EASO and the Member States.⁷⁵ The contested decision states, moreover, in recital 15, that ‘many actions have been taken so far to support [the Italian Republic and the Hellenic Republic] in the framework of the migration and asylum policy, including by providing them with substantial emergency assistance and EASO operational support’.

269. However useful those various support measures may be, the institutions of the Union were to my mind entitled to consider that, without their utility being called into question, they were not sufficient to respond to the emergency situation with which the Italian Republic and the Hellenic Republic had to cope from the summer of 2015.⁷⁶

270. Last, as regards the argument relating to the excessive administrative and financial burdens which the contested decision imposed on the Member States, the Slovak Republic does not show that the alternative measures which it proposes would have been less costly than a temporary relocation mechanism.

271. In the light of the foregoing factors, I consider that the arguments whereby the Slovak Republic disputes the necessity of the contested decision must therefore all be rejected.

272. It is now necessary to examine the arguments put forward by Hungary in order to challenge the necessity of the contested decision.

2) The arguments put forward by Hungary

273. Hungary, supported by the Republic of Poland in this argument, claims, in the first place, that since, contrary to the provisions made in the Commission’s initial proposal, Hungary is no longer among the Member States benefiting from the relocation mechanism, it was not right that the contested decision should provide for the relocation of 120 000 applicants, and that for that reason the decision is contrary to the principle of proportionality. In effect, fixing that total number of 120 000 applicants exceeds what is necessary in order to attain the objective pursued by the contested decision, since it includes a number of 54 000 applicants who, according to the Commission’s initial proposal, were to be relocated from Hungary. Thus, there is no explanation of why such a high total number of applicants, which had been determined on the basis of a mechanism benefiting three Member States, would still be necessary when the number of beneficiary Member States was reduced from three to two.

274. Hungary adds that the distribution of the 54 000 applicants initially envisaged as being relocated from Hungary became hypothetical and uncertain, since the contested decision provides that it will be the subject of a final decision taken in the light of subsequent developments.

275. In answer to those arguments, it must be observed that, as is apparent from recital 26 of the contested decision, the Council considered, on the basis of the overall number of nationals of third countries who have entered Italy and Greece irregularly in 2015, and the number of those who are in clear need of international protection, that, in spite of Hungary’s decision not to be part of the Member States benefiting from the temporary relocation mechanism, a total of 120 000 applicants in clear need of international protection should be relocated from Italy and Greece.

⁷⁵ See, in particular, the Commission’s Eleventh report on relocation and resettlement, *op. cit.*, which is the most recent one available at the time of writing this Opinion.

⁷⁶ In its Proposal for a Decision, the Commission proceeded from the finding that the different financial and operational measures which it had thus far taken to support the Italian, Greek and Hungarian asylum systems had not proved sufficient to address the current crisis situations in those three Member States. It therefore considered that, given the urgency and the severity of the situation created by the influx of third country nationals into those Member States, opting for further EU action in reaction to that phenomenon did not go beyond what was necessary to achieve the objective of addressing the situation effectively (p. 8).

276. Recital 26 states that that number ‘corresponds to approximately 43% of the total number of third-country nationals in clear need of international protection who have entered Italy and Greece irregularly in July and August 2015’. At the hearing, the Council explained that the reference to that percentage was the result of a technical error and that the figure of 78% should be substituted.

277. In arriving at such a number, the Council had to reconcile two requirements, namely the requirement that that number would be sufficiently high to actually reduce the pressure on the Italian and Greek asylum systems and the requirement that it would not be set at such a level that it would place too high a burden on the Member States of relocation.

278. I see nothing in Hungary’s argument to show that in acting in that way the Council clearly exceeded its margin of discretion. On the contrary, I consider that, in the light of the data relating to the number of irregular entries available to the Council at the time of the adoption of the contested decision, and having regard to the fact that there were at the time sound reasons to think that the migration crisis would extend beyond the date of adoption of that decision, the Council set the number of applicants to be relocated at a reasonable level. As already stated, the fact that that number is far from being attained today cannot undermine that assessment.

279. As regards the number of 54 000 applicants who were initially to be relocated from Hungary, Article 4(1)(c) of the contested decision provides that they ‘shall be relocated to the territory of the other Member States, proportionally to the figures laid down in Annexes I and II, either in accordance with paragraph 2 of this Article or through an amendment of this Decision, as referred to in Article 1(2) and in paragraph 3 of this Article’.

280. In that regard, the Commission explains in its written observations that, following Hungary’s refusal to be among the Member States benefiting from the relocation measure, it was decided to introduce, in Article 4(2) of the contested decision, what is known as a ‘by default’ rule, under which those 54 000 applicants were, as of 26 September 2016, to be relocated from Italy and Greece to the other Member States and, in Article 4(3) of the contested decision, a flexible rule enabling that mechanism for the relocation of those 54 000 persons to be adapted if justified by the evolution of the situation on the ground or if a Member State were confronted with an emergency situation characterised by a sudden inflow of nationals of third countries owing to a sharp shift of migration flows.

281. To my mind, in thus providing for a reserve corresponding to the number of 54 000 applicants to be relocated in conditions precisely defined in the contested decision, the Council not only did not act in a disproportionate manner but also took fully into account the need to adapt the temporary relocation mechanism to the evolution of the situation.

282. In that regard, it should be recalled that the Court has already emphasised the need for the institutions of the Union to ensure that the rules are adapted to the new data.⁷⁷ That need to adapt its rules where necessary was also provided for by the Council in the contested decision, in particular in Article 1(2) and Article 4(3).

283. In providing for a reserve of 54 000 applicants that could be used in one way or another depending on circumstances, the Council took that need for adaptation into account at the time of the adoption of the contested decision, in a particularly relevant way having regard to the degree of uncertainty as to the evolution of the migratory flows. As the Council correctly states, such a flexible

⁷⁷ See, in particular, to that effect, judgment of 9 June 2016, *Pesce and Others* (C-78/16 and C-79/16, EU:C:2016:428, paragraph 51 and the case-law cited).

solution is justified owing to the very dynamic nature of migratory flows and allows the content of the contested decision to be adapted to circumstances, in the desire for solidarity, effectiveness and proportionality. It cannot therefore be considered that by acting in that way the Council went beyond what is necessary in order to attain the objective pursued by the contested decision.

284. I would observe, last, that, in accordance with that same requirement for adaptation, the reserve of 54 000 applicants was eventually attributed to the resettlement programme negotiated between the Union and the Republic of Turkey on 18 March 2016.⁷⁸

285. In the second place, Hungary maintains, in the alternative, that if the Court were not to uphold any of its pleas for annulment, the contested decision would nonetheless be illegal so far as Hungary is specifically concerned, since it infringes Article 78(3) TFEU and breaches the principle of proportionality vis-à-vis that Member State.

286. It is apparent from the explanations provided by Hungary in support of its 10th plea that it takes issue with the Council for having included it among the Member States of relocation when in Hungary's submission it cannot be disputed that it was subject to particularly strong migratory pressure both during the period preceding the adoption of the contested decision and at the time of its adoption. In those circumstances, the contested decision places a disproportionate burden on Hungary by setting a mandatory relocation quota for it as for the other Member States.

287. Hungary maintains that, if the objective of Article 78(3) TFEU is to provide assistance to Member States in an emergency situation in the light of migratory pressure, it is then contrary to that objective to impose an additional burden on a Member State which is actually in such a situation.

288. In essence, Hungary criticises the fact that its refusal to be included among the Member States benefiting from the temporary relocation mechanism had the automatic consequence of placing it among the Member States contributing to that mechanism, that is to say, among the Member States of relocation.

289. Hungary explains its refusal to be included among the Member States benefiting from the temporary relocation mechanism put in place by the contested decision as follows. In the first place, it rejects the idea that it should be classified as a 'frontline Member State'. Hungary makes clear, in that regard, that the Italian Republic and the Hellenic Republic are Member States which, owing to their geographic situation, are the first point of entry for applicants for international protection in the Union, unlike Hungary, whose territory, having regard to the migration routes and to geographic reality, can be accessed by such applicants only when they necessarily pass through Greece. Classifying Hungary as a 'frontline Member State' obscured that reality and suggested that Hungary could be considered to be the Member State responsible for examining the application for asylum, which in its view was unacceptable. In the second place, Hungary states that it expressed its disagreement with a relocation of applicants based on quotas, explaining that it considered that such a procedure was not an instrument that would permit an adequate response to the migration crisis, especially in the form of mandatory quotas per Member State, which contradicts the conclusions of the European Council of 25 and 26 June 2015. Hungary states that it could not accept the idea that applicants should be relocated from its territory, because that ran counter to the position of principle which it had expressed. However, in Hungary's contention, none of that can be interpreted as meaning that it was not itself faced with the effects of the migration crisis and that it was not itself in an emergency situation.

⁷⁸ See Decision 2016/1754, which inserted paragraph 3a in Article 4 of the contested decision.

290. Hungary claims that, by rejecting the arrangement whereby applicants for international protection would be relocated from its territory, it, to use its expression, accepted 'its share of the common burden'. Thus, Hungary does not breach the principle of solidarity. It continues to form part of the Member States that support the Italian Republic and the Hellenic Republic even though, owing to its own situation, namely that it was itself in an emergency situation, it does so in a different way from the other Member States.

291. It is apparent from Hungary's application, from its reply and from its response to the statements in intervention that this 10th plea, which it raises in the alternative, is meant to support the claim, which it also puts forward in the alternative, that the contested decision should be annulled 'insofar as it concerns Hungary'.

292. I understand that claim as seeking the annulment in part of the contested decision. Hungary thus seeks to remove itself from the group of Member States of relocation by seeking annulment of the provision of the contested decision that determines the number of migrants to be relocated to Hungary.

293. Such a claim is in my view inadmissible.

294. It is settled case-law that the partial annulment of an act of the Union is possible only if the elements the annulment of which is sought may be severed from the remainder of the act.⁷⁹ The Court has repeatedly held that the requirement of severability is not satisfied in the case where the partial annulment of an act would have the effect of altering its substance.⁸⁰

295. The claim for partial annulment of the contested decision submitted in the alternative by Hungary is in reality directed at two figures which specifically concern that Member State and are set out in the annexes to that decision. However, the deletion of those figures would entail the annulment of those annexes in their entirety, since the figures for the other Member States would have to be recalculated in order to keep the total number of 120 000 relocations. That would affect an essential element of the contested decision, namely the mandatory determination of the allocations per Member State which gives real scope to the principle of solidarity and fair sharing of responsibility between Member States laid down in Article 80 TFEU.

296. In addition, as is apparent, in particular, from recitals 2, 16, 26 and 30 of the contested decision, which refer to that principle, the idea of a distribution of the applicants for international protection who have arrived in Italy and Greece among all the other Member States is a fundamental element of the contested decision. The limitation of the scope *ratione territoriae* of the contested decision that would result from the partial annulment of that decision would thus strike at the very heart of the decision. I infer that the element which Hungary seeks to have annulled cannot be severed from the contested decision, insofar as its disappearance would objectively alter the very substance of the contested decision.

297. It follows from the foregoing that the contested provisions, which correspond to the quotas from Italy and from Greece allocated to Hungary which are set out in Annexes I and II to the contested decision, cannot be severed from the remainder of the contested decision. It follows that the claims for partial annulment of that decision submitted by Hungary, to which its 10th plea relates, must be rejected as inadmissible.

⁷⁹ See, in particular, judgment of 30 March 2006, *Spain v Council* (C-36/04, EU:C:2006:209, paragraph 9 and the case-law cited, and also paragraph 12).

⁸⁰ See, in particular, judgment of 30 March 2006, *Spain v Council* (C-36/04, EU:C:2006:209, paragraph 13 and the case-law cited).

298. In any event, if Hungary's 10th plea were to be understood as seeking more generally the annulment of the contested decision in its entirety, on the ground that the failure to take its particular situation into account constituted as such a breach of the principle of proportionality affecting the entire decision, such a plea would in my view have to be rejected as unfounded.

299. More specifically, I consider that, even on the assumption that Hungary was, at it maintains, in an emergency situation characterised by constant migratory pressure at the time of the adoption of the contested decision,⁸¹ it does not follow, in my view, that the imposition on it of quotas of applicants for relocation from Italy and Greece is contrary to the principle of proportionality.

300. In effect, it should first of all be borne in mind that Hungary's withdrawal from the Member States benefiting from the temporary relocation mechanism originates solely in its refusal to benefit from that mechanism. Whatever the reasons that gave rise to that refusal, I must emphasise that the institutions of the Union could not but take note of such a refusal.

301. As the Grand Duchy of Luxembourg observes, in essence, since Hungary had expressly requested not to be included among the Member States benefiting from the temporary relocation mechanism, it had to be considered, in accordance with the principle of solidarity, that it was included among the Member States of relocation.

302. Next, it follows from the case-law that the mere fact that an act of the Union is likely to affect one Member State more than others cannot be contrary to the principle of proportionality, as long as the conditions laid down by the Court in order to ensure compliance with that principle are met.⁸²

303. I observe, in that regard, that the contested decision has an impact on all the Member States and assumes that a balance will be struck between the different interests involved, regard being had to the objective which it pursues. Therefore, the attempt to strike such a balance, taking into account not only the particular situation of a single Member State, but that of all the Member States of the Union, cannot be regarded as being contrary to the principle of proportionality.⁸³ That applies a fortiori when account is taken of the principle of solidary and fair sharing of responsibility between the Member States laid down in Article 80 TFEU, from which it follows that the burdens constituted by the provisional measures adopted on the basis of Article 78(3) TFEU in favour of one or more Member States in an emergency migratory situation must be shared among all the other Member States.

304. Incidentally, it should be emphasised that the contested decision is more nuanced than the impression that Hungary seeks to give. That decision cannot be reduced to a binary arrangement, with the Member States benefiting from the temporary relocation on one side and the Member States which are allocated quotas of persons to be relocated on the other side.

305. In fact, the contested decision includes adjustment mechanisms which enable it to be adapted to the evolution of migratory flows and thereby to take account of the particular situation, characterised by variable migratory pressure, with which certain Member States might be confronted.

⁸¹ The existence of an emergency situation in Hungary at the time of the adoption of the contested decision is disputed by the Council, which maintains that the situation changed during the summer of 2015 owing to the unilateral measures taken by Hungary, in particular the construction of a barrier along its border with the Republic of Serbia, which was completed on 14 September 2015, and the transit policy to other Member States, in particular to Germany, practised by Hungary. Those measures put an end to the arrival of migrants on the territory of Hungary, while those who had succeeded in entering Hungarian territory had to leave quickly. In order to illustrate the fact that it was in a situation of emergency, Hungary states, in particular, that between 15 September and 31 December 2015 the Hungarian police apprehended 190 461 illegal migrants, including 31 769 between 15 and 22 September 2015. Hungary states that it was under 'enormous migratory pressure' characterised by the following factors: up to 15 September 2015 there were 201 126 illegal breaches of the border. That figure was 391 384 as at 31 December 2015. In the second half of September, the number of illegal breaches of the Croatian-Hungarian border was as high as 10 000 on some days. Hungary adds that during 2015, 177 135 applications for international protection were lodged with the competent asylum authority of that Member State.

⁸² See, to that effect, judgment of 4 May 2016, *Poland v Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 103).

⁸³ See, by analogy, judgment of 4 May 2016, *Poland v Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 103 and the case-law cited).

306. Thus, it should be recalled that the second subparagraph of Article 1(2) and the first subparagraph of Article 4(3) of the contested decision provide that the Commission may submit proposals to the Council if it considers that an adaptation of the relocation mechanism is justified by the evolution of the situation on the ground or that a Member State is confronted with an emergency situation characterised by a sudden inflow of nationals of third countries due to a sharp shift of migration flows. Under the second subparagraph of Article 4(3) of the contested decision, a Member State may, giving duly justified reasons, notify the Council and the Commission that it is confronted with a similar emergency situation. The Commission is then to assess the reasons given and submit, as appropriate, proposals to the Council, as indicated in Article 1(2) of the contested decision.

307. In addition, Article 4(5) of that decision provides that the relocation of applicants may be temporarily suspended for Member States which duly notify the Council and the Commission.

308. Furthermore, Article 9 of the contested decision refers to the possibility that the Council may adopt provisional measures pursuant to Article 78(3) TFEU if the conditions laid down in that provision are met, and states that such measures may include, where appropriate, a suspension of the participation of a Member State confronted with a sudden inflow of nationals of third countries in the relocation as provided for in the contested decision.

309. I would point out that the Republic of Austria and the Kingdom of Sweden have availed themselves of those adjustment mechanisms.⁸⁴

310. On the other hand, Hungary has not relied on any of those mechanisms, which seems to contradict the argument whereby it disputes its position as a full Member State of relocation.

311. The existence of adjustment mechanisms in the contested decision does indeed show that, contrary to the impression given by Hungary, the situation is not binary. In providing for such mechanisms, of which the Republic of Austria and the Kingdom of Sweden have taken advantage, the Council has succeeded in reconciling the principle of solidarity with the taking into account of the particular needs that some Member States may have owing to the evolution of migratory flows. Such a reconciliation seems to me, moreover, to be perfectly consistent with Article 80 TFEU, which, as will be seen on a careful reading, provides for the '*fair sharing of responsibility ... between Member States*'.⁸⁵

312. The existence of such adjustment mechanisms in the contested decision can thus only reinforce my finding that, by imposing on Hungary quotas of applicants for relocation from Italy and Greece, that decision did not breach the principle of proportionality.

313. In addition, I would point out that it is not disputed that the quotas mentioned in the annexes to the contested decision were determined on the basis of a distribution key which is explained in recital 25 of the Commission's proposal for a decision. In order to ensure the fairness of the sharing of responsibility, that distribution key takes into account the size of the population, total gross domestic product, the average number of asylum applications per one million inhabitants over the period 2010 to 2014 and the unemployment rate. On that basis, the distribution key therefore contributes to the proportionate nature of the contested decision.

⁸⁴ See, as concerns the Kingdom of Sweden, Council Decision (EU) 2016/946 of 9 June 2016 establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Decision (EU) 2015/1523 and Article 9 of Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2016 L 157, p. 23). Article 2 of that decision provides that the obligations of the Kingdom of Sweden as a Member State of relocation under Decision 2015/1523 and the contested decision are to be suspended until 16 June 2017. As concerns the Republic of Austria, see Council Implementing Decision (EU) 2016/408 of 10 March 2016 on the temporary suspension of the relocation of 30% of applicants allocated to Austria under Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2016 L 74, p. 36). Article 1 of that decision provides that the relocation to Austria of 1 065 of the applicants allocated to that Member State under the contested decision is to be suspended until 11 March 2017.

⁸⁵ Emphasis added.

314. Having regard to the foregoing factors, the arguments whereby Hungary disputes the necessity of the contested decision must therefore in my view all be rejected.

315. It is appropriate, finally, to answer the argument put forward by the Republic of Poland in support of the pleas alleging that the contested decision is disproportionate, according to which that decision interferes with the exercise of the Member States' responsibility to maintain law and order and to safeguard internal security, contrary to Article 72 TFEU. The Republic of Poland recalls, in that regard, that the principle of proportionality requires that the disadvantages caused by the acts of the Union must not be disproportionate to the aims pursued by those acts.⁸⁶ In fact, the Commission does not make provision for mechanisms sufficient to enable the Member States to check that applicants will not represent a danger for security.

316. I consider, however, that in providing for an orderly and controlled mechanism for the relocation of applicants for international protection, the contested decision fully takes into consideration the requirement of protection of the national security and public order of the Member States. That requirement thus governs the 'close administrative cooperation between Member States'⁸⁷ whereby the contested decision must be implemented. I observe, in that regard, that recital 32 of that decision states that 'national security and public order should be taken into consideration throughout the relocation procedure, until the transfer of the applicant is implemented. In full respect of the fundamental rights of the applicant ... where a Member State has reasonable grounds for regarding an applicant as a danger to its national security or public order, it should inform the other Member States thereof'. Likewise, the description of the relocation procedure set out in Article 5 of the contested decision demonstrates the desire of the institutions of the Union to take into account the requirement to safeguard the national security and public order of the Member States. Thus, apart from the fact that that article expressly provides that applicants for international protection must be identified, registered and fingerprinted for the purposes of the relocation procedure, Article 5(7) of the contested decision provides that 'Member States retain the right to refuse to relocate an applicant only where there are reasonable grounds for regarding him or her as a danger to their national security or public order or where there are serious reasons for applying the exclusion provisions set out in Articles 12 and 17 of Directive 2011/95/EU'.⁸⁸

317. In the light of those factors, that argument put forward by the Republic of Poland in support of the claim that the contested decision must be held to be disproportionate must in my view be rejected.

318. It follows from the foregoing that, insofar as neither Hungary nor the Slovak Republic, nor indeed the Republic of Poland, has succeeded in demonstrating that the contested decision is disproportionate in the light of the objectives which it pursues, the corresponding pleas raised by the applicants must be rejected as unfounded.

⁸⁶ See, in particular, judgment of 4 May 2016, *Poland v Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 78 and the case-law cited).

⁸⁷ See recital 31 of the contested decision.

⁸⁸ Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9). Among the grounds of exclusion from being a refugee or receiving subsidiary protection are the existence of serious reasons for considering that the applicant has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes, that he has committed a serious crime or that he constitutes a danger to the community or to the security of the Member State in which he is present.

2. Hungary's eighth plea, alleging breach of the principles of legal certainty and of normative clarity, and also of the Geneva Convention

319. Hungary maintains, in the first place, that the contested decision fails to observe the principles of legal certainty and of normative clarity, since, on a number of points, it does not clearly indicate the way in which its provisions must be applied or how they relate to the provisions of the Dublin III Regulation.

320. Thus, although recital 35 of the contested decision addresses the issue of the legal and procedural safeguards applicable to the relocation decisions, none of its normative provisions regulates that matter or refers to the relevant provisions of the Dublin III Regulation. That raises a problem from the viewpoint, in particular, of the applicants' right to a remedy, in particular those who are not designated for relocation.

321. Nor does the contested decision clearly determine the criteria against which the applicants are chosen for relocation. The way in which the authorities of the Member States are called upon to decide on the transfer of applicants to a Member State of relocation makes it extremely difficult for applicants to know in advance whether they will be among the persons relocated and, if so, in which Member State they will be relocated. The absence of objective criteria for the designation of the applicants to be relocated amounts to a breach of the principle of legal certainty and renders the selection arbitrary, which constitutes a breach of the applicants' fundamental rights.

322. In addition, the contested decision does not define in an appropriate manner the applicants' status in the Member State of relocation and does not ensure that an applicant will actually remain in that Member State while a decision is taken on his application. As regards 'secondary' movements, Article 6(5) of the contested decision does not in itself ensure that that decision will attain its objectives, namely the distribution of applicants between Member States, unless it is guaranteed that applicants will actually remain in the Member States of relocation.

323. In the second place, the fact that applicants may, where applicable, be relocated to a Member State with which they have no particular connection raises the question whether the contested decision is compatible in that respect with the Geneva Convention.

324. In fact, according to the interpretation adopted in the guide published by the HCR,⁸⁹ the applicant should be permitted to remain in the country in which he has lodged his request pending a decision on his request by the competent authority of that Member State.

325. That right to remain in that Member State is also recognised in Article 9 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.⁹⁰

326. Indeed, the contested decision deprives applicants of their right to remain on the territory of the Member State in which they lodged their application and allows them to be relocated to another Member State even though the existence of a significant link between the applicant and the Member State of relocation cannot be established.

327. Although the right that applicants thus enjoy seems to be undermined by the Dublin III Regulation, in that it provides for the transfer of applicants from the Member State in which they lodged their application to the Member State responsible for examining the application, that procedure takes the applicants' personal situation into account and ultimately serves their interests.

⁸⁹ Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees, Geneva, 1992, point 192(vii).

⁹⁰ OJ 2013 L 180, p. 60.

328. I shall examine, in the first place, the complaint alleging breach of the principles of legal certainty and normative clarity.

329. Like the Council, I observe that the contested decision is an emergency measure which forms part of the *acquis* related to the common European asylum system and which derogates from that *acquis* only on certain specific points and on a temporary basis. Consequently, that decision must be interpreted and applied in the light of all the provisions constituting that *acquis*, without its being necessary, or indeed desirable, to mention in that decision all the rules governing the status, rights and obligations of persons relocated in their host Member State. In that regard, the Council seems to me to have sufficiently explained, in particular in recitals 23, 24, 35, 36 and 40 of the contested decision, the way in which that decision must relate to the provisions of legislative acts adopted by the Union in that area.

330. As regards, in particular, the right to an effective remedy, it is clear from recitals 23 and 35 of the contested decision that, when that decision does not provide for a temporary derogation, the legal and procedural safeguards set out in the Dublin III Regulation continue to apply with respect to applicants coming within the scope of that decision. That is the case of the right of appeal provided for in Article 27(1) of that regulation. In any event, in the context of the implementation of the contested decision, Article 47 of the Charter must be observed.

331. As for the criticism, still made from the aspect of the principle of legal certainty, that the contested decision does not contain effective rules ensuring that an applicant for international protection will remain within the Member State of relocation while a decision is taken on his application, I would point out that the contested decision provides, in Article 6(5), that ‘an applicant or beneficiary of international protection who enters the territory of a Member State other than the Member State of relocation without fulfilling the conditions for stay in that other Member State shall be required to return immediately’ to the Member State of relocation, which ‘shall take back the person without delay’. Furthermore, recitals 38 to 41 of the contested decision set out in a sufficiently clear and precise manner the measures to be taken by the Member States in order to avoid secondary movements by the persons who have been relocated.

332. In the second place, I consider that Hungary has not demonstrated how the temporary relocation mechanism put in place by the contested decision, in that it provides for the transfer of an applicant for international protection before a decision on his application has been taken, is contrary to the Geneva Convention.

333. It should be emphasised, first of all, that, as the Council observes, neither the Geneva Convention nor Union law guarantees an applicant for international protection the right freely to choose his host country. In particular, the Dublin III Regulation establishes a system for the determination of the Member State responsible for processing applications for international protection which is based on a list of objective criteria, none of which is connected with the applicant’s preference. From that aspect, the relocation provided for in the contested decision does not differ substantially from the system established by that regulation.

334. Next, I consider, as does the Council, that the passage from the HCR guide, mentioned in footnote 89 of this Opinion, on which Hungary relies, must be understood as an expression of the principle of *non-refoulement*, which prohibits the expulsion of an applicant for international protection to a third country while a decision has not been taken on his application. In fact, the transfer, in the context of a relocation operation, of an applicant for international protection from one Member State to another Member State does not constitute a breach of that principle. It must be emphasised that the aim of relocation is to facilitate access to the asylum procedures and to the reception infrastructures, with a view to offering appropriate status to persons requiring international

protection, as required by Article 78(1) TFEU. In fact, the Union decided to establish the temporary relocation mechanism provided for in the contested decision precisely because, at the time of the adoption of that decision, it was impossible to offer such status to those requesting it in Italy and Greece.

335. Thus, the contested decision does not merely respect the fundamental rights and observe the principles recognised by the Charter, as recital 45 of that decision states, in the traditional manner: it goes further, by playing an active role in that area. It participates in the preservation of the fundamental rights of applicants in clear need of international protection, as guaranteed by the Charter, and in particular by Article 18 thereof, by transferring them to Member States, other than the Italian Republic and the Hellenic Republic, which are in a better position to process their applications.

336. I would add, moreover, that, as the Council observes, for the purposes of the common European asylum system, the territory of all the Member States must be treated as a common area for the uniform application of the Union *acquis* in asylum matters. It follows that transfers between the territories of the Member States cannot be treated as *refoulement* outside the territory of the Union.

337. Last, it should be observed that, contrary to what appears to emerge from the line of argument developed by Hungary, and as the Council points out, the particular situation of the individuals affected by the relocation, including any family ties, is taken into account not only in the context of the application of the criteria of the Dublin III Regulation, but also in the context of Article 6(1) and (2) of the contested decision, read in conjunction with recital 34 of that decision.

338. Article 6(1) of the contested decision thus provides that ‘the best interests of the child shall be a primary consideration for Member States when implementing this Decision’. In addition, under Article 6(2) of that decision Member States are to ensure ‘that family members who fall within the scope of this Decision are relocated to the territory of the same Member State’.

339. As for recital 34 of the contested decision, it states that ‘the integration of applicants in clear need of international protection into the host society is the cornerstone of a properly functioning Common European Asylum System’. For that reason, that recital states that ‘in order to decide which specific Member State should be the Member State of relocation, specific account should be given to the specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties which could facilitate their integration into the Member State of relocation’.

340. It follows that the eighth plea raised by Hungary must be rejected as unfounded.

341. As none of the pleas raised by the Slovak Republic and by Hungary can in my view be upheld, I propose that the Court should dismiss the actions brought by those two Member States.

IV. Costs

342. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. As the Council has claimed that the Slovak Republic and Hungary should be ordered to pay the costs, and as those two Member States have been unsuccessful, they must be ordered to pay the costs.

343. In addition, as interveners, the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Republic of Poland, the Kingdom of Sweden and the European Commission must bear their own costs, in accordance with Article 140(1) of the Rules of Procedure of the Court of Justice.

V. Conclusion

344. In the light of all of the foregoing, I propose that the Court should:

- (1) dismiss the actions brought by the Slovak Republic and by Hungary;
- (2) order the Slovak Republic and Hungary to pay the costs;
- (3) order the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Republic of Poland, the Kingdom of Sweden and the European Commission to bear their own costs.