



Reports of Cases

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

**Slovak Republic
and
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 Hellenic Republic and the Italian Republic – Emergency situation characterised by a sudden inflow of nationals of third countries into certain Member States – Relocation of those nationals to other Member States – Relocation quotas – Article 78(3) TFEU – Legal basis – Conditions under which applicable – 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 – Essential procedural requirements – Amendment of the European Commission’s proposal – Requirements for a further consultation of the European Parliament and a unanimous vote within the Council of the European Union – Article 293 TFEU – Principles of legal certainty and of proportionality)

Summary — Judgment of the Court (Grand Chamber), 6 September 2017

1. *Acts of the institutions — Legal nature — Legislative act — Meaning — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Not included*

(Arts 78(3) TFEU, 289 TFEU and 294 TFEU)

2. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Scope*

(Art. 78(2) and (3) TFEU)

3. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Possibility of derogating from provisions of legislative acts — Limits — Requirement that the measures be temporary in nature*

(Art. 78(2) and (3) TFEU; Council Decision 2015/1601)

4. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Setting the duration of the measures — Criteria for assessment*

(Art. 78(3) TFEU; Council Decision 2015/1601)

5. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Meaning of ‘sudden’*

(Art. 78(3) TFEU)

6. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Need for a close link between the emergency situation and that inflow*

(Art. 78(3) TFEU)

7. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Council’s discretion as to the choice of measures to be adopted — Possibility of providing for adjustment mechanisms to respond to developments in the situation*

(Art. 78(3) TFEU)

8. *Commission — Powers — Power to initiate legislation — Exercise in accordance with the principle of conferred powers and the principle of institutional balance — Application to proposals for legislative and non-legislative acts*

(Art. 13(2) TEU; Arts 68 TFEU and 78(3) TFEU)

9. *Acts of the institutions — Procedure for adoption — Due consultation of the Parliament — Further consultation obligatory where the initial proposal is substantially amended — Scope of the obligation*

(Art. 113 TFEU)

10. *Commission — Powers — Power to initiate legislation — Power to amend a proposal — Conditions of exercise — Proposal for provisional measures for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries*

(Arts 78(3) TFEU and 293(2) TFEU)

11. *Commission — Powers — Power to initiate legislation — Power to amend a proposal — Right of the College of Commissioners to empower certain of its Members to approve amendments*

(Art. 293(2) TFEU; Commission’s Rules of Procedure, Art. 13)

12. *Council — Deliberations — Rules on languages — Whether possible to put forward an amendment to a proposal for a legal act in just one of the official languages of the European Union — Lawfulness — Condition — No objection on the part of a Member State*

(Art. 3(3), fourth para., TEU; Council Decision 2009/937, Art. 14)

13. *EU law — Principles — Proportionality — Scope — Discretion of the EU legislature — Judicial review — Limits — Assessment in the light of the information available at the time of the adoption of the measure*

(Art. 5(4) TEU; Art. 78(3) TFEU)

14. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Relocation of those nationals to the territory of other Member States — Judicial review — Limits — Imposition as between the Member States of quotas of persons to be relocated — Lawfulness — Observance of the principle of solidarity and fair sharing of responsibility between the Member States*

(Arts 78(3) TFEU and 80 TFEU)

15. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Relocation of those nationals to other Member States — Obligation to take account of cultural or linguistic links between each third country national and the Member State of relocation — No such obligation*

(Arts 78(3) TFEU and 80 TFEU; Charter of Fundamental Rights of the European Union, Art. 21)

16. *Judicial proceedings — Intervention — Pleas different from those of the main party supported — Admissibility — Condition — Connection with the subject-matter of the case*

(Statute of the Court of Justice, Art. 40; Rules of Procedure of the Court of Justice, Arts 129 and 132(2)(b))

17. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Relocation of those nationals to other Member States — Obligation to ensure that there is a right to an effective remedy against the relocation decision*

(Art. 78(3) TFEU; Charter of Fundamental Rights of the European Union, Art. 47)

18. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Relocation of those nationals to other Member States — Decision 2015/1601 relating to measures for the benefit of Greece and Italy — Arrangements for the distribution of nationals of third countries — Whether the preferences of such a national for a host Member State to be taken into account — Precluded*

(Art. 78(3) TFEU; European Parliament and Council Regulation No 604/2013, Art. 13(1); Council Decision 2015/1601, Art. 5(3))

19. *Border controls, asylum and immigration — Asylum policy — Provisional measures adopted by the Council for the benefit of Member States confronted with an emergency situation characterised by a sudden inflow of nationals of third countries — Relocation of those nationals to other Member States — Classification of relocation as refoulement to a third State — Precluded*

(Art. 78(3) TFEU; Charter of Fundamental Rights of the European Union, Art. 18)

1. A legal act can be classified as a legislative act of the European Union only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure. Accordingly, it cannot be inferred from the reference, made in the provision of the Treaties that forms the legal basis for the act at issue, to the requirement for consultation of the Parliament that the special legislative procedure applies to the adoption of that act.

Thus, as Article 78(3) TFEU, which provides that the Council is to adopt the provisional measures referred to therein on a proposal from the Commission and after consulting the Parliament, does not contain an express reference to either the ordinary legislative procedure or the special legislative procedure, it must be held that measures which are capable of being adopted on the basis of that provision must be classified as non-legislative acts because they are not adopted at the end of a legislative procedure.

(see paras 62, 64-66)

2. Paragraphs 2 and 3 of Article 78 TFEU are complementary, permitting the European Union to adopt, in the context of the EU common policy on asylum, a wide range of measures in order to ensure that it has the necessary tools to respond effectively, both in the short term and in the long term, to migration crises. In that regard, the concept of provisional measures that may be adopted under Article 78(3) TFEU must be sufficiently broad in scope to enable the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of nationals of third countries.

(see paras 74, 77)

3. Although it is true that the provisional measures adopted on the basis of Article 78(3) TFEU may in principle derogate from provisions of legislative acts, both the material and temporal scope of such derogations must nonetheless be circumscribed, so that the latter are limited to responding swiftly and effectively, by means of a temporary arrangement, to a specific crisis: that precludes such measures from having either the object or effect of replacing legislative acts or amending them permanently and generally, thereby circumventing the ordinary legislative procedure provided for in Article 78(2) TFEU.

The derogations provided for in Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece meet that requirement. Indeed, the derogations for which that decision provides apply for a two-year period only, subject to the possibility of extending that period. Moreover, they concern a limited number of nationals of third countries who have made an application for international protection in either Greece or Italy, who have one of the nationalities referred to in Decision 2015/1601, who will be relocated from either Greece or Italy and who arrive in those Member States over a given period.

(see paras 78-80)

4. Whilst Article 78(3) TFEU requires that the measures referred to therein be temporary, it nonetheless affords the Council discretion to determine their period of application on an individual basis, in the light of the circumstances of the case and, in particular, of the specific features of the emergency situation justifying those measures.

As regards Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, the Council did not manifestly exceed the bounds of its discretion when it set the period of application of the measures provided for in that decision at 24 months. That choice is justified in view of the fact that the relocation of a large number of persons is an unprecedented and complex operation which requires a certain amount of preparation and implementation time, in particular as regards coordination between the authorities of the Member

States, before it has any tangible effects. In that regard, it cannot properly be maintained that Decision 2015/1601 is not provisional since it will have long-term effects. If, in assessing whether a relocation measure is provisional within the meaning of Article 78(3) TFEU, it were necessary to take into account the duration of the effects of that measure on the persons relocated, no measures for the relocation of persons in clear need of international protection could be taken under that provision, since such more or less long-term effects are inherent in such relocation.

(see paras 92, 96-99)

5. An inflow of nationals of third countries on such a scale as to be unforeseeable may be classified as ‘sudden’ for the purposes of Article 78(3) TFEU, even though it takes place in the context of a migration crisis spanning a number of years, inasmuch as it makes the normal functioning of the EU common asylum system impossible.

(see para. 114)

6. With regard to the interpretation of the word ‘characterised’ qualifying the emergency situation referred to in Article 78(3) TFEU, although a minority of the language versions of that provision do not use the word ‘characterised’ but rather the word ‘caused’, in the context of that provision and in view of its objective of enabling the swift adoption of provisional measures in order to provide an effective response to a migration crisis, those two words must be understood in the same way, namely as requiring there to be a sufficiently close link between the emergency situation in question and the sudden inflow of nationals of third countries.

(see para. 125)

7. In view of the fact that migration flows are inherently likely to evolve rapidly, notably by shifting towards other Member States, Article 78(3) TFEU does not preclude the provisional measures taken under it being supplemented by adjustment mechanisms. That provision confers a broad discretion on the Council in the choice of the measures that may be taken in order to respond rapidly and efficiently to a particular emergency as well as to possible developments in the situation. Responding to the emergency does not mean that the response cannot evolve and adapt, provided that it retains its provisional nature.

(see paras 131-134)

8. The principles of conferred powers and of institutional balance apply to the Commission’s power of initiative in the context of the adoption, on the basis of Article 78(3) TFEU, of non-legislative acts, such as a decision establishing provisional measures in the area of international protection for the benefit of certain Member States. In that regard, Article 78(3) TFEU does not make the Commission’s power of initiative conditional upon the European Council’s having previously defined guidelines under Article 68 TFEU.

Moreover, Article 78(3) TFEU allows the Council to adopt measures by a qualified majority. The principle of institutional balance prevents the European Council from altering that voting rule by imposing on the Council, by means of conclusions adopted pursuant to Article 68 TFEU, a rule requiring a unanimous vote. As the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or of the institutions themselves, the Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by the Treaties.

(see paras 146-149)

9. See the text of the decision.

(see paras 160-162)

10. Article 293(2) TFEU states that, as long as the Council has not acted on a Commission proposal, the Commission may alter its proposal at any time during the procedures leading to the adoption of an EU act. The amended proposals that the Commission adopts do not have to be in writing as they are part of the process for adopting EU acts, a characteristic of which is a degree of flexibility, necessary for achieving a convergence of views between the institutions.

In the particular context of Article 78(3) TFEU, the Commission may be considered to have exercised its power of amendment under Article 293(2) TFEU when its participation in the process for adopting the measure concerned clearly shows that it has approved the amended proposal. Such an interpretation is consistent with the objective of Article 293(2) TFEU, which seeks to protect the Commission's power of initiative.

(see paras 177, 179, 181)

11. It follows from Article 13 of the Commission's Rules of Procedure, interpreted in the light of the objective of Article 293(2) TFEU of protecting the Commission's power of initiative, that the College of Commissioners may authorise one or more of its Members to amend, in the course of the procedure, the Commission's proposal within the limits that the College has previously defined.

(see para. 185)

12. Even though the European Union is committed to the preservation of multilingualism, the importance of which is stated in the fourth subparagraph of Article 3(3) TEU, nothing prevents the Council from interpreting Article 14 of its Rules of Procedure to the effect that, whilst paragraph 1 of that article requires that the drafts that constitute the basis of the Council's deliberations must as a rule be drawn up in all the official languages of the European Union, paragraph 2 lays down a simplified procedure for amendments, which do not necessarily have to be available in all the official languages of the European Union. Only where a Member State objects do the language versions indicated by that Member State also have to be submitted to the Council before it can continue to deliberate. Such an interpretation in fact reflects a balanced and flexible approach conducive to efficacy and speed in the Council's work.

(see paras 201, 203)

13. See the text of the decision.

(see paras 206-208, 221)

14. In the particular context of an acute emergency characterised by a sudden massive inflow of nationals of third countries, a decision to adopt a compulsory mechanism for relocating 120 000 persons under Article 78(3) TFEU, whilst it must be founded on objective criteria, may be censured by the Court only if it is found that, when the Council adopted the contested decision, it made, in the light of the information and data available at that time, a manifest error of assessment in the sense that another measure that was less restrictive, but equally effective, could have been adopted within the same period.

In that regard, so far as concerns the argument that the contested decision is disproportionate because it needlessly imposes a binding mechanism entailing the compulsory distribution between the Member States, in the form of quotas, of specific numbers of relocated persons, the Council does not appear to have made a manifest error of assessment in having chosen to introduce a binding relocation mechanism of that kind. In fact, the Council is fully entitled to take the view, in the exercise of the broad discretion which it must be allowed in this regard, that the distribution of the persons to be

relocated has to be mandatory, given the particular urgency of the situation in which the contested decision is to be adopted. Moreover, the Council, when adopting the contested decision, is in fact required to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented. There is therefore no ground for complaining that the Council has made a manifest error of assessment when it considers, in view of the particular urgency of the situation, that it has to take — on the basis of Article 78(3) TFEU, read in the light of Article 80 TFEU and the principle of solidarity between the Member States laid down therein — provisional measures imposing a binding relocation mechanism.

(see paras 235, 236, 245, 246, 252, 253)

15. When one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy. Accordingly, the Commission and the Council rightly consider, at the time of adoption of a decision establishing provisional measures in the area of international protection for the benefit of certain Member States, that the distribution of the relocated applicants among all the Member States, in keeping with the principle laid down in Article 80 TFEU, is a fundamental element of that decision.

In that regard, if relocation were to be strictly conditional upon the existence of cultural or linguistic ties between each applicant for international protection and the Member State of relocation, the distribution of those applicants between all the Member States in accordance with the principle of solidarity laid down by Article 80 TFEU and, consequently, the adoption of a binding relocation mechanism would be impossible. In any event, considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law and, in particular, to Article 21 of the Charter of Fundamental Rights of the European Union.

(see paras 291, 292, 304, 305)

16. See the text of the decision.

(see para. 303)

17. In accordance with Article 47 of the Charter of Fundamental Rights of the European Union, there must be a right to an effective remedy under national law against any decision to be taken by a national authority in the course of a relocation procedure under Article 78(3) TFEU.

(see para. 325)

18. The system set up by Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece is based — like the system established by Regulation No 604/2013 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 — on objective criteria rather than on a preference expressed by an applicant for international protection. In particular, the rule concerning the responsibility of the Member State of first entry, laid down in Article 13(1) of that regulation, which is the only rule for determining the responsible Member State laid down in that regulation from which Decision 2015/1601 derogates, is not linked to the applicant's preference for a particular host Member State and does not specifically seek to ensure that there are linguistic, cultural or social ties between the applicant and the responsible Member State.

Furthermore, if the authorities of the beneficiary Member States are afforded some latitude when they have to identify, under Article 5(3) of Decision 2015/1601, the individual applicants who can be relocated to a given Member State of relocation, such latitude is justified in the light of the objective of that decision, which is to take pressure off the Greek and Italian asylum systems by actually relocating, within a short time frame, a significant number of applicants to other Member States, in compliance with EU law and, in particular, with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union. Moreover, applicants do not have the right under EU law to choose the Member State responsible for examining their applications. The criteria which Regulation No 604/2013 lays down for determining which Member State is to be responsible for processing an application for international protection are not connected with the applicant's preference for a particular host Member State.

(see paras 333, 334, 337, 339)

19. The transfer, in the context of a relocation operation, of an applicant for international protection from one Member State to another for the purpose of ensuring that his application is examined within a reasonable time cannot be regarded as *refoulement* to a third State. It is on the contrary a crisis-management measure, taken at EU level, whose purpose is to ensure that the fundamental right to asylum, laid down in Article 18 of the Charter of Fundamental Rights of the European Union can be exercised properly, in accordance with the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951.

(see paras 342, 343)