THE PRINCIPLE OF SOLIDARITY BETWEEN VOLUNTARY COMMITMENT AND LEGAL CONSTRAINT

Comments on the Judgment of the Court of Justice of the European Union in Joined Cases C-643/15 and C-647/15

Andrea Circolo – Ondrej Hamuľák – Peter Lysina

Abstract: The paper offers an analysis of the key decision of the CJEU in joined cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the EU decided in September 2017. CJEU ruled on the action for annulment brought by those Member States against 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. The adoption of contested decision has resulted in many political debates and has been the subject of political struggle between the Member States. By its decision, the Court strengthened the supranational elements of EU migration policy, minimized the role of the European Council, and in its arguments confirmed the establishment of the principle of solidarity not only as a political but also as a legal principle accompanying European integration. The last question mentioned gets a special focus in this paper. The authors also point to interesting formal and procedural issues that have been resolved in this case for a very first time and shall have a horizontal impact, especially on law making processes.

Resumé: Článek nabízí rozbor klíčového rozhodnutí Soudního dvora EU v spojených věcech C-643/15 a C-647/15 Slovenská republika a Maďarsko proti Radě EU ze září 2017. Soudní dvůr zde rozhodl o žalobě na neplatnost, kterou uvedené členské státy napadly Rozhodnutí Rady (EU) 2015/1601 ze dne 22. září 2015, kterým se stanoví dočasná opatření v oblasti mezinárodní ochrany ve prospěch Itálie a Řecka. Přijetí daného rozhodnutí vyvolalo mnohé politické diskuse a stalo se předmětem politického boje mezi člesnkými státy. Soudní dvůr svým rozhodnutím posílil supranacionální prvky migrační politiky EU, minimalizoval roli Evropské rady a ve své argumentaci potvrdil etablování principu solidarity jako nejen politického, ale rovněž právního principu doprovázejícího evropskou integraci. Posledně zmiňované otázce je v článku věnována speciální pozornost. Autoři dále poukazují i na zajímavé formální a procedurální otázky, které byly v této kauze vyřešené a které mohou mít horizonátlní dopady zvláště v oblasti tvorby práva EU.

Key Words: Actions for annulment; principle of solidarity; relocation; migration.

About the Authors:

Andrea Circolo is a Ph.D. candidate at the Department of Economic and Legal Studies, Parthenope University of Naples, Naples, Italy. E-mail: andrea.circolo@uniparthenope.it.

Ondrej Hamuľák is a senior lecturer at the Faculty of Law, Palacký University Olomouc (Czech Republic) and Adjunct Professor in EU Strategic Legal Affairs, Tallinn University of Technology (Estonia). He participated in the work on this paper on behalf of project no. 17-24822S "Postavení osob ze třetích zemí v právu Evropské unie", funded by the Czech Science Foundations (GAČR). E-mail: ondrej.hamulak@upol.cz.

Peter Lysina is senior lecturer and head of the Department of International Law and International Relations at Faculty of Law, Comenius University in Bratislava (Slovakia). Email: peter.lysina@flaw.uniba.sk.

1. Introduction

The judicial dispute over decision on so called migration quotas elevated within the context of the migratory emergency, erupted in the European Union in the second half of 2015 (particularly, during the months of July and August), which gave rise to a disastrous humanitarian situation, especially in the Member States in forefront, such as Greece and Italy, which had to face with a massive influx of migrants from third countries, such as Afghanistan, Eritrea, Iraq and Syria.

In order to manage this migration crisis and to support the pressure exerted by itself on the asylum systems of Greece and Italy, the Council adopted the decision on provisional measures in the area of international protection for the benefit of Italy and Greece.[1] The legal basis for this decision lays in art. 78 para 3 TFEU, pursuant to which: „In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament”.[2].

With their actions, Slovakia (case C-643/15) and Hungary (case C-647/15)[3] asked the Court for the annulment *in toto* of the aforementioned decision, which established the relocation, from Greece and Italy to the other Member States, of 120,000 people in clear need of international protection, for a period of two years. Moreover, Hungary alone sought the annulment of the decision only for the part that concerns itself. The applicants also requested the annulment of Annex I and Annex II to the decision, which established, for the first phase, the allocation of 66,000 persons (15,600 from Italy and 50,400 from Greece), which were distributed on the basis of compulsory quotas fixed for each Member State.

In support of its arguments, the Slovak Republic relied on six pleas in law, while Hungary proposed ten.[4] After summarizing the context, the genesis and the content of the contested decision, both the Advocate General Yves Bot, in his Opinion delivered on 26 July 2017,[5]

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[1] 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, OJ L 248, 24.9.2015, p. 80-94.

[2] About these relocation measures see PEERS, S. Relocation of Asylum-Seekers in the EU: Law and Policy. *EU Law Analysis* blog, 24th Septebmer 2015 (available at: http://eulawanalysis.blogspot.com/2015/09/relocation-of-asylum-seekers-in-eu-law.html); or DI FILIPPO, M.: Le misure di ricollocazione dei richiedenti asilo adottate dall'Unione europea nel 2015: considerazioni critiche e prospettive. *Diritto, Immigrazione, Cittadinanza*, 2015, no. 2, pp. 34-60. For English version of this paper see DI FILIPO, M.: The strange procedural fate of the actions for annulment of the EU relocation scheme. Eurojus.it (available at: http://rivista.eurojus.it/the-strange-procedural-fate-of-the-actions-for-annulment-of-the-eu-relocation-scheme/?print=pdf).

[3] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, further referred as *Slovakia and Hungary v Council*.

[4] For detailed contemporary analysis see VIKARSKÁ, Z.: The Slovak Challenge to the Asylum-Seekers' Relocation Decision: A Balancing Act. *EU Law Analysis* blog, 29th December 2015 (available at: http://eulawanalysis.blogspot.com/2015/12/the-slovak-challenge-to-asylum-seekers.html).

[5] AG Opinion in Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:618, further referred as "AG Opinion in C-643/15".

and the Court, in the aforesaid judgment, have adopted, in the logical-temporal development of the analysis of this case, the same systematic approach: „since the legal basis of an act determines the procedure to be followed when that act is adopted, 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. […] 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. 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."[6]

2. Question of choice of the right legal basis

With reference to the first macro-issue, the Court ruled on the inadequacy prefigured by the applicants of art. 78 para 3 TFEU as the legal basis for the adoption of the contested decision.

In particular, the Slovak Republic and the Hungary argued that, although the contested decision (only) formally vests the nature of a non-legislative act, it should be classified as a legislative act by virtue of its content and effects, or as it amends various legislative acts of European Union law. However, even though the decision in point considered such changes to be mere derogations, the appellants argue that the distinction between an exemption and an amendment was, in the present case, artificial, given that, in practice, both an exemption and a modification produce exactly the same effects, i.e. the failure to apply a regulatory provision so that, in practice, its effectiveness is impaired.

Therefore, the art. 78 para 3 TFEU would not provide, according to the applicants, a proper legal basis for the adoption of legislative measures, since it does not include any indication that the acts enacted on the basis of the aforementioned decision should be adopted in the context of a legislative procedure. In fact, the art. 78 para 3 TFEU does not mention either the ordinary legislative procedure or the special legislative procedure, thus not allowing legislation to be adopted. Consequently, the form of the contested decision does not correspond to its content.

In this regard, Slovakia added that the Council violated art. 78 para 3 TFEU, because the contested decision, a non-legislative act, derogated from provisions contained in a legislative-act. Such changes could only be made through a legislative procedure, regardless of the size of the exemption and whether it is fundamental or not: "any derogation, however limited its scope, by a non-legislative act from a legislative act is prohibited given that it amounts to a circumvention of the legislative procedure, in the present case the procedure provided for in article 78(2) TFEU".[7]

Finally, Hungary argued that art. 78 para 3 TFEU should be interpreted in the meaning that "the requirement to consult the Parliament, laid down in that provision, should be regarded as 'participation' of the Parliament within the meaning of article 289(2) TFEU, with the consequence that the special legislative procedure applies. In that case,

[6] See paras 39-40 of the AG Opinion in C-643/15; see also para 46 of the judgment in case *Slovakia and Hungary v Council*; see also C-363/14, *Parliament v Council*, EU:C:2015:579, para 17.

[7] *Slovakia and Hungary v Council*, para 52.

article 78(3) TFEU could in fact constitute a valid legal basis for the contested decision, as a legislative act."[8]

First of all, with reference to this last point, the Court recalled that a legal act can only be qualified as a legislative act of the EU law if it has been adopted on the basis of a provision of the Treaties expressly referred to the ordinary legislative procedure or to the special legislative procedure: this kind of systematic approach guarantees the protection of the principle of legal certainty. This turns out to be crucial in the procedures for adopting Union acts since it allows to identify with certainty the legal bases that legitimize the institutions of the Union to adopt legislative acts, and to distinguish these legal bases from those that can serve only as a basis for the adoption of non-legislative acts. Art. 289 para 3 TFEU, reports the category of acts legislation in the sense that it covers "legal acts adopted by legislative procedure". The legislative procedure, accordingly, can be developed in an ordinary legislative procedure or in a special legislative procedure.

According to art. 289 para 1 TFEU, "the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission" characterizes the ordinary legislative procedure, while, as regards the special legislative procedure, the expressions contained in the various provisions clarify that, whatever the modalities, the procedure concerned is certainly a special legislative procedure, and it will therefore lead to the adoption of a legislative act. After all, it is the same art. 289 para 2 TFEU to establish that the special legislative procedure applies only "in the specific cases provided for by the Treaties".

For this reason, procedures whose development is similar to that of special legislative procedures, but which the Treaty does not explicitly consider as such, must be qualified as non-legislative procedures, which will give rise to non-legislative act.[9]

The CJEU judgment in *Slovakia and Hungary v Council* in contrast to previous case-law,[10] implies a strictly formalistic approach to definition of legislative act in EU law. According to the Court, only those acts that are adopted on the legal basis which explicitly refers to legislative procedure (ordinary or special) could be regarded as legislative acts. The Court clarified the question of classification of secondary law acts also other way round, by focusing on the notion of so-called non-legislative acts. Until this judgement was delivered, that category of acts was dominantly associated only with the delegated acts under art. 290 TFEU. For all other acts for which the Treaty explicitly did not state the legislative procedure as the prescribed procedure for their adoption, there was a certain degree of uncertainty due to the absence of clear definition. Jurisprudence understood this sum of acts as acts with non-legislative nature[11] or as non-legislative acts.[12] Even the approach of EU Courts was not stabile and clear and there are some examples of determining those acts as legislative.[13]

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[8] *Slovakia and Hungary v Council*, para 54. In this sense, see also paras 151-161 of the AG Wathelet Opinion in case C-104/16 P, *Council v Front Polisario*, EU:C:2016:677.

[9] In this regard, see LENAERTS, K., VAN NUFFEL, P.: *European Union Law, 3rd ed.*, Sweet & Maxwell, 2011, para 677.

[10] C-104/16 P, *Council v Front Polisario,* EU:C:2016:973.

[11] GEIGER, R., KHAN, D. E., KOTZUR, M.: *European Union Treaties, Treaty on European Union, Treaty on the functioning of the European Union*. C.H. Beck, Hart, 2015, p. 946.

[12] CRAIG, P., DE BÚRCA, G.: *EU Law, Text, Cases and Materials. Fifth Edition*. Oxford University Press, 2011, p. 113.

[13] T-512/12, *Front Polisario v. Council,* EU:T:2015:953.

Therefore, we may welcome the CJEU decision in case *Slovakia and Hungary v Council* for clear determination of non-legislative acts[14] and elimination of existing grey zone.

It's true that a distinction between legislative acts and non-legislative acts, which bases its *ratio existendi* on legal nominalism, creates many problems of coherence with the nature and the purposes of the Treaty;[15] however, it is equally true that the jurisdictional dispute is not the natural *forum* for reviewing inconsistencies of this kind; indeed, changes of this type involve the activation of the revision mechanism pursuant of art. 48 TEU.

Moreover, it was the same Court, in the case *Parliament v. Council* (C-130/10), to remember, reporting the defence of the Council, 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."[16]

Therefore, the Court rightly considered that the appellants' attempt to assess the contested decision as a legislative act in the light of its content was unfounded. In the alternative, the Court analysed whether it was legitimate that a non-legislative act could derogate from several legislative acts, or whether only a legislative act could derogate from another legislative act. According to the Grand Chamber, the concept of „provisional measures", pursuant to art. 78 para 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."[17] Hence, these may, in principle, also derogate from provisions of legislative acts, provided that they are limited in terms of their scope, both substantive and temporal.

In fact, if they limit themselves to respond quickly and effectively, by means of a provisional regulation, to a specific critical situation, it is excluded that such measures may have as their object or effect the replacement or modification of the legislative acts in point in a permanent and general manner. In this way, the ordinary legislative procedure provided for in art. 78 para 2 TFEU would be circumvented.

Also in this case, the CJEU rejected the part of the pleas relating to the question. In the present case, from the temporal point of view, the derogations provided for in the contested decision have been applied only for a period of two years (subject to any extension pursuant to art. 5 para 4 of the Decision), *id est* from 25 September 2015 until September 26, 2017. With reference to the substantive application, the temporary measures referred to a limited number of citizens of some third countries (120,000), specifically to those who had submitted an application for international protection in Greece or Italy, that belonged to one of the nationalities prepared by the art. 3 para 2, of the contested decision, which had arrived between 24 March 2015 and 26 September 2017 in Greece or Italy and which were to be relocated from the latter to the other Member States. Therefore, the Court rejected both arguments under the magnifying glass.

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[14] CJEU clearly stated that „[...] non-legislative acts are those that are adopted by a procedure other than a legislative procedure." C-643/15 a C-647/15, EU:C:2017:631, p. 58.

[15] *Ex multis*, RITLENG, D.: *Les catégories des actes de l'Union – Réflexions à partir de la catégorie de l'acte législatif*, in *Les catégories juridiques du droit de l'Union européenne*, Bruylant, 2016, pp. 170-174; CRAIG, P., DE BÚRCA, G.: *EU Law – Text, Cases and Materials, 6th ed.,* Oxford University Press, 2015, p. 114.

[16] C-130/10, *Parliament v. Council*, EU:C:2012:472, para 80.

[17] *Slovakia and Hungary v Council*, para 77.

In addition, the Slovak Republic and Hungary argued that art. 78 para 3 TFEU did not constitute an adequate legal basis for the adoption of the decision in point, since the latter was not endowed with the character of temporariness, in spite of the requirements of that provision. The Court also rejected these pleas, contesting their recklessness individually. On the alleged inability of the 24-month period to constitute a temporary measure, the Court could not but recall that art. 78 para 3 TFEU reserves a margin of discretion to the Council to determine, on a case-by-case basis, their period of application in relation to the circumstances of the case and, in particular, taking into account the specificities of the emergency situation that justifies these measures.[18]

In confirmation of what have been brought to light by the Court, it should be noted that art. 78 para 3 TFEU no longer mentions a *maximum* duration of six months, contrary to what happened in the case of art. 64 para 2, TEC. Therefore, it is possible to deduce that the temporary measures, adopted on the basis of this provision, can certainly have a longer duration, so that they can have a real impact. Furthermore, according to the appellants, the contested decision was not temporary inasmuch as it is capable of producing long-term effects, since many applicants for international protection will remain, after their relocation, in the territory of the Member State of relocation far beyond the application period of 24 months of the contested decision. Besides, the duration of the application of the measure in question should not exceed the *minimum* duration necessary for the adoption of a legislative act, pursuant to art. 78 para 2 TFEU.

In this regard, it is quite clear that assessing the temporariness of the measure on the base, in the first hypothesis, of the permanence of its effects, and, secondly, of the *minimum* duration necessary for the adoption of a legislative act *ex*. art. 78 para 2 TFEU, would make unforeseeable any relocation mechanism pursuant to art. 78 para 3 TFEU.[19] In particular, with reference to the second hypothesis, the criterion claimed by the applicants, in addition to linking the validity of the measure to the uncertain duration of a legislative procedure, whose conclusion is unpredictable, does not find any textual recognition.

CJEU inclined to the grammatical interpretation of art. 78 para 3 TFEU and emphasized the fact that the provision does not provide for a specific time limit for the measures taken. The Court declined to use (at least in partial extent) the method of historical interpretation that would justify a maximum period of 6 months for application of temporary measures.[20]

[18] For further analysis see LABAYLE, H.: Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council). *EU Immigration and Asylum Law and Policy* blog, 11th May 2017 (available at: http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/).

[19] See also OVÁDEK, M.: Legal basis and solidarity of provisional measures in Slovakia and Hungary v Council. *European Database of Asylum Law* online, 4th December 2017 (available at: http://www.asylumlawdatabase.eu/en/journal/legal-basis-and-solidarity-provisional-measures-slovakia-and-hungary-v-council).

[20] It is important to note here, that while art. 78 para 3 TFEU does not contain a reference to the duration of the temporary measures, art. 64 para 2 TEC historically included such a reference. In line with this provision of the TEC, the temporary nature of the measures was limited to a period not exceeding 6 months. Therefore, both actions, Hungarian and Slovak, have claimed that period of effectivity of contested decision is too long and could not be regarded as temporary. In addition, they have pointed out that the temporal effects of the contested decision in relation to the applicants for international protection in general exceed two or three years as it will most likely lead to the establishment of permanent links between applicants for international protection and the Member States of removal.

After the exclusion of historical interpretation and in situation of no explicit reference to the duration of the measures, CJEU had no alternative but to state that setting the duration of the temporary measures is fully at the disposal of Council, provided that this duration must be limited due to the circumstances of the particular case. In other words, measures lasting longer than 6 months may still be accepted as s temporary if the circumstances of the case justify it. This part of the Courts' reasoning has a general importance and could have impact also in the future. CJEU confirmed and upheld the Council's discretion in determining the duration of the measures adopted on the basis of art. 78 para 3 TFEU. It should be added here that CJEU approved the general approach of jurisprudence related to this question.[21] Even tough the use of historical interpretation in relation to art. 78 para 3 TFEU is disputable, we may agree with the approach followed by the CJEU. Thus, if the Member States were in favour of keeping the limitation of the temporary measures for a maximum of 6 months, they would unquestionably do so within the creation of this provision. However, as there is no reference to the duration of the temporary measures in the text of art. 78 para 3 TFEU, one may conclude that such intention cannot be foreseen or developed by the interpretation.

The first macro-question ends with an argument proposed by the Slovak Republic alone. It insisted, with three argumentations, on the fact that the contested decision did not comply with the condition for the application of art. 78 para 3 TFEU, according to which the beneficiary Member State of the temporary measures should be "in an emergency situation characterized by a sudden inflow of nationals of third countries".

Firstly, the influx of third-country nationals to Greece and Italy, at the time of the adoption of the contested decision or immediately prior to that adoption, was reasonably foreseeable and, therefore, could not be qualified as "sudden". *In secundis*, according to the applicant, with reference to Greece, there was no causal link between the emergency situation and the influx of third country nationals to that Member State, as indicated by the adjective "characterised" alongside the emergency situation contemplated by at. 78 para 3 TFEU. Furthermore, the proven shortcomings of the Greek asylum system did not break this causal link necessary for the adoption of the contested decision. Ultimately, despite the *raison d'être* of art. 78 para 3 TFEU is to resolve existing or imminent emergency situations, the contested decision would have regulated, at least in part, any future situations. Also on this occasion, the judges of the Grand Chamber rejected every argument brought by the applicant. With regard to the first reasoning, the Court just reported the Frontex statistics, annexed to the documents of the case by the Luxembourg's adhesive intervention to the Council, and the Eurostat data: "in 2015, for the European Union as a whole, 1.83 million irregular border crossings were detected at the Union's external borders as against 283 500 in 2014. Moreover, almost 1.3 million migrants applied for international protection in the Union as against 627 000 in the previous year". The significant increase in arrivals and the applications for protection are sufficient to demonstrate the sudden nature of the situation.

Secondly, as regards the strict interpretation of the word "characterized" describing the "emergency situation" referred to in art. 78 para 3 TFEU, the Court observed that "although a minority of the language versions of article 78(3) TFEU do not use the word "characterized" but rather the word "caused", in the context of that provision and in view of

[21] See e.g. HAILBRONNER, K., THYM, D.: *EU Immigration and Asylum Law.* C. H. BECK, Hart, Nomos, 2016, p. 1041.

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."[22]

This finding of fact is not undermined by the existence of other factors that may also have contributed to that emergency situation, including the structural and the organizational deficiencies of Greek and Italian asylum systems.

Therefore, even if the structural weaknesses of these systems and the strong stresses they suffered in the previous months are evident, the pressure exerted by the flow of migrants during the period of interest would have seriously disrupted any kind of system, even those ones characterized by the absence of organizational weaknesses.

About the last plea in law, according to the Court, the need to respond to an emergency situation through temporary measures *ex* art. 78.3 TFEU does not prevent the updating of the decision based on the development of the events, nor the adoption by the Council of implementing acts. As the Advocate General correctly stated, "responding to the emergency does not exclude the developing and adapted nature of the response, provided that it retains its provisional nature."[23]

In the end, art. 78 para 3 TFEU, does not preclude that such adjustment mechanisms juxtapose with the temporary measures adopted previously; it should not be forgotten, in fact, that this provision confers a broad discretion on the Council.

3. The procedure of the adoption of the contested decision between the (lack of) lawfulness and the breach of essential procedural requirements

The second macro-issue submitted to the Court concerns the grounds of appeal concerning the regularity of the procedure for adopting the contested decision and relating to the infringement of essential procedural requirements.

In relation to the first point, the applicants observed that, since the decision in question exceeded the guidelines formulated by the European Council in its conclusions of 25 and 26 June 2015, according to which the decision had to be adopted *„per consensus"* and „reflecting the specific situations of Member States", the Council did not comply with art. 68 TFEU, infringing essential procedural requirements.

Specifically, as these conclusions expressly stated that a relocating decision by the Council could only have taken place for the number of 40 000 applicants, the Council would have exceeded this limit through the decision to relocate 120 000 applicants without relying on a new European Council decision.

Even in this case, the findings of the Court followed fully that of AG Bot. According to the CJEU, while the 40 000 relocated persons constituted the subject of Council Decision 2015/1523 of 14 September 2015, the (contested) decision to relocate 120,000 applicants for international protection was the consequence of a new European Commission's proposal, following that of the first decision and different from it.

[22] *Slovakia and Hungary v Council*, para 125.
[23] *Slovakia and Hungary v Council*, para 130.

In this regard, it should be noted that the temporary measures referred to in art. 78 para 3 TFEU are adopted on a proposal formulated by the Commission and on the basis of its general power of initiative, pursuant to art. 17 TEU. Therefore, taking up the words of the Advocate General, "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. […] 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."[24]

For this reason, the principle of institutional balance, set forth by art. 13 para 2 TEU and called in support of those arguments by the applicants, would in fact end up being infringed if the Commission were prevented from exercising its own powers of initiative in compliance with those of the other institutions, including the European Council.[25]

Although CJEU basically limited its reasoning only on the inability to vote on the draft decision unanimously, its assertion essentially states that no decision of European Council could affect the legislative role of the European Commission. This approach significantly marginalizes the impact of the guidelines or European Council conclusions on the process of adopting legal acts and, on the contrary, strengthens the supranational features and role of the Commission to the detriment of the impact Member States. While it is clear that art. 17 TEU entrusts the Commission with the legislative initiative, on the other hand, European Council sets out general policy directions and EU priorities. That is why we must ask whether the legislative initiative should be absolutely unlimited, as it was alleged by the Advocate General as well as CJEU in its judgement. As an alternative, we may conclude that Commission should respect the general guidelines laid down in the European Council when submitting proposals for secondary law acts in accord with the principle of institutional balance. Unfortunately, CJEU remained silent and did not address this question. In the light of institutional balance requirement, we may raise some doubts whether in case where European Council fully agrees on the parameters for solving of particular question, the Commission and subsequently the Council can still diverge from the determined policy solution and is still totally autonomous in preparation and adoption of particular measures.

Furthermore, Slovakia and Hungary complained about the violation of art. 78 para 3 TFEU, by the Council, because of its substantive changes to the initial Commission proposal and for having adopted the contested decision without consulting the EP again. Particularly, Hungary no longer appeared among the Member States benefiting from the relocation mechanism, but between the relocation Member States, which led to the deletion of Annex III of the initial proposal and the inclusion of Hungary in Annexes I and II of the contested decision.

However, the total number of 120 000 people had been retained, since the number of 54 000 applicants from Hungary had been transformed into a „reserve" that had not been foreseen in the Commission's original proposal. Therefore, the structure and several essential elements of this proposal would have been profoundly modified, such as the title and its

[24] AG Opinion in case *Slovakia and Hungary v Council*, paras 144, 145.

[25] On this point see C-409/13, *Council v Commission*, EU:C:2015:217, paras 64-70.

scope *ratione personae*, the list of Member States beneficiaries and of relocation, as well as the number of persons to be relocated in each of the Member States.

These changes, as rightly pointed out by the applicants, must have involved a new consultation of the Parliament.[26] According to the appellants, this (re)consultation would not have occurred despite the fact that, in the Parliament resolution dated 17 September 2015, the Council was asked to consult it again so far as any changes had had to be made.

This question is not unimportant, given that, in the cases provided for by the Treaty, the failure to consult the Parliament causes the invalidity of the measure in question.[27] This formality is a reflection of the Parliament's effective participation in the decision-making process, expression of the principles of institutional balance and of the democratic representation.[28] Also on this occasion, the Court upheld the defense prepared by the Council. If it is true that the text had been modified in its substance, it is equally true that informal contacts between the parties and the statement by the President of the Council before the extraordinary plenary session of Parliament, on 16 September 2015, constituted the fulfillment of the formality required by the Treaties. The urgency of the situation and the peculiarity of the legal rule referred to in art. 78 para 3 TFEU justified a relative flexibility regarding the modalities for consulting the Parliament on the amendments to the initial text. Therefore, the Court duly rejected the applicants' arguments.

Furthermore, Slovakia and Hungary complained that the Council did not comply with the unanimity criterion, pursuant to art. 293 para 1 TFEU, as it adopted a decision which substantively changed the previous Commission proposal.

It should immediately be noted that, in this regard, the Court relied on an error in the factual assessment of the applicants, specifically on the subjective side of the operation. In fact, the change had been made by the Commission not pursuant to para 1, but of para 2, which allows the latter to modify its proposal at every stage of the procedures which lead to the adoption of a EU legislative act, before that the Council has decided.[29]

Here again, we may raise some doubts towards the CJEU approach and reasoning. CJEU solely stated that: "[…] 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"[30] and continued: "Although the Slovak Republic and Hungary dispute the fact that the two Members of the Commission in question had been duly empowered by the College of Commissioners, as required by article 13 of the Commission's Rules of Procedure, to approve the amendments to the initial proposal, those Member States have adduced no evidence which casts doubt on the veracity of the Commission's remarks or the reliability of the evidence that it has put before the Court."[31] Even here, we may contest the Court's approach.

26 On the verge, compare with C-388/92, *Parliament v Council*, EU:C:1994:213, paras 13 and 18; or C-408/95, *Eurotunnel and Others v SeaFrance*, EU:C:1997:532, para 46.

27 Among the many see C-392/95, *Parliament v Council*, EU:C:1997:289, paras 14-15.

28 Recently see C-390/15, *RPO*, EU:C:2017:174, paras 24-25.

29 *Ex multis* see C-409/13, *Council v Commission*, EU:C:2015:217, paras 71-73.

30 *Slovakia and Hungary v Council*, para 181.

31 *Slovakia and Hungary v Council*, para 186.

In particular, CJEU limited its conclusions only to the specific framework of art. 78 para 3 TFEU without any significant reasoning or justification of this approach. In the light of the wording of paragraph 181 of the judgment, it can be considered that, outside the specific framework of art. 78 para 3 TFEU, any activity of the Commission could not be considered as change of proposal according to art. 293 para 2 TFEU.

In the alternative to the classification of the contested decision as a (non) legislative act, the applicants claimed the infringement of the Protocols nos. 1 and 2 about the participation of National Parliaments in the legislative process of the Union and of art. 15 para 2 TFEU and art. 16 para 8, TUE. As is clear from the judgment, the contested decision must be classified as a non-legislative act and, consequently, this plea in law has been rejected, given that, for that reason, the opinion of the National Parliaments and the open nature of the deliberation and of the vote within the Council were not necessary.

Lastly, the plaintiffs raised a procedural defect of which the Council would have been guilty. Precisely, in the case in question, the Council did not comply with the art. 14 para 1 of its Rules of Procedure in so far as the texts which reproduce the changes subsequently made to the Commission's original proposal were sent to the Member States only in English.[32]

The Court found valid the defensive argument proposed by the Council. According to the last one, the modification in question would fall within those referred to in para 2 of the art. 14 of the aforementioned regulation, which provides for a simplified regime for amendments that do not have to be imperatively available in all the official languages of the Union; moreover, only in the case of opposition from a Member State, the other language versions designated by that State, initially unavailable, should be presented to the Council before the institution can continue to deliberate.

Given that the Union attaches great importance to the preservation of multilingualism, whose importance is recalled in art. 3 para 3 TEU,[33] the Court rightly held that this principle had been fully protected, once verified that no Member State had opposed a deliberation on the basis of the texts that incorporated the agreed amendments drafted in English. Furthermore, as correctly pointed out by the Council in its defence, it comes precisely from the case-law of the Court the fact that, even if the Council, because of the adoption of the contested decision, infringed art. 14 of its Rules of Procedure, a procedural irregularity of this type can affect the validity of the measure only to the extent that the applicant shows that, in the absence of such irregularity, the procedure could have led to a different result. In the present case, Hungary did not produce such proof.[34]

4. The substantive pleas in law

In the analysis of the last macro-issue, devoted to the substantive pleas in law, the Court formulates some premises for its assessment of the possible infringement of the general principles of EU law. In particular, while dwelling on the principle of proportionality, the Grand Chamber recalled that the latter requires that "acts of the EU institutions [have to] be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do

[32] Council Decision 2009/937/EU of 1 December 2009 *adopting the Council's Rules of Procedure,* OJ L 325, 11. 12. 2009, p.35.

[33] In this way see C-147/13, *Spain v Council, EU:C:2015:299*, para 42.

[34] C-465/02 and C-466/02, *Germany and Denmark v Commission*, EU:C:2005:636, para 37.

not [have to] go beyond 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."[35]

It should be added that, according to the settled case-law of the Court itself, the principle of proportionality succumbs where the Treaties recognize a wide discretionary power for the institutions of the Union and when they adopt measures in areas that involve choices of a political nature and complex assessments.[36]Therefore, the Court might censor the actions of these institutions in compliance with the principle of proportionality only to the extent that the measure is manifestly inappropriate in relation to the objective to be pursued.

It should be noted that only Slovakia considered that the decision in question was not adequate to achieve the target it had set itself and, for this reason, it would have violated the principle of proportionality, as set out in art. 5 para 4 TEU, as well as art. 1 and 5 of the Protocol n. 2. According to the latter, the contested decision was not capable of achieving that objective because the relocation mechanism which it provides did not remedy the structural deficiencies of the Greek and Italian asylum systems. These deficiencies, linked to the organizational incapacity to manage the applications for asylum seekers, had to be resolved before the said relocation could be effectively implemented. Furthermore, the small number of relocations so far carried out shows that the relocation mechanism provided for in the contested decision was, since its adoption, unsuitable for achieving the objective sought.

First of all, as already referred to by the Court earlier, any asylum regime, even if it did not present structural weaknesses in terms of reception and of ability to process applications for international protection, would have been seriously altered by the unprecedented influx of migrants who had place in Greece and in Italy during the year 2015.

In fact, according to the art. 1 and the recital 18 of the decision concerned, the objective of the relocation mechanism was to help the Hellenic Republic and the Italian Republic to deal with an emergency situation by providing "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."[37] From this point of view, we mean how the relocation measure could be considered necessary under any conditions.

Furthermore, the relocation measure is just one of the measures to alleviate the burden on hotspots, namely Greece and Italy. Therefore, the respect of the principle of proportionality should not be assessed alone, but with reference to the general framework of the measures implemented (such as, for example, the financial support provided to the States of *second reception* for each relocated person).

The Court then recalled that it is not possible to deduct *a posteriori*, from the small number of relocations carried out in application of the contested decision, that the latter was, in its origin, unsuitable for the purpose set, as claimed by the Slovak Republic and by the Hungary in the context of its ninth plea in law.

In particular, it is necessary to recall a settled case-law of the Court, on the issue of the action for annulment, according to which: the legality of an act must be assessed by taking

[35] *Slovakia and Hungary v Council*, para 206.

[36] Lastly C-358/14, *Poland v Parliament and Council*, EU:C:2016:323, paras 78-79.

[37] *Slovakia and Hungary v Council.* para 216.

into account the legal and the factual situation existing at the time of its adoption and cannot be subjected to retroactive reflections about its suitability;[38] when the Union lawmaker is called upon to assess the future effects of the legislation to be adopted, although these effects cannot be predicted with certainty, its assessment can be objected only if it appears to be manifestly erroneous in the light of the elements available to itself when the legislation is adopted.[39]

Therefore, in the present case, the Council correctly carried out a prognostic analysis of the effects of relocation on the basis of the data available when the decision was taken, as set out in the recitals 12, 14 and 26.

Furthermore, the Court concluded adding that, among the factors responsible for the small number of relocations, there are some elements that could not be foreseen by the Council when the decision was taken, including the lack of cooperation of some Member States.

The Slovak Republic also claimed that the objective sought by the decision concerned could be achieved equally in a effective way by preparing other measures which could have been adopted on the basis of other regulatory provisions, already existing, less restrictive for the Member States and less affecting on the sovereign right of each of them to freely decide on the admission in their territory of citizens of third countries, as well as on the right of the Member States, stated in the art. 5 of the Protocol (2), that the financial and administrative burden were as low as possible.

The appellant supported her arguments by offering, in her opinion, the alternatives appropriate in relation to the objective that had to be pursued.

Firstly, Slovakia submitted that recourse could have been had to the mechanism provided for by Council Directive 2001/55/EC.[40] Secondly, the Slovak Republic added that the Hellenic Republic and the Italian Republic could have triggered what is known as the "EU civil protection" mechanism provided for in art. 8a of Council Regulation (EC) No 2007/2004.[41] Thirdly, the two States in emergency could have asked for the intervention of the Frontex Agency in the form of "rapid intervention". Lastly, the Slovak Republic argued that art. 78 para 3 TFEU also made it possible to adopt measures which, whilst less restrictive for the Member States, would have been suitable for attaining the objective pursued, such as "the provision of assistance to facilitate return and registration or the provision of financial, material, technical and personnel support to the Italian and Greek asylum systems."[42]

In relation to this plea in law, the Court dusted off an argument used to justify the suitability of the relocation measure in relation to art. 78.3 TFEU. Proper this provision, as it recalls the Grand Chamber, recognizes wide discretion of action in the choice of measures to be taken. In this case, moreover, the emergency situation in which the contested decision was to be adopted urged the Council to select the most rapid and feasible measures capable

[38] See C-449/98 P, *IECC v Commission*, EU:C:2001:275, para 87.

[39] In this sense see C-189/01, *Jippes and others*, EU:C:2001:420, para 84; or C-78/16 and C-79/16, *Pesce and others*, EU:C:2016:428, para 50.

[40] 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, OJ L 212, 7.8.2001, p. 12–23.

[41] 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, OJ L 349, 25.11.2004, p. 1–11

[42] *Slovakia and Hungary v Council*, para 232.

of producing concrete effects in order to help these Member States to control the important migratory flows on their territory. That's why a binding measure, as that one of the distribution of relocated persons, was rightly imposed in this particular hypothesis.

Hungary, for its part, relied on a plea in law identical to that of Slovakia, but on the basis of different arguments. According to the Hungary, it was not justifiable that the contested decision now established the relocation of 120 000 applicants, since, unlike the original Commission proposal, itself was no longer present, in the definitive text of the contested decision, inside the list of the beneficiaries Member States.

The Court also rejected this argument, establishing that "it was necessary to retain the 54 000 applicants who had initially been assigned for relocation from Hungary is also supported by recital 16 of the contested decision. That recital states that, because of the ongoing instability and conflicts in the immediate vicinity of Greece and Italy, it was very likely that significant and increased pressure would continue to be put on the Greek and Italian asylum systems after the adoption of the contested decision."[43]

Since Hungary has not shown, on the basis of specific elements, that the statistical data, taken into consideration by the Council to fix the total number of persons to be relocated to 120 000, are not relevant, it must be noted that the Council, having established this figure, on the basis of the considerations and of the data referred to above, has not committed any manifest error of assessment, which would lead to the annulment of the contested decision, even after the withdrawal of Hungary as the Member State benefiting from the relocation.

In the alternative, Hungary accused the Council of having included itself among the Member States of relocation after it had renounced the beneficiary Member State *status* as set out in the Commission's original proposal. In that regard, the fact that that Member State was also subject, like Greece and Italy, to significant migratory pressure is not disputed. For this reason, the contested decision would have placed a disproportionate burden on Hungary by imposing compulsory relocation quotas on the same basis as the other Member States, despite the emergency situation incumbent upon it.

The Court held that, faced with Hungary's refusal to benefit from the relocation mechanism as proposed by the Commission, the Council could not be criticized, from the point of view of the principle of proportionality, "for having concluded on the basis of the principle of solidarity and fair sharing of responsibility laid down in article 80 TFEU that Hungary had to be allocated relocation quotas in the same way as all the other Member States that were not beneficiaries of the relocation mechanism."[44]

About this, the search for a balance between the different interests at stake, which takes into account not the particular situation of a single Member State, but that of all the Member States, "cannot be regarded as being contrary to the principle of proportionality."[45]

It should be noted that the contested decision provided in art. 4 para 5 and in art. 9 the possibility for a Member State, subject to certain conditions established by the decision itself, to request a suspension of its obligations as Member State of relocation, as it was the case for

[43] *Slovakia and Hungary v Council*, para 271.

[44] *Slovakia and Hungary v Council*, para 293.

[45] *Slovakia and Hungary v Council*, para 290. See, by analogy, C-508/13, *Estonia v Parliament and Council*, EU:C:2015:403, para 39.

the Republic of Austria[46] and for the Kingdom of Sweden.[47] This adjustment mechanism had never been activated.

Therefore, it can be concluded, according to the Court, that the establishment of such adjustment mechanisms demonstrates that the relocation measures provided for in the contested decision make it possible to take account, proportionately, of the specific situation of each Member State.

With the last plea in law, Hungary pointed out that the contested decision infringed the principles of legal certainty and normative clarity, as it did not clearly determine the criteria for the relocation of the applicants. In particular, the way in which the beneficiary Member State authorities 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, to which Member State they will be relocated."[48]

In relation to this profile, the Court has shown that the Council has not infringed the principles of legal certainty and normative clarity by specifying, in recitals 23, 24, 35, 36 and 40 of the decision in question, the interaction between provisions of that act and those of legislative acts adopted in the framework of the common Union asylum policy.

It should be added that paragraphs 1 and 2 of art. 6 of the contested decision lay down certain specific criteria for determining the Member State of relocation, "which relate to the best interests of the child and to family ties and which are, moreover, similar to the criteria laid down in the Dublin III Regulation."[49]

Furthermore, the Court pointed out that recital 34 of the decision in question provides for a set of elements which are designed with a view to the promotion of the integration of applicants within that State, in particular for the asylum seekers to be relocated to a Member State to which they have family, cultural or social ties and which must be taken into account when the second reception country is designated.

The contested decision cannot therefore be held to be arbitrary with respect to the objective system laid down by the Dublin III regulation. On the contrary, in fact, these two systems are both based on objective evaluations, and not on the indication of a preference on the part of the asylum seeker.

Specifically, the Court recalled that the rule of competence of the Member State of first reception, provided for by art. 13 para 1 of the Dublin III Regulation, which is the only rule of determination of the competent Member State dictated by that regulation to which the contested decision derogates, does not relate to the choice of the applicant for a given host Member State and does not specifically aim to ensure that there is a linguistic, cultural or social link between this applicant and the competent Member State.

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[46] 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 L 74, 19. 3. 2016, p. 36-37.

[47] 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 L 157, 15. 6. 2016, p. 23-25.

[48] *Slovakia and Hungary v Council*, para 313.

[49] *Slovakia and Hungary v Council*, para 330.

Indeed, as it appears from the recital 35 of the decision in question, the inability of asylum seekers to choose the relocation Member State is counterbalanced by the right to bring an effective remedy against the relocation decision for the purpose of the respect for their fundamental rights:[50] for this reason, the asylum seeker is informed of the relocation decision before the effective relocation.

5. The principle of solidarity in the light of the EU *acquis*

The judgment of the Court disavowed the applicants' arguments both on the merit and on the procedural profile. To avoid the risk of issuing a „politicized" judgment, the Grand Chamber, first of all, used several procedural arguments dear to its case-law, as "the scrutiny limited to the absence of manifestly inappropriate or unreasonable assessments, the reference to the discretional nature of the decisions taken, […] rather than focus [only] on more innovative but less manageable termswith reference to the relations with national authorities, an effect that would have been triggered by a full exploitation of the solidarity principle enshrined in art. 80 TFEU".[51]

However, it is clear that the ruling in question is characterized by an intertwined valence of not only legal but also political profiles.[52] Indeed, the contested decision is one of the few expressions of the principle of solidarity which the Treaties deem operating between the Member States.[53] As it's known, the need for solidarity was repeatedly evoked in the Treaty of Rome and is a central feature of it; "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".[54]

Although it is surprisingly absent from the list of fundamental values of the Union as per art. 2 TEU, solidarity is currently mentioned in the preamble to the Charter of Fundamental Rights of the European Union as part of the "indivisible and universal values" on which the Union is founded, as well as in other provisions of the consolidated Lisbon version; to mention one, art. 3 paras 2 and 3 TEU, states that the EU is promoting not only "solidarity between generations" but also "solidarity among Member States".[55]

[50] See also KERIKMÄE, T., HAMULÁK, O., CHOCHIA, A.: A Historical Study of Contemporary Human Rights: Deviation or Extinction? *Acta Baltica Historiae et Philosophiae Scientiarum*, 2016, vol. 4., pp. 98-115.

[51] LABAYLE, H.: Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council). *EU Immigration and Asylum Law and Policy* blog, 11th May 2017 (available at: http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/). PENASA, S.: La relocation delle persone richiedenti asilo: un sistema legittimo, giustificato e … inattuato? Brevi riflessioni sulla sentenza Slovacchia e Ungheria c. Consiglio. *DPCE Online*, 2017, vol. 31, no. 3, p. 740 (available at http://www.dpceonline.it/index.php/dpceonline/article/view/451). See also FAVILLI, C.: L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'«emergenza» immigrazione. *Quaderni costituzionali*, 2015, no. 3, pp. 785-788.

[52] For detailed analysis see BIONDI, A., DAGILYTÉ, E., KÜCÜK, E. (eds.): *Solidarity in EU Law – Legal Principle in the Making*, Edward Elgar, 2018.

[53] See also OVÁDEK, M.: Legal basis and solidarity of provisional measures in Slovakia and Hungary v Council. *European Database of Asylum Law* online, 4th December 2017 (available at: http://www.asylumlawdatabase.eu/en/journal/legal-basis-and-solidarity-provisional-measures-slovakia-and-hungary-v-council).

[54] LABAYLE, S.: *Les valeurs de l'Union*, doctoral thesis in public law, Aix-en-Provence, pp. 117-118.

[55] More, see the "solidarity clause" pursuant to art. 222 TFEU, inserted precisely by the Treaty of Lisbon.

In this sense, the Advocate General Bot, in his Opinion, insisted that solidarity is one of the basic principles of European construction, believing, from the first points, that the present proceedings offered the opportunity to remember that solidarity "is both the *raison d'être* and the objective of the European project."[56]

Since its codification in the Treaties, however, the concept of solidarity has raised an interpretative conflict,[57] inherent in the very nature of value, which places itself between the legal obligation and the moral obligation.[58] In this regard, the Treaties do not help to identify their legal nature, since the notion of solidarity is not defined at any point in the Treaties.[59]

With due consideration, part of the doctrine notes that "the Treaties confer on that concept [the solidarity] 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".[60]

With specific reference to the policies related to border checks, asylum and immigration, which form the subject matter of Title V of Chapter 2 of the TFEU, dedicated to the area of freedom, security and justice, it is undeniable that solidarity constitutes a guiding principle of Union action.[61]

It is certified, on the one hand, by art. 67 para 2 TFEU, according to which the EU "shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals"; on the other one, by art. 80 TFEU, pursuant to which "the policies of the Union set out in this 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 this Chapter shall contain appropriate measures to give effect to this principle".

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56 AG Opinion in case *Slovakia and Hungary v Council*, para 17. See also FAVREAU, B.: La Charte des droits fondamentaux: pourquoi et comment?, in *La Charte des droits fondamentaux de l'Union européenne après le traité de Lisbonne*, Bruylant, 2010, pp. 3-38, especially p. 13.

57 See also KERIKMÄE, T.: European History and the Future of Legal Freedoms. *Baltic Journal of European Studies*, 2015, vol. 5, pp. 3-5.

58 TAKLE, M.: Is the Migration Crisis a Solidarity Crisis? In Grimmel, A. (ed.) *The Crisis of the European Union. Challenges, Analyses, Solutions*, Routledge, 2018.

59 On the principle of solidarity in general, see BOUTAYEB, C.: *La solidarité dans l'Union européenne – Éléments constitutionnels et matériels*, Dalloz, 2011.

60 BIEBER, R., 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*, 2012, p. 295.

61 *Ex multis*, see *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, Brussels; KÜÇÜK, E.: *The principle of solidarity and fairness in sharing responsibility: more than window dressing? European Law Journal*, 2016, vol. 22, no. 4, pp. 448-469; BAST, J.: Deepening supranational integration: interstate solidarity in EU migration law. *European Public Law*, 2016, vol. 22, no. 2, pp. 289-304; MORGESE, G.: (2014). Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea, in CAGGIANO, G. (ed.) *I percorsi giuridici per l'integrazione*, Turin, 2014, p. 366 et seq.

Indeed, even at the international level, the principle of solidarity is configured, in the same way, as a fundamental value of asylum policy. The fourth considering of the preamble to the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (so-called „Geneva Convention") states that "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation".

With reference to the case, as reported by the AG Bot, "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."[62]

The innovative scope of the contested decision, and the consequent judgment to protect solidarity, therefore lies in having (re)affirmed that solidarity between the Member States has a concrete content and a binding character and that the distribution mechanism of the applicants for international protection, based on proportional relocation quotas, is mandatory, thus allowing the principle of solidarity and of fair sharing of responsibility between the Member States, enshrined in art. 80 TFEU, not to remain a dead letter.[63]

The aforementioned characteristic, essential and innovative at least with reference to practice, reveals the politically sensitive nature of the proceedings in question; in fact, both the Council decision and the Court's judgment are aimed at countering the position taken by some Member States in favour of a freely assumed solidarity based solely on voluntary commitments.[64]

Moreover, this would explain the absence of the principle of solidarity from the founding values of the Union listed in art. 2 TEU. This *lacuna legis* certainly constitutes an ideological *lacuna* and not a technical one. Indeed, otherwise, behaviours in violation of the principle of solidarity would possibly have allowed the activation of the so-called „suspension clause" and the related procedure pursuant to art. 7 TEU, certainly more burdensome than the one referred to in art. 258-260 TFEU (the infringement action).

The case in question has a potential to stand as a turning point in this sense. If it is true that the Court has maintained a more politically correct attitude than the one taken by Advocate General Bot, it is also true that, even though in filigree, it has reconnected the ineffectiveness of measures for relocation to the passive attitude of some Member States and noted that "moreover, it is apparent that the small number of relocations so far carried out pursuant to the contested decision can be explained by a series of factors that the Council

[62] AG Opinion in case *Slovakia and Hungary v Council*, para 22.

[63] See OBRADOVIC, D.: Cases C-643 and C-647/15: Enforcing Solidarity in EU Migration Policy. *European Law Blog*, 2nd October 2017 (available at: http://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/). See also OVÁDEK, M. Legal basis and solidarity of provisional measures in Slovakia and Hungary v Council. *European Database of Asylum Law* online, 4th December 2017 (available at: http://www.asylumlawdatabase.eu/en/journal/legal-basis-and-solidarity-provisional-measures-slovakia-and-hungary-v-council).

[64] TAKLE, M.: Is the Migration Crisis a Solidarity Crisis? In Grimmel, A. (ed.) *The Crisis of the European Union. Challenges, Analyses, Solutions*, Routledge, 2018.

could not foresee at the time when the decision was adopted, including, in particular, the lack of cooperation on the part of certain Member States."[65]

The judgment built up the conditions and stood as a starting point for the activation of the treatment that the Treaties devote for the protection of the obligations deriving from the EU *acquis* and as such, it led to the launching of infringement procedure against Czech Republic, Hungary and Poland for non-compliance with their legal obligations on relocation.[66] It is worth to mention here, that, in the past, the Court of the European Community invited to censor the accounts of this kind: "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 Community 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 Community legal order".[67]

[65] *Slovakia and Hungary v Council*, para 223.

[66] See European Commission press release – Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice (available at: http://europa.eu/rapid/press-release_IP-17-5002_en.htm). On the approach of Poland, Slovakia and Hungary see NAGY, B. Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees, *Central European University, Working Paper n. 17*, 2017. On the "Visegrád Group" (V4), see CIRCOLO, A.: La sospensione dei diritti degli Stati membri alla luce di violazioni gravi dei valori UE. *Gazzetta Forense*, 2017, luglio/Agosto, pp. 768-769.

[67] C-39/72, *Commission v Italy,* EU:C:1973:13, paras 24-25; see also C-128/78, *Commission v United Kingdom*, EU:C:1979:32, para 12.