

[Home](#) > CJEU - Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the European Union, 6 September 2017

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Date of Decision:

06-09-2017

Citation:

C-643/15 and C-647/15

Court Name:

Court of Justice of the European Union (Grand Chamber)

Keywords:[Dublin Transfer](#) [1]**Relevant Legislative Provisions:**

European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [2] > [Article 18](#) [3]

European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [2] > [Article 21](#) [4]

European Union Law > [EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013](#) [5] > [Article 9](#) [6]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [7] > [Article 13](#) [8]

Headnote:

The Court of Justice of the European Union rejected the actions brought by Hungary and Slovakia seeking the annulment of the so-called 'Relocation Decision'.

Facts:

The Slovak Republic and Hungary sought annulment of Council Decision (EU) 2015/1604 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (also known as 'the Relocation decision'). That decision was adopted by the Council by a qualified majority, with the Czech Republic, Hungary, Romania and the Slovak

Republic voting against and Finland abstaining.

Decision & Reasoning:

The Slovak Republic's action for annulment contained six pleas in law, while Hungary's action brought forward ten pleas in law. Poland has supported some of the pleas by means of its intervention.

The CJEU chose to join the cases and separated the pleas into three categories: those attacking the lack of legal basis for adopting the Council Decision, those pointing to alleged procedural errors on the adoption of the decision, and those contesting the substance of the decision itself.

1. Pleas alleging that Article 78(3) TFEU is not a proper legal basis for the contested decision

1. *The legislative nature of the contested decision:* HU and SK maintained that even though the contested decision was adopted in accordance with a non-legislative procedure, it must be classified as a legislative act because of its content and its effects, since it amends a number of legislative acts of EU law, more fundamentally the Dublin III Regulation.

The CJEU held that provisional measures adopted under Article 78(3) TFEU must be classified as 'non-legislative acts' because they are not adopted at the end of a legislative procedure. It found that the concept of 'provisional measures' must be sufficiently broad in scope to enable 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. It ruled that, while provisional measures adopted under Article 78(3) TFEU may in principle derogate from provisions of legislative acts, both the material and temporal scope of such derogations must be circumscribed. Therefore, the CJEU rejected this plea in law.

1. *The provisional nature and period of application of the decision:* HU and SK argued that the decision applies for a period of two years that can be extended by one year, so it cannot be classified as a 'provisional measure' within the meaning of Article 78(3) TFEU. Moreover, this is also the case since the temporal effects of the decision will far exceed that period since lasting ties and obligations will be created between the applicants for international protection and the Member States of relocation.

The CJEU rejected this plea and concluded that the application of the two year period was reasonable based on the unprecedented and complex nature of the relocation decision. It also held that such more or less long-term effects are inherent in the relocation procedure and could not justify the prohibition of a provisional measure for that purpose.

1. *Situation 'characterised by a sudden inflow of national of third countries':* the Slovak Republic argued that the inflow of third country nationals into Italy and Greece was reasonably foreseeable, that there was no direct causal link between the shortcomings in the Greek asylum system and the 'migration phenomenon' of the period, and that the decisions addressed hypothetical future situations.

The CJEU rejected all arguments and recalled that the EU institutions must be allowed broad discretion when they adopt measures in areas which entail complex assessments, particularly of a political nature. In the case in question, the Council had relied on statistical data and had identified the scale of the migration inflow, which would have disrupted any asylum system, even one without structural weaknesses.

2. Pleas related to alleged breach of procedural requirements for the adoption of the decision

1. *Alleged infringement of Article 68 TFEU:* HU and SK maintained that the decision had to be adopted unanimously or in the form of voluntary allocations, taking into account the politically sensitive question for several Member States. Moreover, Hungary submitted that the conclusions of the European Council of 25 and 26 June 2015 referred only to the relocation of 40 000 applicants, instead of the 120 000 number agreed in the decision.

The CJEU rejected this plea based on the enhanced power of legislative initiative accorded to the European Commission by Article 17(2) TEU. The Commission's power of initiative to adopt provisional measures on the basis of Article 78(3) TFEU is not conditional upon the European Council having previously defined guidelines under Article 68 TFEU. The CJEU also recalled that Article 78(3) TFEU allows the Council to adopt measures by a qualified majority (as it did when it adopted the contested decision), and neither the European institutions nor the Member States can deviate from the rules regarding the decision-making process as established in the Treaties.

1. *Alleged failure to consult the European Parliament:* HU and SK claimed that the Council made substantial amendments to the Commission's initial proposal and adopted the contested decision without consulting the Parliament afresh, resulting in a breach of Article 78(3) TFEU. SK also sustained that this failure led to a breach of the principles of representative democracy, institutional balance and sound administration under Articles 10(1) and (2) and 13(2) TEU.

The CJEU accepted that the European Parliament must be consulted again whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted. However, it rejected the plea since the amendments did not affect the very essence of the proposal and the Council Presidency kept the Parliament fully informed of those amendments.

1. *Need for unanimity and the Commission's amendment of the initial proposal:* SK and HU argued that the Council breached the essential procedural requirement under Article 293(1) TFEU by amending a Commission proposal without complying with the requirement for unanimity. In turn, the Council argued that the Commission's agreement (even if implicit) amounted to an alteration of the proposal on the part of the Commission.

The CJEU concluded that flexibility must prevail in the case of the procedure for adopting a provisional measure under Article 78(3) TFEU, since the purpose of that provision is to make it possible for measures to be adopted quickly in order to respond rapidly and effectively to an emergency situation. It concurred with the Council and the Commission in that the Commission exercised its power to amend a proposal by virtue of the participation of the First Vice-President and by the responsible Commissioner in the process for adopting the decision.

1. *Right of national parliaments to issue an opinion and deliberation and voting within the Council behind closed doors:* SK and HU claim that the right of national parliaments to issue an opinion on any draft proposal for a legislative act, as provided for in Protocols [No. 1](#) [9] and [No. 2](#) [10] to the EU Treaties. The Slovak Republic also sustained that, should the CJEU find that the decision had to be adopted by means of a legislative procedure, the Council had breached the procedural requirement by adopting the decision *in camera*, instead of in public.

The CJEU dismissed both pleas since the contested decision must be classified as a non-legislative act, thus not being subject to the requirements indicated by HU and SK.

1. *Rules of EU law on the use of languages:* HU and SK put forward that the Council infringed its Rules of Procedure since the text setting forth the successive amendments to the initial proposal and the final text were provided to the Member States only in English.

The CJEU accepted the Council's interpretation that a simplified procedure applies in the case of amendments and that only where a Member State objects do the language versions indicated have to be submitted to the Council before it can continue to deliberate. The particular context of urgency characterising the procedure for adopting provisional measures on the basis of Article 78(3) TFEU also justifies this flexibility.

3. Pleas related to the substance of the decision

1. *Principle of proportionality ? allegation that the decision is not appropriate for attaining its objectives:* SK claimed that the relocation decision is not capable of redressing the structural defects in the Greek and Italian asylum systems. It also relied upon the small number of people relocated under the scheme by the time of the CJEU's ruling to show that the decision is inappropriate for attaining the intended objective.

The CJEU rejected this plea and interpreted the Relocation Decision in the broader set of measures intended to relieve the pressure on Greece and Italy. It also recalled that the legality of an EU act cannot depend on retrospective assessments of its efficacy.

1. *Principle of proportionality ? allegation that the decision is not necessary in the light of the objective it seeks to attain:* The Slovak Republic argued that the objectives pursued by means of the decision could be achieved just as effectively by other measures which could have been taken in the context of existing instruments, namely the so-called Temporary Protection Directive, the recourse to the 'EU civil protection' mechanism provided for in Council Regulation (EC) no. 2007/2004 establishing Frontex, and the assistance from Frontex in the form of a 'rapid intervention'.

The CJEU found that the Council, when adopting the decision, was giving effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, in accordance with Article 80 TFEU. The Court also dismissed the claim that the Temporary Protection Directive would provide a solution to the problem in the present case, since under that Directive persons eligible for temporary protection are entitled to protection in the Member State where they are located. Moreover, the choice made in the decision of granting international protection rather than temporary protection was essentially a political choice, which the CJEU deemed itself inappropriate to examine. The CJEU stated that the measures identified by SK are of a complementary nature which may contribute to better control of future inflows of migrants but which, alone, cannot solve the saturation of the Greek and Italian asylum systems.

1. *The particular effects on Hungary:* HU argued that it was subjected to particularly strong migratory pressure both before the adoption of the decision and at the time of decision. Therefore, it argued, the decision placed a disproportionate burden on Hungary by setting mandatory relocation quotas for it as it does for the other Member States.

The CJEU dismissed this allegation and pointed to the existence of adjustment mechanisms to the Relocation Decision, such as the subsequent Council Decisions regarding Austria and Sweden that partially and temporarily suspended their obligations under the Relocation Decision. It also recalled that the distribution key used to determine the 'relocation quota' for each Member State took into account the migration pressure on their asylum systems.

1. *The Polish argument of a 'cultural impact':* In its intervention, Poland argued that the Relocation Decision put a heavier burden on Member States which are 'virtually ethnically homogeneous, like Poland' and whose population are different, from a cultural and linguistic point of view, from the migrants to be relocated there.

The CJEU strongly condemned this argument and affirmed that considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law, in particular Article 21 of the Charter of Fundamental Rights of the European Union.

1. *The alleged lack of legal certainty and normative clarity.* HU, supported by PL, argued that the Relocation Decision is not sufficiently clear as to how it relates to the provisions of the Dublin III Regulation, that it raises an issue regarding the right to an effective remedy of those applicants who are not designated for relocation, and that there is a lack of clarity to determine to which country an eligible applicant is to be relocated. HU also claimed that the Relocation Decision was incompatible with the 1951 Refugee Convention since, in accordance with the UNHCR Handbook and guidelines on procedures and criteria for determining refugee status under that Convention, an applicant should be permitted to remain in the Member State in which he has lodged his request pending a decision on that request by the authorities of that country.

The CJEU rejected all arguments. First, it ruled that the Relocation Decision is an integral part of the EU asylum *acquis*, which remains fully applicable despite the temporary derogations brought by the provisional measures. In addition, it affirmed that there must be a right to an effective remedy under national law, in accordance with Article 47 of the Charter, against any decision to be taken by national authorities in the course of the relocation procedure. The CJEU also affirmed that the relocation mechanisms cannot be regarded as an arbitrary system since, *inter alia*, recital 34 of the Relocation Decision establishes that applicants are to be relocated to a Member State with which they have some family, cultural or social ties.

Finally, the CJEU interpreted the 'right to remain' established by the 1951 Refugee Convention as a particular expression of the principle of non-refoulement, thus not precluding the relocation of an applicant from one Member State to another.

Outcome:

As none of the pleas in law put forward by the Slovak Republic or by Hungary can be accepted, the CJEU dismissed the actions for annulment.

Observations/Comments:

The CJEU's ruling was in line with [AG Bot's Opinion](#) [11].

According to European Commission's [Fifteenth report on relocation and resettlement](#) [12], Hungary and Poland are the only Member States that have not relocated a single person from Greece or Italy. Slovakia, on its turn, had relocated 16 persons as of 4 September 2017.

Relevant articles:

Michal Ovádek, Legal basis and solidarity of provisional measures in Slovakia and Hungary v Council, EDAL blog, available [here](#).

Daniela Obradovic, 'Cases C-643 and 647/15: enforcing solidarity in EU migration policy?', European Law Blog, available [here](#) [13].

Henri Labayle, 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 Migration Law Blog, available [here](#) [14].

Zuzana Vikarska, The Slovak Challenge to the Asylum-Seekers? Relocation Decision: A Balancing Act, EU Law Analysis Blog, available [here](#) [15].

Steve Peers, Relocation of Asylum-Seekers in the EU: Law and Policy, EU Law Analysis Blog, available [here](#) [16]

Case Law Cited:

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C-508/13, Estonia v. Parliament and Council, 18 June 2015

C-78/16 and C-79/16, Pesce and Others, 9 June 2016

C-189/01, Jippes and Others, 12 July 2001

C-147/13, Spain v. Council, 5 May 2015

C-409/13, Council v. Commission, 14 April 2015

C-280/93, Germany v. Council, 5 October 1994

C-388/92, Parliament v. Council, 1 June 1994

C-390/15, RPO, 7 March 2017

C-408/95, Eurotunnel and others, 11 November 1997

C-363/14, Parliament v. Council, 10 September 2015

C-358/14, Poland v. Parliament and Council, 4 May 2016

Attachment(s):



[Joined Cases C-643_15 and C-647_15.docx](#)[17]

Other sources cited:

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Treaty on the European Union, Article 10(1)

Treaty on the European Union, Article 10(2)

Treaty on the European Union, Article 13(2)

Treaty on the European Union, Article 16(8)

Treaty on the European Union, Article 17(1)

Treaty on the European Union, Article 17(2)

Protocol (No 1) on the role of the national parliaments in the European Union, annexed to the EU and FEU Treaties, Article 3

Protocol (No 1) on the role of the national parliaments in the European Union, annexed to the EU and FEU Treaties, Article 4

Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU and FEU Treaties, Article 6

Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU and FEU Treaties, Article 7

Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

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 State in receiving such persons and bearing the consequences thereof

Council Regulation (EC) No 2007/2004 of 26 October 2014 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

Authentic Language:

English

Country of preliminary reference:

Hungary

Links:

- [1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A1213
- [2] <https://www.asylumlawdatabase.eu/node/453>
- [3] https://www.asylumlawdatabase.eu/node/453#toc_85
- [4] https://www.asylumlawdatabase.eu/node/453#toc_97
- [5] <https://www.asylumlawdatabase.eu/node/4039>
- [6] https://www.asylumlawdatabase.eu/node/4039#toc_119
- [7] <https://www.asylumlawdatabase.eu/node/4037>
- [8] https://www.asylumlawdatabase.eu/node/4037#toc_165
- [9] <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/protocols-annexed-to-the-treaties/656-protocol-on-the-role-of-national-parliaments-in-the-european-union.html>
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- [12] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170906_fifteenth_report_on_relocation_and_resettlement_en.pdf
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[16] <http://eulawanalysis.blogspot.be/2015/09/relocation-of-asylum-seekers-in-eu-law.html>

[17] https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Joined%20Cases%20C-643_15%20and%20C-647_15.docx