



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Cases C-643/15 and C-647/15  
Slovakia and Hungary v Council

## **Advocate General Bot proposes that the Court should dismiss the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers**

*That mechanism is actually a proportionate means of enabling Greece and Italy to deal with the impact of the 2015 migration crisis*

In response to the migration crisis that affected Europe in the summer of 2015, the Council of the European Union adopted a decision<sup>1</sup> in order to help Italy and Greece deal with the massive inflow of migrants. The decision provides for the relocation from those two Member States to other EU Member States, over a period of two years, of 120 000 persons in clear need of international protection.

The contested decision was adopted on the basis of Article 78(3) TFEU, which provides that 'in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the [European] Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament'.

Slovakia and Hungary which, like the Czech Republic and Romania, voted against the adoption of the contested decision in the Council,<sup>2</sup> have asked the Court of Justice to annul the decision. In support of their actions they put forward grounds seeking to show (i) that the adoption of the decision was vitiated by errors of a procedural nature or arising from the choice of an inappropriate legal basis and (ii) that the decision was neither a suitable response to the migrant crisis nor necessary for that purpose.

In the proceedings before the Court, Poland has intervened in support of Slovakia and Hungary, while Belgium, Germany, Greece, France, Italy, Luxembourg, Sweden and the Commission have intervened in support of the Council.

In his Opinion delivered today, Advocate General Yves Bot proposes that the Court should **dismiss the actions brought by Slovakia and Hungary**.

First, the Advocate General rejects the argument that although the contested decision was not adopted in accordance with the legislative procedures provided for in the FEU Treaty<sup>3</sup> and thus does not formally constitute a legislative act in the EU legal system, it should nonetheless be classified as a legislative act because it amends a number of EU legislative acts, such as the Dublin III Regulation.<sup>4</sup> According to that argument, such a legislative act should have been adopted

<sup>1</sup> 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 2015 L 248, p. 8).

<sup>2</sup> Finland abstained from the vote, whilst the other Member States voted in favour of the decision.

<sup>3</sup> Those procedures are the ordinary legislative procedure and the special legislative procedure, for which Article 289 TFEU makes provision.

<sup>4</sup> Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (OJ 2013, L 180, p. 31).

on the basis of a provision other than Article 78(3) TFEU, since the latter cannot provide a legal basis for legislative acts.

The Advocate General stresses in that regard that **the contested decision cannot be classified as a legislative act on the basis of its content**, since the FEU Treaty takes a purely formal approach for the purpose of differentiating between legislative acts and non-legislative acts. Indeed, only acts adopted in accordance with a legislative procedure (ordinary or special) can be considered to be legislative acts. Accordingly, procedures such as the one provided for in Article 78(3) TFEU, which follow a similar course to that of special legislative procedures but which are not expressly classified as such by the FEU Treaty, must be considered to be non-legislative procedures that result in the adoption of non-legislative acts. In such circumstances, the Advocate General considers the **contested decision to be a non-legislative act adopted on the basis of Article 78(3) TFEU**.

The Advocate General takes the view that **Article 78(3) TFEU permits the adoption of measures which, in order to address a clearly identified emergency situation, derogate temporarily and on specific points from legislative acts in asylum matters**. He also considers that Article 78(3) enables the Council to adopt **all the provisional measures** which it deems necessary to deal with a migration crisis. In addition, these ad hoc, temporary derogations cannot, in his view, be assimilated to a permanent amendment of the substantive rules contained in EU legislative acts in asylum matters: consequently, **adoption of the contested decision did not entail any abuse of the ordinary legislative procedure**.

The Advocate General also makes the point that, since the decision is a non-legislative act, **its adoption was not subject to the requirements relating to the participation of national Parliaments** (given that those requirements apply only to legislative acts).

Second, the Advocate General notes that the temporal scope of the contested decision (from 25 September 2015 to 26 September 2017) is precisely delineated and therefore its provisional nature cannot be disputed.

Third, the Advocate General states that the **Conclusions of the European Council of 25 and 26 June 2015**, which stated that the Member States were to decide 'by consensus' on the distribution of persons in clear need of international protection and were to do so in a manner 'reflecting the specific situations of Member States', **do not prevent the Council from adopting the contested decision**. Those conclusions in fact related to another relocation plan which, in response to the flow of migrants in 2014 and early 2015, aimed to allocate 40 000 persons between the Member States. That plan formed the subject-matter of Decision 2015/1523<sup>5</sup> rather than of the decision challenged in this case.

Fourth, the Advocate General **rejects the argument that the Council should have consulted the European Parliament again** because it had made substantial amendments to the Commission's initial proposal by taking note inter alia of Hungary's stated intention not to be included on the list of Member States that benefit from the relocation mechanism<sup>6</sup> and by classifying Hungary as a Member State of relocation. The Advocate General considers in that regard that, since those amendments do not affect the essential features of the mechanism, there was no need for the Parliament to be formally consulted afresh.

Fifth, the Advocate General states that although the contested decision includes amendments to the initial Commission proposal, **the Council was not required to act unanimously** given that the Commission did not object to those amendments.

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<sup>5</sup> Council Decision of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ 2015 L 239, p.146).

<sup>6</sup> Hungary states that it refused to be included among the Member States benefiting from the temporary relocation mechanism in order to avoid being considered the Member State responsible for examining applications for asylum which should have been made in the Member State where the migrants actually entered the EU.

Sixth, the Advocate General considers that the **contested decision automatically helps to relieve the considerable pressure on the asylum systems of Italy and Greece following the migration crisis in the summer of 2015 and that it is thus appropriate for attaining the objective which it pursues.**

The limited efficacy of the measures provided for in the contested decision does not call in question its appropriateness for achieving the objective sought, since the appropriateness of the decision must be assessed on the basis of the facts and the law at the time when it was adopted and not in the light of retrospective considerations as to how effective it has been. Moreover, the Advocate General points out that **that limited efficacy can be explained by** a series of factors **including the partial or total failure of certain Member States** (including Slovakia and Hungary) **to implement the contested decision**, which is contrary to the obligation concerning solidarity and the fair sharing of burdens, to which the Member States are subject in the area of asylum policy.

Seventh and finally, the Advocate General states that **the above-mentioned obligation permits the Council to adopt a provisional measure for the mandatory distribution between Member States of persons in need of international protection: such a measure therefore cannot be regarded as manifestly exceeding what is necessary to provide an effective response to the migration crisis.**

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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*Unofficial document for media use, not binding on the Court of Justice.*

*The full text of the Opinions [C-643/15](#) & [C-647/15](#) are published on the CURIA website on the day of delivery.*

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