

Anna Doliwa-Klepcka*

**JOINED CASES C-643/15 AND C-647/15 SLOVAK
REPUBLIC AND HUNGARY
V COUNCIL OF THE EUROPEAN UNION**

Abstract: In the commented judgment the Court of Justice has, for the first time, made an analysis of the legal nature of Article 78(3) TFEU including in particular the understanding of the concepts contained in that provision and the conditions for its application. This provision allows the Council to adopt the non-legislative acts in case of a sudden influx of migrants from third countries into the territory of the Member States. The Court also characterized the temporary relocation mechanism as a part of the common asylum system of the EU and a crisis management measure and examined the provisions of Council Decision 2015/1601, obligating the Member States to relocate 120000 persons staying in Italy and Greece – in the light of the notions used in Article 78(3) TFEU.

Keywords: Refugees, Dublin Transfer, Relocation Decision, temporary relocating mechanism

1. Introduction

The Court of Justice of the European Union (CJEU), in its judgment of 6.09.2017 in joined Cases C-643/15 and C-647/15 Slovak Republic

* Dr hab., Faculty of Law, University of Białystok

and *Hungary v Council of the European Union*¹, has for the first time made an interpretation of concepts included in Article 78(3) Treaty on the Functioning of the European Union (TFEU).² It includes the so-called emergency provision within the Union's asylum policy. The Court, in the commented opinion, has made an interpretation of Article 78(3) TFEU in the context of the refugee crisis in 2015. The interpretation of Article 78(3) TFEU made by the Court, especially the statement that the Council has a wide recognition margin while constituting instruments based on this foundation, will surely determine the manner of using Article 78(3) TFEU in the future.

According to the present tone (after the changes made by the Treaty of Lisbon – TL³) of Article 78(3) TFEU, 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 Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

So far, the mentioned provision has been used in effect twice. In both cases, the basis for this was the present Article 78(3) TFEU. On 14.09.2015, the Council accepted a 2015/1523⁴ decision which obliged Member States to take 40,000 people as part of relocation, and on 22.09.2015, the 2015/1601⁵ decision obliged Member States to take an additional 120,000 people. The 2015/1601 decision was changed by the 2016/1754 resolution of the Council of 29.09.2016,⁶ implementing Council decision

¹ *Slovak Republic and Hungary v Council of the European Union*, Cases C-643/15 and C-647/15, Judgment of 6.09.2017, ECLI:EU:C:2017:631.

² Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47-390.

³ OJ C 306, 17.12.2007, pp. 1-231.

⁴ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, pp. 146–156 (date of end of validity: 17.09.2017).

⁵ 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, pp. 80–94 (date of end of validity: 26/09/2017).

⁶ Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 268, 1.10.2016.

(EU) 2016/408 of 10 March 2016,⁷ (setting exceptions in favour of Austria) and Council Decision (EU) 2016/946 of 9 June 2016 (setting lapses in favour of Sweden).⁸ The indicated decisions were made in the context of the exceptional migratory flow to Italy and Greece in 2015.

2. Background of the Case

The commented case concerns one of the above-mentioned decisions – 2015/1601. Decision 2015/1523 was adopted by the Council by a qualified majority, with the Czech Republic, Hungary, Romania and the Slovak Republic voting against and Finland abstaining. The plea for certifying its invalidity was placed on trial by the Slovak Republic and Hungary. Under the proceedings in front of the Court, they were supported by Poland, while Belgium, Germany, Greece, France, Italy, Luxembourg and Sweden intervened alongside the Commission in support of the Council.

In support of its action in Case C-643/15, the Slovak Republic relied on six pleas in law, alleging: the first – infringement of Article 68 TFEU and Article 13(2) TEU, and breach of the principle of institutional balance; the second – infringement of Article 10(1) and (2) TEU, Article 13(2) TEU, Article 78(3) TFEU, Articles 3 and 4 of Protocol (No. 1) on the role of the national parliaments in the European Union, annexed to the EU and FEU Treaties ('Protocol (No. 1)'), and Articles 6 and 7 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU and FEU Treaties ('Protocol (No. 2)'), and breach of the principles of legal certainty, representative democracy and institutional balance; the third – breach of essential procedural requirements relating to the legislative process and infringement of Article 10(1) and (2) TEU and Article 13(2) TEU, and breach of the principles of representative

⁷ 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, pp. 36-37.

⁸ 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, pp. 23-25.

democracy, institutional balance and sound administration (in the alternative); the fourth – breach of essential procedural requirements and infringement of Article 10(1) and (2) TEU and Article 13(2) TEU, and breach of the principles of representative democracy, institutional balance and sound administration (partly in the alternative); the fifth – failure to meet the conditions under which Article 78(3) TFEU is applicable (in the alternative); and the sixth – breach of the principle of proportionality.⁹

In support of its action in Case C-647/15, Hungary relied on ten pleas in law. The first and second pleas allege infringement of Article 78(3) TFEU, since, in Hungary's submission, that provision does not afford the Council an appropriate legal basis for the adoption of measures which entail a binding exception to the provisions of a legislative act, which are applicable for a period of 24 months, or indeed of 36 months in some cases, and the effects of which extend beyond that period, something which, in its view, is incompatible with the concept of 'provisional measures'. The third to sixth pleas allege breach of essential procedural requirements: when adopting the contested decision, the Council infringed Article 293(1) TFEU by departing from the Commission's initial proposal without a unanimous vote (third plea); the contested decision contains a derogation from the provisions of a legislative act and is itself a legislative act by virtue of its content, so that, even if it were decided that the contested decision could properly have been adopted on the basis of Article 78(3) TFEU, it would have nonetheless been necessary, at the time of its adoption, to respect the right of the national parliaments to issue an opinion on legislative acts, laid down in Protocol (No. 1) and Protocol (No. 2) (fourth plea); after consulting the Parliament, the Council substantially amended the text of the proposal without consulting the Parliament again on the matter (fifth plea); and when the Council adopted the contested decision, the proposal for a decision was not available in all the language versions corresponding to the official languages of the European Union (sixth plea). The seventh plea alleges infringement of Article 68 TFEU and of the conclusions of the European Council of 25-26.06.2015. The eighth plea alleges breach of the principles of legal certainty and normative clarity, since on a number of points it is, in Hungary's view, unclear how the contested decision should be applied or how its provisions interrelate with those of the Dublin III Regulation. The ninth plea alleges breach of the principles of necessity and proportionality, in that, as Hungary is no longer among the beneficiary

⁹ Para. 38 of the judgment.

Member States, there is no reason why the contested decision should provide for the relocation of 120,000 persons seeking international protection. And the tenth plea, which was submitted in the alternative, alleges breach of the principle of proportionality and infringement of Article 78(3) TFEU so far as Hungary is concerned, since the contested decision attributes a mandatory quota to it as a host Member State, even though it is recognised that a large number of migrants have entered Hungary irregularly and have made applications for international protection there.¹⁰

The CJEU chose to join the cases and – since it is the legal basis of a measure that determines the procedure to be followed in adopting that measure¹¹ – separated the pleas into three categories. The CJEU decided to examine: first, the pleas alleging that Article 78(3) TFEU does not provide a proper legal basis for the contested decision¹², secondly, the pleas alleging that procedural errors were made when the decision was adopted and that such errors amounted to breaches of essential procedural requirements¹³ and, thirdly, the substantive pleas¹⁴.

3. Judgement of the Court of Justice

By the judgement in joined cases C-643/15 and C-647/15, the Court of Justice rejected all arguments and dismissed the actions.

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

In the first instance, the Court rejected the argument that Article 78(3) TFEU is to be interpreted to the effect that acts adopted under it must be classified as ‘legislative acts’ on the ground that the requirement for consultation of the Parliament which that provision imposes constitutes a form of participation of that institution within the meaning

¹⁰ Paras. 39-45 of the judgment.

¹¹ See also *Parliament v. Council*, C-363/14, Judgment of 10.09.2015, EU:C:2015:579, para. 17.

¹² Paras. 46-135 of the judgement.

¹³ Paras. 136-205 of the judgement.

¹⁴ Paras. 206-345 of the judgement.

of Article 289(2) TFEU, with the consequence that such acts must follow the special legislative procedure. In that regard, the Court certified that the legislative procedure may be put in use only in cases which are clearly stated in the Treaty. Article 78(3) TFEU does not include any clear cross-reference to the legislative procedure; thus, the contested decision might have been accepted in a non-legislative procedure and, as a consequence, constitutes a non-legislative EU act.¹⁵

After further analysis, the Court ruled that Article 78(3) TFEU enables the institutions of the Union to take temporary measures which will enable fast and effective reactions to an exceptional situation which is characterised by a sudden inflow of nationals of third countries¹⁶. Such measures may also introduce exceptions to the regulations of legislative acts, on conditions that the range of such exceptions will be strictly stated in terms of both objective and time and neither the aim nor the effect of these measures will include permanent supersession or a change of the regulations of legislative acts.¹⁷ The Court emphasised that the indicated requirements were complied with in the examined case.

The Court also stated that since the contested decision is a non-legislative act, its acceptance is not subject to conditions connected particularly with the participation in the rulemaking process of the European Parliament and State parliaments, as well as ensuring the public nature of the discussion and voting in the Council.¹⁸

Afterwards, the Court related to the plea concerning the lack of the temporary nature of the contested decision. The Court noticed that the temporal range of using the contested decision (covering the period from 25.09.2015 to 26.09.2017) was clearly stated, thus its temporary nature may not be questioned.¹⁹

The Court also confounded an accusation concerning non-compliance with the condition mentioned in Article 78(3) TFEU of a “sudden” inflow of nationals of third countries. The Court ascertained in that regard that an inflow of nationals of third countries on such a scale as to be unforeseeable may be classified as “sudden” for the purposes of Article 78(3) TFEU, even though it takes place in the context of a migration crisis spanning a number

¹⁵ Paras. 57-67 of the judgement.

¹⁶ Paras. 69-74 of the judgment.

¹⁷ Para. 80 of the judgment.

¹⁸ Para. 83 in connection with para. 55 and paras. 191-192 of the judgment.

¹⁹ Paras. 93-100 of the judgment.

of years, inasmuch as it makes the normal functioning of the EU common asylum system impossible.²⁰

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

In relations to the plea concerning contradiction between the contested decision and the European Council's conclusions of 25 and 26.6.2015, the Court stated that the mentioned conclusions, according to which Member States should decide "by consensus" about the division of people who obviously need international protection, taking into consideration specific situations of Member States, did not cause an obstacle towards the acceptance of the contested decision. These conclusions refer to a different relocation project aimed at – answering the migratory inflow established in the first six months of 2015 – dividing the first 40,000 people among the Member States. This project involved the 2015/1523 decision (accepted by consensus) and not the considered 2015/1601²¹ decision. The Court added that, on the one hand, the possible "political" influence of the European Council may not become the basis for the Court to state the invalidity of the contested decision. On the other hand, the rule of institutional balance does not allow the European Council to change the rules stated in the treaties concerning voting in the Council.²²

Regarding further pleas, the Court stated that there was no procedural breach relying on the lack of proper consultation with the Parliament in the context of changing the original motion of the Committee. The Court ruled that even though the original motion of the Committee concerning the contested decision was changed vitally, mostly in order to consult the Hungarian motion to exclude them from the list of Member States using the relocation mechanism, the European Parliament (as follows from the contents of the European Parliament President) was rightly informed about the changes before accepting the resolution of 17.09.2015. The Court also emphasised that the remaining changes introduced to the original motion of the Committee did not concern the essence of the motion.²³

²⁰ Para. 114 of the judgment.

²¹ Paras. 143-144 of the judgment.

²² Paras. 145 and 148 of the judgment.

²³ Paras. 163-169 of the judgment.

The Court also claimed that the Council was not obliged to accept the contested decision unanimously, because the Committee changed its motion in the process of accepting the act.²⁴ The Court emphasised that due to the exceptional situation and flexibility of the process of accepting the act²⁵, the change of motion done by the Committee does not necessarily have to take a written form, even though by accepting the above-mentioned changes, it has parted from the text of the original Committee motion. The Court acknowledged that in the present case, the Commission exercised its power under Article 293(2) TFEU to amend a proposal, since its participation in the process for adopting the contested decision clearly shows that the amended proposal was approved on behalf of the Commission by two of its Members who were authorised by the College of Commissioners to adopt the amendments concerned.²⁶

3.3. Pleas related to the substance of the decision

The Court ruled that, in the subject case, there was no breach of proportionality rule, and the relocation mechanism predicted in the contested decision 2015/1601 does not constitute a mean that would be inappropriate for its realisation in a clear way. The Court noticed that the importance of this decision may not depend on further assessments of its effectiveness. In a situation when a Union's employer is forced to estimate the future effects of a given regulation, its assessment may be undermined only when, in light of information the employer had while a regulation was being given, it proves to be completely false. However, the Council, on the basis of a detailed assessment of the statistical data it had at that time, made an analysis of a potential influence of the mean on the considered exceptional case. In this context, the Council, at the time of making a decision, could not predict additional means which would influence the low number of performed relocations. The Court finally stated that the Council did not make any obvious mistake in the assessment, acknowledging that the aim realised by the contested decision could not have been reached by using less restrictive means. According to the Court,

²⁴ Para. 178 of the judgment.

²⁵ See also *Germany v. Council*, C-280/93, Judgment of 5.10.1994, EU:C:1994:367, para. 36.

²⁶ Paras. 180-187 of the judgment.

the Council did not go beyond the wide recognition margin vested in it, claiming that the mechanism given in decision 2015/1523 predicting the relocation of 40,000 people, on a voluntary basis, was not sufficient in light of the unprecedented inflow of migration that happened in July and August 2015.²⁷

4. Comment

The Court of Justice pointed out a few particular issues in the commented judgement – both of which were of a procedural and material character. In the first group, the Court confirmed the rules of qualifying acts as legislative and non-legislative (Article 289(3) TFEU) and gave its opinion on the case of binding the Council with the provisions accepted by the European Council (Article 68 TEU), the change of the Commission’s motion during an ongoing procedure, the requirements of a new consultation with the European Parliament and the demand for unanimous voting in the Council (Article 293 TFEU).

It can be stated, that the Court also made a proper clarification of Article 78(3) TFEU, concerning issues like “interim measures” or “sudden inflow”. The inclusion in Article 78(3) TFEU of the so-called provision of exceptional situations in the face of the ongoing migratory crisis in the European Union has (besides Article 78(1) TFEU) a particular meaning, as it became the basis for crucial actions in terms of a common policy of the European Union concerning asylum, complementary security and temporary security.

The set of beliefs of the Court of Justice presented in an extensive justification to the verdict in joined cases C-643/15 and C-647/15 deserves approval and recognition for being especially significant for future interpretation, usage and also control over the respecting Union’s legal regulations within a common asylum system.

In relations to the division of Union’s legal acts into legislative and non-legislative, the Tribunal emphasised that the procedure which was used has a definitive meaning – a purely formal criterium was assumed

²⁷ Paras. 212-224, 235-261, 267-278 of the judgment.

here.²⁸ In Article 289(3) TFEU, we find a definition of “legislative acts” as “legal acts accepted within legislative procedure” (ordinary or special). As provided in Article 289(1) TFEU, it is the joint adoption of a legal act by the Parliament and the Council on a proposal from the Commission that characterises the ordinary legislative procedure. In Article 289(2) TFEU, a special legislative procedure is a procedure which ‘in the specific cases provided for by the Treaties’ consists of ‘the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament’.²⁹

The purely formal qualifying criterium for a legislative or non-legislative act assumed by the creators of the treaty (the used procedure) generates some second thoughts concerning the unity or the accuracy of the division. The used procedure may be considered legislative only when the Treaty’s article, which is its basis, clearly states this. On the contrary – some procedures, especially those which are similar to the special legislative procedure, without a clear statement in the Treaty that it is the case of a special legislative procedure, need to be considered as non-legislative ones. It seems that the standpoint presented by Advocate General Yves Bot is of significant importance. He stated that:

(...) on the other hand, by opting for an exclusively formal approach to the legislative act, the framers of the Treaty made it possible to identify with certainty the legal bases that authorise the institutions of the Union to adopt legislative acts. The incompleteness, indeed, according to some, the evident inconsistency of the classification made by the framers of the Treaty must thus be seen as the consequence of their intention to afford certain acts the status of legislative act and to deny that status to other acts.³⁰

²⁸ Paras. 58–66 of the judgment. See also *Parliament v. Council*, C-363/14, Judgment of 10.09.2015, EU:C:2015:579, para. 17, or inter alia A. Doliwa-Klepcka, *Stanowienie aktów ustawodawczych w Unii Europejskiej* [The procedure for adopting legislative acts in the EU], Warszawa – Białystok 2014, p. 12; D. Ritleng, *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’, Brussels 2016, p. 155; P. Craig, G. De Búrca, *EU Law – Text, Cases and Materials*, 6th ed., Oxford University Press, Oxford 2015, p. 114; K. Lenaerts, P. van Nuffel, *European Union Law*, 3rd ed., Sweet and Maxwell, London 2011, p. 677.

²⁹ See D. Ritleng, *op. cit.*, p. 159.

³⁰ Para. 70 of the Advocate General’s opinion, *ECLI:EU:C:2017:618*. See also the *Parliament v. Council*, C-130/10, Judgment of 19.07.2012, EU:C:2012:472, para. 80.

The Court also referred to a general issue to bind the Council with the content of a provision of the European Council. In its assessment, the Court invoked the content of the key Article 13(2) TEU – “each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them”. This is the core of the principle of institutional balance, which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions³¹. The Court emphasised that the institutional balance rule does not allow the European Council to change voting rules within the Council.³² Only Treaties – in special cases – may authorise institutions to change the established decisional procedure.³³

Referring to another general procedural problem – the changes of the Commission’s motion by the Council – the Court reminded that there are two important treaty regulations here. Article 293(1) TFEU provides that where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously, except in the cases referred to in the provisions of the FEU Treaty which are mentioned in Article 293(1) and which are of no relevance in the present case. And Article 293(2) TFEU states that as long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of an EU act.³⁴ Therefore, if the Commission (under Article 293(2) TFEU) amends its proposal during the procedure of adoption of an EU act, the Council is not obliged to unanimity (mentioned in Article 293(1) TFEU). The Court did not introduce any revolutionary approach, but it referred to its previous judgement emphasising that a change of the Commission’s motion does not have to take a written form. The Court emphasised that the change of the Commission’s motion is a part of an ongoing procedure of accepting

³¹ See e.g. *Parliament v. Council*, C-70/88, Judgment of 22.05.1990, EU:C:1990:217, para. 22; *Parliament v. Council*, C-133/06, Judgment of the Court (Grand Chamber) of 6.05.2008, EU:C:2008:257, para. 57; *Council v. Commission*, C-409/13, Judgment of the Court (Grand Chamber) of 14.4.2015, EU:C:2015:217, para. 64.

³² Para. 148 of the judgment.

³³ See *Parliament v. Council*, C-363/14, Judgment of 10.09.2015, EU:C:2015:579, para. 43.

³⁴ See *Council v. Commission*, C-409/13, Judgment of 14.4.2015, EU:C:2015:217, paras. 71-73.

an act, which is characterised by some flexibility, necessary for achieving a convergence of views between the institutions.³⁵

The Court also paid attention in its judgement to the need of another consultancy with the European Parliament in the case of a crucial change of the original motion of the Commission³⁶. The Court reminded here that in cases when the Treaty needs it, regular consultations with the Parliament are a key procedural requirement, violation of which leads to the act being overridden. The participation of the Parliament is an important element of institutional balance and also an expression of the democratic rule of indirect participation of citizens in the process of creating the law. The Court reminded that, according to its previous judgement:

(...) the obligation to consult the Parliament in the decision-making procedure in the cases provided for by the Treaty means that the 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, except in cases in which the amendments substantially correspond to the wishes of the Parliament itself.³⁷

Apart from the interpretation of the mentioned procedural elements, the material explanation of concepts mentioned in Article 78(3)TFEU has particular meaning. The interpretation of “interim measures” is key here. The Court declared for accepting a wide explanation of this concept, referring in its judgement to the aim and explanation of the system. This was in contrast with the “interim measures” (adopted on the basis of Article 78(3) TFEU), which are supposed to solve the problems as fast as possible under exception circumstances, to the measures of permanent and general character (adopted on the basis of Article 78(1) TFEU), which aim at introducing structural solutions.³⁸ Time has an essential meaning for differentiating interim measures from permanent ones. This is why we need to divide the opinion of the Court stating that the restrictive interpretation of the concept of “provisional measures” in Article 78(3) TFEU, to the effect

³⁵ Paras. 177-179 of the judgment. See also *Germany v. Council*, C-280/93, Judgment of 5.10.1994, EU:C:1994:367, para. 36.

³⁶ Para. 160 of the judgment.

³⁷ Para. 161 of the judgment. See, for example, *Eurotunnel and Others*, C-408/95, Judgment of 11.11.1997, EU:C:1997:532, para. 46; *RPO*, C-390/15, Judgement of 7.03.2017, EU:C:2017:174, para. 26.

³⁸ Para. 73 of the judgment.

that it permits only the adoption of accompanying measures which supplement the legislative acts adopted on the basis of Article 78(2) TFEU but not the adoption of measures derogating from such acts, would significantly reduce its effectiveness (*effect utile*).³⁹ The possibility to accept interim measures refers to exceptional situations, impossible to predict, requiring fast reactions, thus, as general rule, not included in binding legislative acts. Accepting the introduction of aberrations from regulations of legislative acts by interim measures showed their acceptable range. The Court's assessment that the aim of an interim measure has to enable a rapid and efficient reaction to an exceptional situation is undisputed. (The aberrations from the rules set in legislative acts may be limited only to this). Besides, neither the object nor the effect of the provisional measures is the replacement or permanent amendment of provisions of legislative acts. It is necessary to achieve the requirement of their material and temporal scope.⁴⁰ The Court emphasised that the "temporality" of means requirement mentioned in Article 78(3) TFEU was not connected with any particular time limitation. The Court fairly emphasised that determining the length of the usage period for using exceptional means is left to be recognized by the Council– depending on the circumstances and the situation character.⁴¹

A similar assessment should be carried out with the defining of prerogatives concerning the usage of Article 78(3) TFEU – “an emergency situation characterised by a sudden inflow of nationals of third countries”. According to the Court:

(...) an inflow of nationals of third countries on such a scale as to be unforeseeable may be classified as ‘sudden’ for the purposes of Article 78(3) TFEU, even though it takes place in the context of a migration crisis spanning a number of years, inasmuch as it makes the normal functioning of the EU common asylum system impossible.⁴²

The Court reminded that the Council commands a wide range of recognition in this area concerning assessment and political choice.⁴³

³⁹ Para. 75 of the judgment.

⁴⁰ Para. 79 of the judgment.

⁴¹ Para. 92 of the judgment.

⁴² Para. 114 of the judgment.

⁴³ Para. 123-124 of the judgment. See also *Poland v. Parliament and Council*, C-358/14, Judgment of 4.05.2016, EU:C:2016:323, para. 79.

5. Concluding Remarks

A wide interpretation of terms concerning the spreading migratory crisis of 2015 included in Article 78(3) TFEU is distinctive for the commented judgement. The Court had emphasised, many times, the range of recognition that was acknowledged by the Council concerning the choice of accepted instruments and actions taken.

It is highlighting that despite the fact that the Court defined and elaborated the contended terms of Article 78(3) TFEU, the Court still approaches the problem in the light of the rule of solidarity between Member States. The key character of solidarity between the Member States when one is faced with an emergency situation has been emphasised many times, as well as in the opinion of Advocate General Y. Bot, stressing that “solidarity is both a pillar and, at the same time, a guiding principle of the European Union’s policies on border checks, asylum and immigration”.⁴⁴

By confirming the legitimacy of the contested 2015/1601 decision of joined cases C-643/15 and C-647/15, the Court, in its judgement, also confirmed and solidified the manner of interpretation and usage of Article 78(3) TFEU by the Union’s institutions. This has particular meaning for the future, as a permanent solution of the migratory crisis does not seem to be possible to reach any time soon. It should also be noted that references to the broad discretion that the Council must be allowed may mean that Art. 78(3) TFEU will not be often used by the Member States in practice.

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⁴⁴ See paras. 16-24 of the Advocate General’s opinion.