The strange procedural fate of the actions for annulment of the EU relocation scheme*

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1. Introduction

In early December 2015, Slovakia and Hungary filed to the European Court of Justice (ECJ) two separate actions for annulment (case C-643/15 and case C-647/15), challenging the legality of Decision No 1601/2015 ("the contested decision") adopted on 22 September 2015 by the Council of the EU. This act followed a first decision (Decision No 2015/1523 of 14 September 2015, establishing an infra-EU relocation scheme for 40.000 asylum seekers in favour of Greece and Italy) and added up other 120.000 seats for relocation. For a discussion of the relocation scheme, see M. Di Filippo, *Le misure sulla ricollocazione dei richiedenti asilo adottate dall'Unione europea nel 2015: considerazioni critiche e prospettive*, in *Diritto, immigrazione, cittadinanza*, 2015, 33; S.F. Nicolosi, *Emerging challenges of the temporary relocation measures under European Union asylum law*, in *European Law Review*, 2016, 338.

Contrary to the first decision, the contested decision was adopted with a qualified majority vote and the opposition of the applicants plus the Czech Republic and Romania. Some authors already discussed the legal arguments against the validity of the challenged EU measure, anticipated through various sources and later summarised on the ECJ website (see Peers, Vikarska, Groenendijk & Nagy, Varju & Czina). Here the pleas on the merits will not be discussed: rather, some remarks will be devoted to the procedural behaviour of the applicants, of the defendant (the Council of the EU), of the same ECJ, of the European Commission and of the other Member States. It is understood that the arguments that will be developed are based upon the few publicly available information (extracted from the website of the ECJ and from the OJEU), and upon other information courtesly provided by the Registry of the Court, by the European Commission and by the Italian Ministry of Foreign Affairs.

2. Maybe distraction, maybe forgetfulness: the suspension of the act and the expedited procedure

In order to situate the discussion, it must be remembered that the contested decision is a temporary and emergency measure, derogating to the normal functioning of the Dublin III Regulation and destined to be implemented in a two-year period (expiring on 26 September 2017).

Thus, an applicant interested in not fulfilling the relevant obligations and convinced of the soundness of the pleas advanced should have a clear interest to have a quick answer by the ECJ and should try to obtain a provisional suspension of the effects of the act (under Article 278 TFEU and Article 160 of the ECJ Rules of Procedure). A merely dilatory tactic (trusting the slowness of the ECJ's proceedings) would not appear wise, because in the meanwhile the act must be implemented, and any refusal to do so amount to an infringement of EU law.

On the other side, the defendant should bear a strong interest in the speed definition of the dispute, given the limited time horizon of the contested act, its purported purpose (to give an immediate and tangible relief to two overburdened Member States in the midst of a dramatic crisis of the Schengen governance), and the need to avoid legal uncertainty. Legal uncertainty is always pernicious, but in this case is even more dangerous, because we are dealing with an act requiring the active cooperation of the generality of Member States and enforcing for the first time the emergency clause of Article 78 (3) TFEU in the context of a serious crisis of the EU governance of migratory flows.

Well, the ingenuous lawyer would expect to see the litigants arguing on the invocation of the expedited procedure, regulated in Articles 133 to 136 of the ECJ Rules of Procedure (and applicable "where the nature of the case requires that it be dealt with within a short time"), or on the recurrence of the requisites for ordering the provisional suspension of the act. Instead, to the knowledge of this author the applicants did not require such suspension and, even more surprisingly, nor they neither the Council asked the recourse to the expedited procedure. According to the latest figures available on the duration of proceedings, an average period of 20 months for the decision on a direct action is to be expected (see the ECJ Annual Report, ed. 2015, at 88). If the discussion on the validity of an emergency act expiring in 24 months and supporting the first ever EU-wide plan of relocation is not one

which requires a treatment within a short time according to Article 133 of the Rules of Procedure, then when such threshold will be ever satisfied? The same use of Article 78 (3) TFEU as legal basis of the contested act should suffice to demonstrate the urgency context.

The perplexity increases when we consider that the President of the Court could have taken the decision to apply the expedited procedure *ex officio*, where exceptional circumstances would justify this unusual step. In my opinion, this case fully satisfies such requisite, according to the factual and political context preceding and following the adoption of the contested act and to several Recitals of the same Decision. Suffice it to think to Recitals No 2 ("The recent crisis situation in the Mediterranean prompted the Union institutions to immediately acknowledge the exceptional migratory flows in that region and call for concrete measures of solidarity towards the frontline Member States"), No 10 ("Among the Member States witnessing situations of considerable pressure and in light of the recent tragic events in the Mediterranean, Italy and Greece in particular have experienced unprecedented flows of migrants, including applicants for international protection who are in clear need of international protection, arriving on their territories, generating significant pressure on their migration and asylum systems"), No 12 ("During recent months, the migratory pressure at the southern external land and sea borders has again sharply increased […] In view of the situation, further provisional measures to relieve the asylum pressure from Italy and Greece should be warranted"), and No 16 ("Due to the ongoing instability and conflicts in the immediate neighbourhood of Italy and Greece, and the repercussions in migratory flows on other Member States, it is very likely that a significant and increased pressure will continue to be put on their migration and asylum systems […] This demonstrates the critical need to show solidarity towards Italy and Greece and to complement the actions taken so far to support them with provisional measures in the area of asylum and migration").

Nonetheless, no signals came from Luxembourg on this point. With this in mind, it is hard to fully subscribe the view that the mentioned proceedings indirectly recognise and reinforce the legitimacy of the Court as a central EU institution and the rule of law within the supranational system of the EU (as suggested by Groenendijk and Nagy). More sadly, 2017

arrived and the website of the ECJ does not report any relevant advancement in the procedure. Taking into account the low rate of implementation of the contested act (and of Decision No 2015/1523) and the approaching of the expiration date of the relocation scheme, it would have been appropriate to see enforced the expedited procedure, upon request by the Council or under an *ex officio* decision of the President of the ECJ. It must be recognized that the expedited procedure in contentious cases is quite rare in the ECJ's practice (for some recent cases, see C-104/16 P, or C-286/12; for an interesting example in the General Court, see T-192/16, concerning the hotly debated "EU-Turkey" statement of 8 March 2016). Nevertheless, in this case an emergency situation is clearly present (as explained above) and additionally it should not be forgotten that a quicker settlement of the litigation would have helped to clarify several legal issues surrounding the implementation of the relocation scheme, which provide an easy alibi to some Member States for not complying with their duties. Even a hypothetical action for infringement against blatantly reluctant Member States (see for instance the reply of Mr Avramopoulos to parliamentary question No E-000290-16, or the statement of the Commission in its latest report on relocation and resettlement, at 8) would have to face an easy counter argument based upon the uncertain status of the contested decision.

3. Strategies of intervention in the proceedings

A last remark regards the stance of the Member States and of the Commission.

Only two of the four Member States outvoted by the majority challenged the legality of the Decision in the ECJ. The other two Member States (the Czech Republic and Romania) did not apparently follow this example. Instead, a State having voted in favour of the decision joined later on the applicants: in fact, Poland intervened to formally support the position of Hungary and Slovakia in their actions, as reported in the conclusions of the European Council of 20-21 October 2016 and of 15 December 2016. Although having voted in favour of an act does not preclude a subsequent initiative in an annulment proceeding, this behaviour is at least unusual. It is worth noting to note that Poland did not relocate a single

person from Greece and Italy as of 28 February 2017 (see here).

On the other hand, it must be highlighted that at least one of the most affected States (Italy) intervened in support of the Council. This circumstance must not surprise, in the light of the relevance of these judicial initiatives. It is not only the validity of the contested decision at stake: some fundamental principles of the EU legal order (rule of law, acceptance of majority vote, loyal cooperation, primacy of EU law, solidarity and burden sharing, adherence to asylum principles) are seriously questioned by the acting Member States with an unprecedented virulence. Within such a context, it is not wise to fade into the background, and the intervention of the Italian government is a positive step, which deserves appreciation. No public information is available on the possible intervention of other Member States, due to the strict confidentiality regime surrounding such details in this phase of the procedure (regime that appears to be excessive, in the modest opinion of this author). It is hoped that other governments intervened supporting the position of the Council.

In this framework, it is worth of appreciation the stance of the Commission too. The contested act was strongly supported by the Juncker's cabinet and found, at least in some aspects, a further development in the subsequent proposals for a permanent crisis relocation mechanism and for an overall revision of the Dublin regulation. Given the values at stake, it is no surprise that the Commission did not lose the occasion to intervene alongside the Council, being this a precious occasion to take a strong principled stance, and to reiterate the good reasons behind the relocation plan and the same concept of a robust version of solidarity in asylum and migration policy. Its presence in the mentioned proceedings is coherent with the official statements underlining the paramount importance of a good faith implementation of the Decision and announcing the possible launch of infringement procedures (see for instance, the Tenth report on relocation and resettlement, at 8).

4. A short (and provisional) conclusive remark

It is sad to realize that the first ever attempt to enforce Article 78 (3) TFEU has generated a fierce legal battle and a poor degree of implementation. A cold wind blows all around Europe: to my modest view, a good occasion for promptly reaffirming the primacy of the basic constitutional principles of the EU legal order has been lost, due to the non-use of the instrument of the expedited procedure.

Nevertheless, supposing that the two cases will be joined (as it is reasonable to expect), a judgement will come, and will surely be a landmark one, taking into account the issues at stake and the subjects participating to the proceedings. This judgement will be remembered – more than for its influence on some Member States during the two-year period of enforcement of the relocation scheme – for the indications that it will give to the EU institutions on the future of the CEAS and on the reform of the Dublin III regulation. In this problematic conjuncture for the integration process, the ECJ is called to play a decisive role for reaffirming the primacy of principles and of law over disruptive trends which are fuelled by some political actors.

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