



UDC 314.74"2015/2016":341.176(4-672EU)
Manuscript received: 22.06.2016.
Accepted for Publishing: 06.09.2016.
Original scientific paper

Serbian Political Thought
No. 2/2016,
Year VIII, Vol. 14
pp. 121-139

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Analysis of the EU Measures Adopted in Response to Migrant Crisis: Principle of Institutional Balance and Typology of Legal Acts in the EU Revisited²

Abstract

This article analyses measures that European Union adopted in response to migrant crisis, with a special emphasis on Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. As Slovakia and Hungary filed actions for annulment of this Decision before Court of Justice of the European Union, their claims are taken as a starting point for the analysis. Therefore, this Decision is analyzed in the framework of the principle of institutional balance and the typology of legal acts in the EU. After the presentation of principle of institutional balance, research is focused on relation between the Council and European Council and European Parliament in the process of adoption of this Decision. It is concluded that the sole possible encroach upon the principle of institutional balance can be found in the Council's neglect to reconsult the EP after the change in the initial content of the Decision (deletion of Hungary). As for the typology of acts in the EU, having in mind the process of evolution of the division between legislative and non-legislative acts, it is concluded that the main criteria for the differentiation between these two acts is the procedure in which the act is adopted and not its content, as Slovakia and Hungary claim.

Key words: Decision 2015/1601, principle of institutional balance, Council, European Parliament, typology of acts, Court of Justice of the European Union

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2 This paper is a result of the research project "Political Identity of Serbia in the Regional and Global Context" (reference number 179076), funded by the Ministry of Education, Science and Technological Development of the Republic of Serbia.

Introduction

Migrant crisis that the European Union (EU, Union) has been facing for more than a year now have instigated the EU to adopt new measures in order to address this challenge. The first set of the adopted measures includes instruments regarding the relocation and resettlement of people seeking international protection. The most relevant documents are two Council Decisions about the relocation and resettlement of 160 000 persons in total. The next step is the Commission proposal for the amendments to the “Dublin Regulation” paving the way for the so called third phase in the establishment of the Common European Asylum System.³

This article will be particularly focused on the analysis of one of the adopted measures - Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. Several concerns were raised after the adoption of this Decision, and two states - Slovakia and Hungary - even filed action for annulment of this Decision before the Court of Justice of the European Union (CJEU). Their claims included diverse legal basis for the annulment of the Decision, but of particular importance for this article will be claims about the disrespect of the principle of institutional balance in the EU and the claim about the wrongful determination of the type of legal act that was adopted. Even though they seem far apart, these two claims are connected. As Hofmann pointed out when analyzing the typology of acts in the context of Constitutional Treaty “[a] reform of the typology of acts will also almost automatically have effects to ... the ‘institutional balance’ between the Union’s institutions. The definition of the different forms of action, by definition of their reach and the applicable decision-making procedure, will have implications on the weight of each institution in the political process from rule making to rule implementation.” (Hofmann 2003: 4) Especially in this case, where the typology of the adopted act is in question, the respect of the principle of institutional balance is also at stake. Claims of Slovakia and Hungary suggest the strong linkage between the institutional balance and typology of acts in the EU as will be shown later in the text.

3 See: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 (recast), COM (2016) 270 final

In first part of the Article we will briefly present the Council Decisions 2015/1523 and 2015/1601, both regarding their procedure of adoption and substance. Special emphasis will be put to differentiate these two Decisions as well as to the reaction to the adoption of the second Decision. In the second part of the Article we will present the principle of institutional balance in the EU in general terms and then apply it to the circumstances of the adoption of the Decision 2015/1601. The third part will address the issue of typology of legal acts in the EU by presenting a short description of the historical circumstances in which this typology was introduced in the founding treaties and then by reviewing the typology of the Decision in question. Conclusions will be presented in the last part of the Article.

Measures Adopted in Response to Migrant Crisis

The current migrant crisis is so serious and of such an intensity that it triggered the first ever application of Article 78 (3) (Hofmann 2003: 4). It means that this migrant crisis is defined as an emergency situation requiring the adoption of provisional measures in order to help Member States faced with the sudden influx of nationals of third countries. This Article envisions the procedure that should be followed in the adoption of these measures: The Commission should give a proposal and the Council should adopt a relevant measure after consulting the European Parliament (EP, Parliament). In May 2015 Commission published legislative proposal for the establishment of “provisional measures in the area of international protection for the benefit of Italy and Greece in order to enable them to deal in an effective manner with the current significant inflow of third country nationals in their territories, putting their asylum systems under strain” (COM(2015) 286 final: 4). After consulting the Parliament, the Council adopted Decision 2015/1523 on September 14th 2015. The envisaged temporary solution was the relocation of those who seek international protection, from Greece and Italy to other Member States. The personal scope of application is limited to those applicants who a) lodge application for international protection in Italy or Greece and these states should have otherwise been responsible pursuant to the Dublin III criteria and b) are *prima facie* person in need of international protection.⁴ According to the Eurostat data from fourth

4 “2. Relocation pursuant to this Decision shall only be applied in respect of an applicant belonging to a nationality for which the proportion of decisions granting

quarter of 2015 these are citizens of the following states: Syria, Eritrea, Iraq, Central African Republic, Yemen, Burundi, Maldives, Equatorial Guinea, Swaziland, Dominica, Saint Vincent and Grenadine, Turkmenistan.⁵ As for the number of allocations it is settled that 40 000 persons in total will be relocated (24 000 applicants from Italy and 16 000 from Greece) to the territories of other Member States (Article 4). The acceptance of the allocated persons is to be done on voluntary basis – Member States should indicate the number of applicants who they can accept for relocation and any other relevant information. (Article 5 (2)) Those Member States “shall receive a lump sum of EUR 6 000 for each relocated person pursuant to this Decision” (Article 10). Finally, this measure is of temporary nature since it is applied until September 17th 2017 and is applicable to all applicants who are on the territory of Italy and Greece from August 15th 2015 (Article 13 (3)).

Faced with the new migratory pressure, and especially the formation of the Western Balkan route towards Hungary, Commission decided to submit another legislative proposal on September 9th 2015, this time regarding three states – Italy, Greece and Hungary. Main differences regarding the previous decision were: inclusion of Hungary in the system for the relief regarding the migratory pressures, increase in the number of persons to be allocated and mandatory distribution key for the relocation. Parliament approved the Commission proposal without making any amendments on September 17th 2015.

The Commission’s proposal was to relocate 120 000 applicants in these proportions: 15 600 from Italy, 50 400 from Greece and 54 000 from Hungary. Distribution key is based upon objective criteria: “a) the size of the population (40 % weighting), b) the total of the GDP (40 % weighting), c) the average number of asylum applications per one million inhabitants over the period 2010-2014 (10 % weighting), and d) the unemployment rate (10 % weighting).” (COM(2015) 451 final: 2) However, since Hungary did not consider itself to be a ‘frontline’ Member State and did not want to be included as the beneficiary of this re-

international protection among decisions taken at first instance on applications for international protection as referred to in Chapter III of Directive 2013/32/EU is, according to the latest available updated quarterly Union-wide average Eurostat data, 75 % or higher.”

5 See: <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do> However, these numbers vary. Compare with data in other quarters. In Q3 those were the citizens from following states: Central African Republic, Eritrea, Iraq, Yemen, Syria, Bahrain, Swaziland, and Trinidad and Tobago.

location scheme, the act that the Council adopted on September 22nd differed from the Commission's proposal.⁶ Council Decision 2015/1601 provided that the remaining 54 000 applicants will be, as of September 26th 2016 either a) relocated proportionally from Italy and Greece or b) relocated from another Member State which is confronted with the sudden inflow of third country nationals. The decision also envisaged the possibility that Member States in emergency situations may be suspended of the participation in the relocation (Article 9), as well as the "temporary safeguard clause" – that until December 26th 2015 Member State "may notify the Council and the Commission that it is temporarily unable to take part in the relocation process of up to 30 % of applicants allocated to it" (Article 4 (5)). This decision was adopted by a qualified majority vote – Slovakia, the Czech Republic, Romania and Hungary voted against it, and Finland abstained.

The opposition and abstention in voting prove that the Decision was not deprived of controversies and it became apparent from the outset that its implementation will be difficult. Difficulties were twofold: a) Directive was challenged before the Court of Justice of the EU (Slovakia and Hungary) and b) emergency and safeguard clauses were soon called upon (Sweden, Austria).⁷

On December 2nd Slovakia filed the action for annulment of the Directive 2015/1601⁸, and Hungary did the same the next day.⁹ However, it is important to note that "these actions do not have suspensive effect and the Member States thus remain obliged to relocate under the decision in question" (COM(2016) 165 final: 3). To some extent, claims of Slovakia and Hungary overlap, even though they are presented in a different manner. The outline of their positions is the following: by adopting the contested Decision the Council went beyond the conclusions reached by the European Council at its meeting on 25th and 26th June 2015; the

6 There is also a claim that Hungary did not accept this solution as it included the deployment of European Asylum Support Office and FRONTEX on its territory and a presentation to the Commission of the roadmap of the compliance with EU *acquis* in the area of asylum and migration. (Editorial Comments 2015: 1444)

7 Austria availed itself of the Article 4 (5) and by the Council Implementing Decision of March 10th 2016 „the relocation to Austria of 1 065 of the applicants allocated to that Member State under Decision (EU) 2015/1601 shall be suspended until 11 March 2017.” Sweden triggered the application of Article 9, the Commission submitted a proposal for the decision and the procedure is currently pending.

8 See: Case C-643/15.

9 ee: Case C-647/15.

legal basis for the adoption of such Decision is wrong – in the view of the content of the Decision it constitutes a legislative act while Article 78 (3) only provides for the adoption of non-legislative acts, therefore the right of national parliaments to participate in the process, as well as the right of EP to engage in the co-decision were not respected; even if the legal basis is correct, Article 293 (1) TFEU is breached since the Council did not act unanimously when departing from the Commission’s proposal and the EP was not properly consulted, since it was not consulted once again after a substantial change in the proposal (exclusion of Hungary from the beneficiary states); the Decision is contrary to the principle of proportionality. Hungary further claimed that “contested decision infringes the principles of legal certainty and legislative clarity, since it fails to explain various aspects of how its provisions are to be applied and what relation those provisions are to have to the provisions of Regulation No 604/2013” (Case C-647/15, Application) while Slovakia is of stance that the conditions for the application of Article 78 (3) (temporary nature of the measures and the existence of an emergency situation) are not fulfilled.

Even though we find all the above mentioned claims important, our analysis will focus on the claims that question the proper application of principle of institutional balance and those that challenge the proper qualification of legal act in question.

Principle of Institutional Balance

The principle of institutional balance is yet another design of the Court of Justice of the European Union; it cannot be found in the Treaties and therefore causes difficulties when it should be defined. On the other side, in order to be and to function as a genuine principle it should be understood and applied uniformly. The simplest definition of this principle is the following: “From a legal point of view, the principle of institutional balance is one manifestation of the rule that the institutions have to act within the limits of their competences.”¹⁰ (Jacqué 2004: 383)

10 ee also Case 70/88, *Parliament v. Council*, [1990] ECR I-2041, paras. 21–22. Jacqu e also finds that the principle of institutional balance can be analyzed from the political point of view and in that sense it can be “envisaged as a means of describing the way the relationship between the institutions is organized.” Ibidem. Smulders and Eisele define the principle in political sense “as a dynamic one that explains the relative

Defined in this way the principle is strongly related to the question of separation of power in the EU. Some authors even claim that when the CJEU first inaugurated it, in the *Meroni* case it represented a substitute for the principle of separation of powers (Jacqué 2004: 384). Others claim that both principles are relevant for the functioning of the EU, but that they operate on different levels¹¹ (Chamon 2015: 372-374). There are those who believe that the principle of separation of powers cannot be applied to a *polity* such is the EU and therefore these two notions are strictly separated (Chamon 2015: 372). This belief is often demonstrated by quoting the Vice-President of the Convention on the Future of Europe, Amato who stated that: “Montesquieu has never visited Brussels.” On the other hand, there are those who find that these conclusions stem from “false mental preconceptions ... that this principle [of separation of power] can only be ... effectuated by a strict division of legislative, executive and judicial powers exercised by specific institution...” (Ramirez 2013: 427).

Be that as it may, it seems that for our analysis more important relation is the one between the institutional balance and the principle of conferral. Even though the principle of institutional balance is formulated in the jurisprudence of the CJEU,¹² the expression of its substance can be found in the Treaties. Even though institutional balance is not directly mentioned as such,¹³ Article 13 (2) states that: “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.” For Chevallier-Govers this is just one aspect of the principle of conferral, the other being contained in Articles 4 (1), 5 (1) and (2) of the Treaty on EU. These two aspects – the horizontal one, regarding the relation between the institutions and the vertical one, regarding the relation of institutions and Member States – form a comprehensive principle of conferral of which the principle of institutional balance is only a part (Chevallier-Govers 2013: 557-559).

Both Slovakia’s and Hungary’s claim suggest that the principle of institutional balance was breached and that the Council in various ways

power positions of the EU institutions in respect to one another throughout the European integration process...”, (Smulders and Eisele 2012: 3)

11 However Chamon question whether institutional balance truly functions as a principle in the EU legal order. (Chamon 2015: 375-389)

12 For most important cases in this regard see: Jacqué, 2004: 384-387.

13 For Chevallier-Govers it is therefore unwritten principle and it is not constitutionalised. (Chevallier-Govers, 2013: 557)

encroached on the rights on European Council, European Parliament, Commission as well as national parliaments.

As for the claim that the Council did not act in accordance with conclusions of the European Council from the meeting of 25th and 26th June¹⁴ it is questionable whether these guidelines are relevant for the Decision in question. In fact, European Council conclusions are moot on 120 000 people to whom the Decision applies. Those conclusions regard only 60 000 people, of which 40 000 is to be relocated and 20 000 resettled. It is important to notice that these conclusions were reached only after the Commission already filed the legislative initiative for relocation of 40 000 asylum seekers (on May 27th) and after it gave recommendation for the European resettlement scheme – to resettle 20 000 people in need of international protection. (C(2015) 3560 final) The actions and numbers that appear in the European Council’s conclusion only restate what is already being done, on the Commission’s initiative. Maybe more appropriate than it would be to reconsider another document of the European Council – statement after the special meeting on April 23rd 2015. Then it was decided, *inter alia*, to “increase emergency aid to frontline Member States and consider options for organising emergency relocation between all Member States *on a voluntary basis*” (emphasis added) and to “set up a first *voluntary* pilot project on resettlement across the EU, offering places to persons qualifying for protection.” (emphasis added) (Special meeting of the European Council, 23 April 2015 – statement) What could seem contrary to the Decision 2015/1601 is the notion “voluntary”. Since this Decision provide for mandatory relocation scheme, it can seem at odds with the said statement. On the other hand, European Council seem to have abandoned the “voluntary basis” criteria in its conclusions of 25-26th June, since it stated that all Member States (without prejudice to the specific situation of the United Kingdom, Ireland and Denmark) need to participate in the allocation and that they need to agree on the distribution of these persons. Taken the two statements of the European Council together, it does not seem that the Council decision is contrary to will of the European Council.

However, we find that the real question at stake here is the tension that may exist between the agenda-setting role of the European Council

¹⁴ Slovakian claim does not explicitly state which conclusion of the European Council are in question, but it can be concluded that those are the same conclusions that Hungary calls upon.

and the Commission, and in fact real institutional balance that might be distorted is the one between Commission and European Council. While through the history of European Integration Commission was seen as motor of integration and relevant institution to set the agenda, with the steady institutionalization of the European Council things have changed. It is often debated what is the relation between the Commission and the European Council regarding the agenda-setting (Bocquillon and Dobbels 2013; Allerkamp 2010). For the first time Lisbon treaty defined functions of the European Council which included providing the “necessary impetus for the development [of the Union]” and definition “of the general political directions and priorities thereof.” (Article 15 (1) TEU) However, TEU explicitly excludes legislative functions from the ambit of European Council’s action. Namely, this is the dividing line between the Commission’s and European Council’s functions (Chalmers, Davies and Monti 2014: 90; Bocquillon and Dobbels 2013: 21). Commission is the EU institution that has almost exclusive right to legislative initiative: “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.” (Article 17 (2) TEU) In the case of the adoption of the contested Decision, the relevant Article 78 (3) envisaged a procedure in which the Commission should propose adequate measure.

In line with the Article 17 (1) TEU, to “promote the general interest of the Union and take appropriate initiatives to that end” on May 13th 2015 the Commission presented the European Agenda for Migration (COM(2015) 240 final). In fact that was the relevant document that guided her in further steps to be taken for the “swift and determined action in response to the human tragedy in the whole of the Mediterranean” (COM(2015) 240 final: 3). In the Agenda it was stated that the Article 78 (3) will be triggered and that the temporary distribution scheme for persons in clear need of international protection will be proposed. Also it was envisaged that the Commission will give Recommendation to resettle 20 000 people in need of international protection in all Member States based on the distribution criteria enlisted in the Annex of the Agenda. Commission was of the opinion that “[t]he European Council statement of 23 April 2015 and the European Parliament Resolution a few days later, illustrated the consensus for rapid action to save lives and to step up EU action” (COM(2015) 240 final: 3). Having all said in mind it can be concluded that the Commission in fact primarily acted based on its own motion and not on the impetus of the European Council.

Lastly, the question may be raised whether this Decision need to be in conformity with any of the European Council's decisions having in mind that it is adopted based on Article 78 (3). Special feature of this article is that it entails measures adopted as a reaction to a special emergency situation – characterised by a sudden inflow of nationals of third countries. In that case, it would be impossible to expect that the guidelines of the European Council on the issue exist by all means when taking into account the frequency of the encounters of the members of the European Council. Even if some guidelines of the European Council exist it can be expected that they do not reflect the real position of the European Council on the matter, having in mind the extraordinary nature of the situation.

Another issue related to the institutional balance in the Slovakia's and Hungary's claims is that the Council should have acted unanimously, since it departed from the Commission's proposal. The main rule for voting in Council is that it "shall act by a qualified majority except where the Treaties provide otherwise" (Article 16 (3) TEU).¹⁵ In this case, since Article 78 (3) doesn't contain any rule about the system of voting in the Council, the Council should vote by qualified majority. However, another rule is at stake here. Article 293 (1) TFEU states that when the "Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously..." (Article 293 (1) TFEU). The explanation of this Article is that the unanimity in the Council is requested when "the Commission is unable to agree to the amendments made to its proposal." (Council of the European Union, Voting System) In this case, the Council did change the Commission's original proposal, because of the Hungary's objection to be included as a beneficiary state. However, it is not known whether Commission had any objections to this change. Having in mind that the need for the change was necessary and objective, it is safe to assume that the Commission did back it up, leaving the voting procedure required unchanged.

The most important and we would say the most obvious example of the disturbance to the institutional balance is reflected in the claims that European Parliament was not properly consulted. The procedure for the adoption of the Decision envisaged consultation of the EP, and EP gave its positive opinion promptly, only 8 days after the Commission's proposal. EP did not submit any amendments and on September 17th

¹⁵ Note however that in the area of common foreign and security policy decisions in the Council and European Council are to be taken unanimously. See Article 31 TEU.

adopted resolution in which it approved the Commission's proposal but also emphasized that the Council should notify it "if it intends to depart from the text approved by Parliament" as well as to "consult Parliament again if it intends to substantially amend the Commission proposal" (COM(2015)0451 – C8-0271/2015 – 2015/0209(NLE)). It was obvious that the EP was aware of the change that is about to be included regarding the Hungary. In the plenary debate the representative of the Council did point out that the Hungary will be excluded from the beneficiary system and he advised EP to take this into consideration when deciding upon the matter (European Parliament Press Release European Parliament Press Release, Plenary sessions, Immigration [17-09-2015 - 11:04]). However, from the text of the EP resolution it is obvious that this matter was not taken into consideration and EP explicitly asked the Council to consult it if the change is to occur. However, the Council did not consult EP once again and when adopting the decision it referred to the EP opinion of September 17th as the relevant one.

The role of the EP in the consultation procedure is important, even though the EP is involved in the decision-making to a lesser extent than in the ordinary legislative procedure and consent procedure. According to Chalmers, Davies and Monti "at the very least, Parliamentary hearings bring greater transparency to the process and provide an arena for actors, whose voice might otherwise have been excluded, to express their views" (Chalmers, Davies and Monti 2014: 125). Also, the CJEU in the *Roquette Frères* case expressed its view that: "The consultation ... is the means which allows the Parliament to play an actual part in the legislative process of the Community, such power represents an essential factor in the institutional balance intended by the Treaty" (ECLI:EU:C:1980:249). Another obligation stemming from jurisprudence of the CJEU is the obligation of the Council to reconsult the EP (Lenaerts and Van Nuffel 2011: 675). The Council cannot even say that "it was not required to reconsult that institution provided that ... the Council was sufficiently well informed as to the opinion of the Parliament on the essential points at issue" (ECLI:EU:C:1995:220). The only exceptions to the duty to consult the Parliament again are: a) "the amended proposal as a whole corresponds essentially to the original proposal" or b) "where the amendments made modified the proposal essentially in the manner indicated by the Parliament" (Lenaerts and Van Nuffel 2011: 675 and the case law cited). If the Council fails to consult EP in appropriate manner the act in question can be annulled. Having

in mind the circumstances of this case it is not likely that the conditions for exceptions are fulfilled. The amended proposal was changed in substance, not in some technical aspect, and therefore does not correspond to the original proposal. Also, EP did not indicate in which way to modify the proposal and it even stated that it should be consulted again if the change is to occur. However, some authors claim that the redress in this case is procedural – the Council will consult the EP once again, and the outcome will be the same, while the contested Decision will stay in force in the meantime (Peers, 2015; Vikarska 2015).

Typology of the Adopted Legal Acts

Large part of Slovakia's and Hungary's claim rely on the argument that the contested Decision is in fact legislative act in its substance and that it should have been adopted in the legislative procedure. Hungary claims that the Decision 2015/1601 is legislative act since it represents an exception in respect of Regulation No 604/2013. Hungary is of the view that exceptions to legislative acts can only be done by a legislative act. It follows that non-legislative act cannot change provisions of the legislative act. Slovakia did not go into detail when expressing this claim, it only stated that the Decision has the character of legislative act seen in the light of its content. This is a peculiar statement and it requires analysis of the typology of acts in the EU after the Lisbon Treaty.

The first question that needs to be addressed is the criteria upon which one legal act is to be characterised as legislative or non-legislative. This division arose during the work of the Convention on the Future of Europe in the ambit of Working Group (IX) on simplification of legislative procedures and instruments. During the hearing of the experts, Lenaerts expressed his view that “a distinction between legislation and non-legislation should be the starting point for any work on simplification of instruments” (Bering Liisberg 2006: 15-16). The idea was to make a difference between the legislative and executive functions of the EU institutions and to correlate best suited procedures for those two types of functions. The type of legal act will then depend on the procedure in which it was adopted. Final report of this working group contained the following division of acts: legislative acts, delegated regulations, implementing acts as well as non-legislative acts adopted on the basis of the Treaty (CONV 424/02: 9-13). Then, it should have been decided in each area what are the powers of the institution involved in the decision mak-

ing process and which procedure to assign. Three assumptions emerged: 1) all powers of the Council when acting in co-decision procedure (that was to be renamed to ordinary legislative procedure) are of legislative nature; 2) all the existing regulatory powers of the Commission were labeled as non-legislative; 3) when the Council is acting on its own it had to be decided in which capacity it adopted decisions: as a legislative or executive body? (Bering Liisberg 2006: 26-27) The difference to be made is based on criteria whether the decisions are political choices that include rules on essential elements (legislative acts) or the decisions are adopted to develop the already existing policy choices (executive acts) (Bering Liisberg 2006: 27).

Even though the Constitution for Europe was not adopted and Lisbon Treaty did not incorporate all of its solutions, the division between legislative and non-legislative acts remained (11177/1/07 REV 1, ANNEX I). Article 289 TFEU states that “legal acts adopted by legislative procedure shall constitute legislative acts.” By implication, acts adopted in non-legislative procedure shall constitute non-legislative acts. Therefore, it is obvious that the main and only criterion that the Lisbon Treaty uses to classify legal acts is based on procedure in which the act is adopted. Therefore, its content and qualitative characteristic does not matter when deciding about its typology. The procedure in which the act is adopted reflects the function of the institution that participates in its adoption – whether that institution acts in the capacity of legislator or executive body. Therefore, claims of Slovakia and Hungary about the nature of the contested Decision cannot be upheld since they are based on the inside-out line of argumentation. These two states firstly decide upon the type of the act, and then conclude in which procedure and according to which legal basis the act was to be adopted. This line of reasoning is directly opposed to the division of legal acts in the EU.

However, these claims indicate something else; they express concern about the decisions of treaty makers in assigning relevant decision making procedures in different areas. This issue can be summarized as follows: What criteria guided the treaty makers when they were deciding about the decision making procedures for the adoption of legal acts? According to the drafting history it is safe to presume that the relevant criterion was a preliminary clear-cut separation of powers between the EU institutions. “The Treaty rather employs a competence-based definition: a legislative act is a binding legal act based on a Treaty provision that is explicitly tagged as providing a legislative competence” (Bast 2012: 893). But some authors claim that the Lisbon Treaty concept of legislation “may also be called a voluntaristic concept reflecting the will

of the Treaty drafters” and they ask “how enlightened was that collective will?” (Bast 2012: 894) The main question that arises is whether the aforementioned presumptions about the capacity in which EU institutions act are correct. Therefore, authors usually point out that it is not clear whether the exclusion of Competition and Common Foreign and Security Policy from the ambit of areas in which the legislative acts are adopted was a justified decision (Bering Liisberg 2006: 27-32; Bast 2012: 896-897).

Also, it is not certain how the difference between Council’s legislative and executive powers is reflected in the procedure by which it adopts legal acts, since it is actually the same procedure, only named slightly different. (Dogan 2008: 647-648) As put by some authors: “The distinction [between the procedures] lies mainly in wording rather than any material dissimilarity between the procedures” (Curtin and Manucharayan 2015: 120). Namely, special legislative procedure (in which legislative acts are adopted) according to the Lisbon treaty can be in one of the following forms: Council consults EP and Council asks for the consent of the EP.¹⁶ Procedure by which Council is acting in the non-legislative procedure is again the consultation or consent of the EP. Because of this fact there are some authors who believe that in every case where the Council is acting with any involvement of the EP that should represent a legislative procedure with legislative acts stemming from it. However, this is not accepted view. According to the practice, the dividing line between the procedure in which the legislative and non-legislative acts are adopted is semantic one – when the Treaty explicitly refers to legislation procedure, the legislative acts are to be adopted; when the same procedure is followed but not marked as legislative, non-legislative acts are to be adopted. This solution is underpinned by the wording of Article 289 (2) TFEU which states that the special legislative procedure is to be used in the “specific cases provided for by the Treaties.” The Article 78 (3) based on which the contested Decision is adopted is a good example of this case. Even though the Council acts on the proposal of the Commission and after the consulting EP, the term “legislative” is not mentioned nowhere in the article, therefore, it is yet another confirmation that the Decision in question is non-legislative act.

¹⁶ It is also possible that EP adopts a legal act after obtaining the consent of the Council, but this case is not relevant in the context of this analysis.

Conclusion

Even though it can be questioned whether the EU is actually facing a crisis (Gilbert 2015: 531-535), as well as whether it would be more appropriate to call this crisis a refugee crisis, rather than a migrant one, it is inevitable to conclude that this situation required an adequate Union response.¹⁷ This article analyzed whether the part of that response was truly satisfactory, from the point of view of relevant legal requirements. Actions brought before the CJEU by Slovakia and Hungary are taken as a starting point for the analysis. After the analysis of the selected claims from Slovakia's and Hungary's action for annulment it can be concluded that the judgment of CJEU in these cases will be of great importance, both for the future development of the Common European Asylum System and for validity of future stance in this area by these two states. However, it does not seem likely that the judgment will present any new and groundbreaking conclusions.

CJEU already had a chance to address the issue of difference between legislative and non-legislative acts. In the *Inuit* case CJEU implicitly tackled this issue when deciding on the correct interpretation of the notion "regulatory act" from the Article 263 (4) of the Treaty on the Functioning of the European Union. In this case the question was whether only non-legislative act can be regulatory act or can legislative acts also be a regulatory act. CJEU only implicitly addressed the issue of the criteria based on which the distinction between legislative and non-legislative act is to be made, (ECLI:EU:T:2011:419, para 65) and it was Advocate-General Kokott in her Opinion to explicitly conclude that "distinction between legislative and non-legislative acts now has mainly procedural significance..." (ECLI:EU:C:2013:21, para 42.).

As for the principle of institutional balance, the Court has considerable case-law to build upon.¹⁸ However, it will be important to see how deep the Court will go into the analysis and which aspects of the possible breach of the principle of institutional balance will it include in its analysis.

However, it is important to notice that the claims of Slovakia and Hungary bring under spotlight issues that until now were mostly un-

¹⁷ For the overall assessment of the EU response to crisis see: Den Heijer, Rijpma and Spijkerboer 2016: 607-642.

¹⁸ For the relevant case law see: Jacqu , 2004: 384-387.

disputed. These actions question some basic concepts of the EU legal system, such as institutional balance and the typology of acts. Especially important will be the Court's ruling on the typology of legal acts, since this is a question that the CJEU did not tackle before and that is left to the diverging opinions in doctrine. For example, there are authors who claim that from the perspective of democratic legitimacy an act adopted by Council with mere consultation of the Parliament cannot be considered truly legislative¹⁹ (Curtin and Manucharyan 2015: 110, 122). Implicit claim of the Hungary is that exceptions to the legislative act can only be made by the act of the same nature. This question further opens the debate about the hierarchy of acts in the European Union. On the other side, the questions about the proper typology of acts are intertwined with the issue of institutional balance and some would say the separation of powers in the EU. A proper procedure for the adoption of proper legal acts needs to be undertaken by the proper institutions. But which one is a starting point for the assessment of the adequacy of the adopted measures? It seems that the answer is pretty straightforward, having in mind the state of law as it is now in the Union – procedure as envisaged in the Treaties is a benchmark. However, we need to wait for the CJEU to give its final ruling on the matter in accordance with his role to “ensure that in the interpretation and application of the Treaties the law is observed” (Article 19 TEU).

Bibliography

Books and Articles

- Allerkamp D.K. (2010) “Who Sets the Agenda? How the European Council and the Team Presidencies Are Undermining the Commission's Prerogative”, European Consortium for Political Research, Standing Group on the European Union.
- Bast J. (2012) “New categories of acts after the Lisbon reform: dynamics of parliamentarization in EU Law”, in: *Common Market Law Review*, Vol. 49, No. 3: pp. 885–928.
- Ramirez P. (2013) “Commentary on Article 10”, in: Blanke H.-J., Stelio M. (eds.) *The Treaty on European Union (TEU), A Commentary*. Springer.

19 Same authors also indicate that acts of general application adopted in the special legislative procedure in which EP is only consulted need to be regarded as regulatory act for the purposes of Article 263 (4) TFEU. Ibidem.

- Chevallier-Govers C. (2013) „Commentary on Article 13 TEU“, in: Blanke H-J., Stelio M. (eds.) *“The Treaty on European Union (TEU), A Commentary”*. Springer.
- Bocquillon P, Dobbels M. (2013) “An elephant on the 13th floor of the Berlaymont? European Council and Commission relations in legislative agenda setting”, in: *Journal of European Public Policy* Vol. 21, No. 1: pp. 20-38.
- Chalmers D., Davies G., Monti G. (2014) *“European Union Law”*, Cambridge University Press, Cambridge.
- Chamon M. (2015) “The Institutional Balance, an ill-fated principle of EU law?”, *European Public Law* 21, no 2: pp. 371-391.
- Curtin D., Manucharyan T. (2015) “Legal Acts and Hierarchy of Norms in EU Law”, in: Arnulf A., Chalmers D. (eds.), *“The Oxford Handbook of European Union Law”*, Oxford University Press.
- Den Heijer M., Rijpma J., Spijkerboer T. (2016) “Coercion, prohibition, and great expectations: the continuing failure of the Common European Asylum System” in: *Common Market Law Review*, Vol. 53. No. 3: pp. 607-642.
- Dougan M. (2008) “The Treaty of Lisbon 2007: winning minds, not hearts” in: *Common Market Law Review* Vol. 45, No. 3: pp. 617-703.
- Editorial Comments (2015) „From eurocrisis to asylum and migration crisis: Some legal and institutional considerations about the EU’s current struggles” in: *Common Market Law Review*, Vol. 52, No. 6: pp. 1437-1450.
- Gilbert G. (2015) “Why Europe Does Not Have a Refugee Crisis” in: *International Journal of Refugee Law*, Vol. 27, No. 4: pp. 531-535.
- Hofmann H. C. H. (2003) “A Critical Analysis of the new Typology of Acts in the Draft Treaty Establishing a Constitution for Europe“, *European Integration online Papers (EIoP)* Vol. 7, No. 9.
- Jacqué J.-P. (2004) “The Principle of Institutional Balance” in: *Common Market Law Review* Vol. 41, No. 2: pp. 383-391.
- Lenaerts K., Van Nuffel P. (2011) *“European Union Law”*, Sweet and Maxwell, London.
- Bering Liisberg J. (2006) “The EU Constitutional Treaty and its distinction between legislative and non-legislative acts – Oranges into apples?”, Jean Monnet Working Paper 01/06, New York University School of Law.
- Smulders B., Eisele K. (2012) “Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon”, College of Europe Research Paper in Law 04/2012.

Documents

COMMISSION RECOMMENDATION of 8.6.2015 on a European resettlement scheme, C (2015) 3560 final

- COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL, First report on relocation and resettlement, COM (2016) 165 final
- COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A EUROPEAN AGENDA ON MIGRATION, COM (2015) 240 final
- European Parliament legislative resolution of 17 September 2015 on the proposal for a Council decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary (COM (2015) 0451 – C8-0271/2015 – 2015/0209(NLE))
- Final report of Working Group IX on Simplification, CONV 424/02
- Mandate for the 2007 Intergovernmental Conference, Presidency Conclusions – Brussels, 21/22 June 2007, 11177/1/07 REV 1, ANNEX I
- Proposal for a COUNCIL DECISION establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM (2015) 286 final
- Proposal for a COUNCIL DECISION establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, COM (2015) 451 final
- Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 (recast), COM (2016) 270 final
- Statement of the European Council of 23rd April 2015
- European Parliament Press Release, Plenary sessions, Immigration [17-09-2015 - 11:04]

Treaties

- Treaty on European Union (TEU)
Treaty on the functioning of the European Union (TFEU)

Case law of the CJEU

- Case 138/79 *Roquette Frères v Council* [1980] ECR 3360, ECLI:EU:C:1980:249
- Case 70/88, *Parliament v. Council*, [1990] ECR I-2041
- Case 21/94 *European Parliament v Council* [1995] ECR I-1853, ECLI:EU:C:1995:220
- Case T-18/10, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, ECLI:EU:T:2011:419
- Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, ECLI:EU:C:2013:21

Case C-643/15

Case C-647/15

Internet sources

Council of the European Union, Voting system: <http://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/> [Accessed 17 June 2016].

Peers S. (2015) Relocation of Asylum-Seekers in the EU: Law and Policy. Available at: <http://eulawanalysis.blogspot.rs/2015/09/relocation-of-asylum-seekers-in-eu-law.html> [Accessed 17 June 2016].

Vikarska Z. (2015) The Slovak Challenge to the Asylum-Seekers' Relocation Decision: A Balancing Act. Available at: <http://eulawanalysis.blogspot.rs/2015/12/the-slovak-challenge-to-asylum-seekers.html>. [Accessed 17 June 2016].