Relocation as a Solution to the EU Migration Crisis

Abstract

Asylum law has traditionally been perceived as a sensitive area of state policy. For this very reason, for a long time, it was mostly excluded from the process of European integration. However, the development of the internal market and the removal of internal borders have ultimately necessitated some degree of harmonisation of asylum and migration policies amongst the Member States. Consequently, there have been several major increases in EU competence in the field of asylum and migration since the 1990s. This has eventually led to the creation of the Common European Asylum System (CEAS). Yet, a prolonged lack of political will to introduce a major reform of the CEAS and to duly implement the principle of solidarity has over the years resulted in serious systemic deficiencies. These defects, in particular the uneven distribution of responsibility between the Member States, have fully shown during the EU migration crisis. This far-reaching crisis has translated into several *ad hoc* solutions, including the use of an emergency EU competence to adopt temporary measures under Art. 78(3) SFEU (ex Art. 64(2) TEC), which had not been used until then. The adoption of two Council relocation decisions in September 2015 has raised numerous legal questions and has inspired two annulment actions brought before the Court of Justice (*Slovakia v Council*, C-643/15 and *Hungary v Council*, C-467/15).

The long-awaited opinion of the Advocate General and decision of the Court of Justice have presented a united legal stance on the arguments raised by the Applicant States. Still, they have not brought about any big surprises. Both the Advocate General and the Court of Justice interpreted Art. 78(3) TFEU in a rather extensive manner and concluded that the temporary relocation mechanism introduced by the challenged relocation decision is in compliance with EU primary law. On the one hand, the legal reasoning of the Court of Justice and of the Advocate General undoubtedly strengthens the *effet utile* of Art. 78(3) TFEU and the ability of the EU to respond swiftly to emergency situations. It also without any doubt promotes greater solidarity and burden-sharing in the EU common asylum policy. On the other hand, some conclusions of the Court of Justice, namely regarding the temporal nature of the relocation decisions and the possibility to amend a legislative act by means of a non-legislative act may be said to constitute an example of judicial activism. Some arguments and legitimate concerns raised by the applicants were refuted by the Court of Justice on the basis of rather brief argumentation and often with references to broad and vague legal principles. Yet, the confirmation of legality of the actions of the Council by the Court of Justice has significant consequences as regards democratic legitimacy and rule of law. It

should not be overly convenient for the Council to suspend key CEAS legislation, which has been adopted in standard democratic procedures. Greater solidarity and fairer burden-sharing in the common asylum policy should primarily and ultimately be based upon consensus established through the ordinary legislative procedure.

An example of an attempt to find such a consensus and to reform CEAS are two Commission's proposals of a permanent relocation mechanism from 2015 and 2016. The essence of the 2015 proposal is to incorporate into the Dublin III regulation a crisis relocation mechanism which would be activated by the Commission in times of crisis. Unfortunately, the proposal builds to a great extent on the temporary relocation mechanism and thus shares many of its flaws. Consequentially, if adopted, the crisis relocation mechanism would likely in practice face the same challenges with efficiency as the temporary relocation mechanism. Furthermore, just like the temporary relocation mechanism, the proposal retains the idea that the main part of responsibility belongs to the Member States of first entry and relocation is merely an extraordinary and temporary derogation from the normal state of affairs. This approach seems to be at odds with the principle of solidarity and fair sharing of responsibility mandated by Art. 80 TFEU.

The second Commission's proposal was presented in 2016 in the context of an overall CEAS reform and constitutes a considerable change in this approach. The main positive features of the proposal are its automatic trigger, wider personal and material scope and its focus on a more balanced allocation of responsibility between the Member States. Unlike its predecessors, the corrective relocation mechanism becomes automatically activated whenever the number of asylum applications in a certain Member State exceeds 150% of the Member State's quota (so-called "reference number"), which is being calculated in advance on the basis of objective criteria (i.e. the GDP and size of the population). Needless to say, even the 2016 proposal contains several flaws that may hamper its efficiency and smooth operation. The most notable deficiencies are the involuntary nature of the relocation (leaving no room for any preferences expressed by the asylum seekers) and the rather high bar for the automatic trigger inasmuch as a 100% requirement would achieve a much fairer allocation of responsibility than a 150% requirement.

A compelling solution to these issues was proposed by the LIBE committee of the European Parliament. The European Parliament suggests that in principle all asylum applications be distributed at EU level on the basis of predetermined reference numbers. Part of the proposal is that asylum seekers are given a limited choice between the least burdened Member States. Such a

solution is – at least in theory – capable of achieving the most balanced and fairest distribution of responsibility as required by Art. 80 TFEU. However, it is debatable how efficient the mechanism would be in practice if adopted. The foremost potential obstacles of its operation may be its bureaucratic complexity and possible resistance of the Member States of relocation and of the asylum seekers concerned. At any rate, to meet its objectives, any relocation mechanism will have to bear in mind not only its theoretical capability to allocate responsibility in a symmetrical way but necessarily also its ability to deliver the results in practice. The experience with the temporary relocation mechanism has shown that inefficient *ad hoc* solidarity measures are not suitable to correct the existing imbalances and to achieve genuine EU-wide solidarity and fair burden-sharing.

Keywords: CEAS, Dublin system, solidarity and fair sharing of responsibility, relocation, Art. 78 TFEU, non-legislative acts, derogation from a legislative act, proportionality