

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 31 October 2019 (1)

Case C-715/17

European Commission
v
Republic of Poland

Case C-718/17

European Commission
v
Republic of Hungary

Case C-719/17

European Commission
v
Czech Republic

(Area of freedom, security and justice — Failure of a Member State to fulfil obligations — Decisions (EU) 2015/1523 and (EU) 2015/1601 — Provisional measures in the field of international protection for the benefit of the Hellenic Republic and the Italian Republic — Emergency situation characterised by a sudden influx of third-country nationals into the territory of certain Member States — Relocation of such nationals to the territory of other Member States — Relocation procedure — Obligation for Member States to indicate at regular intervals, and at least every 3 months, the number of applicants who can quickly be relocated on their territory — Consequent obligations to carry out effective relocation — Article 72 TFEU and internal security)

1. Under normal circumstances, Regulation No 604/2013 ('the Dublin III Regulation')(2) governs the allocation, between Member States, of persons seeking international protection within the European Union. However, the continuing conflict in Syria led to a dramatic increase in the overall number of persons seeking such protection. (3) The hazardous sea journey across the Mediterranean was, and indeed remains, a major route for such persons (and other would-be refugees) to enter EU territory. (4) That path places enormous pressure on two EU Member States, Italy and Greece ('the frontline Member States'), both of which have long Mediterranean coastlines that are, in practical terms, impossible to police. Under normal circumstances those Member States would, in accordance with Article 13 of the Dublin III Regulation, (5) be responsible for examining applications for

international protection lodged by persons entering the European Union via their territory. (6) Both were overwhelmed by the sheer number of potential applicants. (7)

2. On 14 and 22 September 2015 respectively, the Council adopted two decisions introducing provisional measures for the benefit of the frontline Member States: Council Decision (EU) 2015/1523 (8) and Council Decision (EU) 2015/1601. (9) Both decisions used Article 78(3) TFEU as their legal basis. Those two decisions put in place detailed arrangements for the relocation of, respectively, 40 000 and 120 000 applicants for international protection. In what follows I shall refer to those two decisions together as ‘the Relocation Decisions’ and shall refer to them individually only where necessary.

3. A challenge to the legality of Decision 2015/1601 was unsuccessful. (10)

4. The Commission has now brought infringement proceedings against three Member States: Poland (Case C-715/17), Hungary (Case C-718/17) and the Czech Republic (Case C-719/17). I shall refer to these Member States collectively, where appropriate, as ‘the three defendant Member States’.

5. In these parallel proceedings, the Commission claims that the three defendant Member States have failed to comply, in the case of Poland and the Czech Republic, with Article 5(2) of both Decision 2015/1523 and Decision 2015/1601 (‘the pledging requirement’) or, in the case of Hungary, with Article 5(2) of Decision 2015/1601 alone, and with their consequent obligations under Articles 5(4) to (11) of those respective decisions, thereby failing to assist Italy and Greece by relocating applicants for international protection to their respective territories in order to proceed there to the substantive consideration of individual applications. (11)

6. Poland, Hungary and the Czech Republic contest the admissibility of the applications. In the alternative, they argue that they may rely on Article 72 TFEU as justification for not applying those decisions (whose validity they do *not* now contest), since EU measures taken under Title V of Part Three of the TFEU (of which Article 78 TFEU, the basis of the Relocation Decisions, forms part) ‘shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’.

7. The three cases were heard together and I shall deliver a joint Opinion covering the three sets of infringement proceedings.

Legal context

8. The Relocation Decisions cannot be viewed in isolation. They were taken against the background of a (highly complex) set of obligations and consequent arrangements in international law and EU law, together with the Court’s careful and detailed ruling in the judgment in *Slovak Republic and Hungary v Council*. I shall endeavour to set out that background as concisely as possible.

Universal Declaration of Human Rights

9. Article 14(1) of the Universal Declaration of Human Rights (12) provides in broad terms that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’. However, Article 14(2) thereof provides that ‘this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations’. (13)

The Geneva Convention

10. Article 1(A)(2) of the Convention Relating to the Status of Refugees (14) provides in its first paragraph that the term ‘refugee’ shall apply to any person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’. The second paragraph thereof adds the clarification that, for stateless persons, ‘that country’ refers to the country of habitual residence.

11. However, Article 1(F) provides that the Geneva Convention ‘shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations’.

Treaty on the European Union

12. Article 4(2) TEU provides that 'the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.

Treaty on the Functioning of the European Union

13. Article 72 TFEU forms part of Chapter 1, ('General Provisions'), within Title V of the TFEU ('Area of Freedom, Security and Justice'; 'the AFSJ'). It provides, succinctly, that 'this Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

14. Article 78(1) TFEU, part of Chapter 2, ('Policies on border checks, asylum and immigration'), requires the Union to 'develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with [the Geneva Convention] and other relevant treaties'. Article 78(2) TFEU provides the legislative basis for measures adopted to construct the common European asylum system ('the CEAS'). (15)

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

16. Article 80 TFEU provides that 'the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Wherever necessary, Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle'.

Charter of Fundamental Rights

17. Article 18 of the Charter of Fundamental Rights of the European Union (16) states that 'the right to asylum shall be guaranteed with due respect for the rules of [the Geneva Convention] and in accordance with the [TEU] and the [TFEU]'.

Relevant elements of the asylum acquis

18. Extensive EU secondary legislation establishes the CEAS and lays down uniform procedural and substantive rules that Member States are to apply when processing and determining applications for international protection.

The Qualifications Directive

19. Directive 2011/95 ('the Qualifications Directive') (17) contains uniform standards to be applied when determining whether third-country nationals or stateless persons are eligible for refugee status or subsidiary protection. It also contains provisions governing exclusion from such status and enabling a Member State to revoke, end or refuse to renew such status in certain circumstances.

20. Article 2(a) defines 'international protection' as 'refugee status and protection subsidiary status as defined in points (e) and (g)'; Article 2(d) defines 'refugee' in accordance with Article 1(A)(2), first paragraph of the Geneva Convention; Article 2(e) explains that "'refugee status" means the recognition by a Member State of a third-country national or a stateless person as a refugee'; and Article 2(f) provides a definition of 'persons eligible for subsidiary protection'.

21. Articles 2(h) and 2(i) respectively define an 'application for international protection' as 'a request made by a third-country national or stateless person ... who can be understood to seek refugee status or subsidiary protection status' and an 'applicant' as 'a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken'.

22. The Qualifications Directive next deals sequentially with the assessment of applications for international protection (Chapter II, Articles 4 to 8) and qualification for being a refugee (Chapter III, Articles 9 to 12). Article 12,

entitled 'Exclusion', provides a detailed list of mandatory grounds that exclude a third-country national or stateless person from eligibility for refugee status. For present purposes it is relevant to note the terms of Article 12(2), which lists reasons that correspond broadly to those contained in Article 1(F) of the Geneva Convention. (18)

23. Chapter IV, entitled 'Refugee status', contains a lengthy provision (Article 14) listing the circumstances in which refugee status, once granted, may nevertheless be terminated or not renewed. These include where the person should have been excluded from such status under Article 12 (Article 14(3)(a)), where earlier misrepresentation was decisive for granting the status (Article 14(3)(b)), where there are reasonable grounds for regarding the person concerned as 'a danger to the security of the Member State in which he or she is present' (Article 14(4)(a)) and where 'he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State' (Article 14(4)(b)). (19)

24. Within Chapter V, entitled 'Qualification for subsidiary protection', Article 17 contains broadly similar stipulations to those contained in Article 12 in respect of refugee status for excluding a third-country national or a stateless person from eligibility for subsidiary protection. The mandatory reasons for exclusion listed, in addition to those contained in Article 12 of the directive echoing Article 1(F) of the Geneva Convention, also include where '[an applicant] constitutes a danger to the community or to the security of the Member State in which he or she is present' (Article 17(1)(d)). Article 17(2) extends the scope of the mandatory exclusion provision to cover 'persons who incite or otherwise participate in the commission of the crimes or acts mentioned [in Article 17(1)]'. Additionally, Article 17(3) gives Member States the facility to exclude a third-country national or stateless person from eligibility for subsidiary protection 'if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of [Article 17(1)] which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes'.

25. Chapter VI, entitled 'Subsidiary protection status', contains in Article 19 a provision parallel to Article 14 in respect of refugee status, listing the circumstances in which subsidiary protection status, once granted, may nevertheless be terminated or not renewed. Such action is permitted, inter alia, if the person concerned could have been excluded (20) from such protection under Article 17(3) (Article 19(2)), or should have been or is excluded under Article 17(1) or (2) (Article 19(3)(a)) and where earlier misrepresentation was decisive for granting the status (Article 19(3)(b)).

26. Finally, within Chapter VII, entitled 'Content of international protection', Article 21 deals with protection from *refoulement*. Whilst requiring Member States to 'respect the principle of *non-refoulement* in accordance with their international obligations' (Article 21(1)), Article 21(2) expressly states that 'where not prohibited by the international obligations mentioned in [Article 21(1)], Member States may *refoule* a refugee, whether formally recognised or not, when (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State'.

The Procedures Directive

27. Directive 2013/32 ('the Procedures Directive') (21) establishes uniform procedures for processing requests for international protection. Recital 51 of that directive expressly states that 'in accordance with Article 72 of the [TFEU], [that] Directive does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

28. The definition of 'applicant' in Article 2(c) of that directive mirrors Article 2(i) of the Qualifications Directive.

29. Since unaccompanied minors figured amongst the numerous applicants to be relocated under the Relocation Decisions, mention should be made of Article 25(6)(a)(iii) and (b)(iii) of the Procedures Directive, which enables Member States to derogate from the otherwise applicable procedural rules if the unaccompanied minor in question 'may for serious reasons be considered a danger to the national security or public order of the Member State, or ... has been forcibly expelled for serious reasons of public security or public order under national law'. (22)

30. More generally, Article 31 of the Procedures Directive, entitled 'Examination procedure', expressly authorises a Member State to accelerate an examination procedure and/or to conduct that procedure at the border or in transit zones if, inter alia, 'the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or ... has been forcibly expelled for serious reasons of public security or public order under national law' (Article 31(8)(j)). (23)

The Reception Directive

31. Directive 2013/33 ('the Reception Directive') (24) complements the Procedures Directive by making detailed arrangements for the treatment ('the reception') of applicants for international protection whilst their applications are being processed. The definition of 'applicant' in Article 2(b) of that directive mirrors Article 2(i) of the Qualifications Directive.

32. Within Chapter II, entitled 'General provisions on reception conditions', Article 7(1) establishes the principle that applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. However, by way of derogation from that principle, Article 7(2) expressly permits Member States to 'decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection'.

33. Article 8 governs the detention of applicants. Article 8(2) states that 'when it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively'. The exhaustive list of permissible grounds for detention include, in Article 8(3)(e), 'when protection of national security or public order so requires'.

The Returns Directive

34. Finally, should an applicant who has not been granted international protection continue to stay illegally on the territory of a Member State, Directive 2008/115 ('the Returns Directive') (25) provides for uniform rules for removing and repatriating them.

35. Article 1 explains that the directive 'sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations'.

36. Article 2 states that the directive applies, subject to certain exceptions, (26) to third-country nationals staying illegally on the territory of a Member State.

37. Article 6(1) instructs Member States to issue a return decision (27) to any third-country national staying illegally on their territory. Where the third-country national's immediate departure is required for reasons of public policy or national security, such a decision may be issued even if that person holds a valid residence permit or other authorisation offering a right to stay issued by another Member State (Article 6(2)). Normally, an appropriate period of between 7 and 30 days is provided for voluntary departure (Article 7(1)), but 'if there is a risk of absconding, ... or if the person concerned poses a threat to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days' (Article 7(4)). As a last resort, coercive measures may be used for removal (Article 8(4)).

38. Article 11 deals with the imposition of an entry ban to accompany removal. Such a ban is mandatory if no period for voluntary departure has been granted (Article 11(1)(a)). The length of the entry ban 'shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security' (Article 11(2)). In specific circumstances, where such coercive treatment is proportionate and duly justified, Member States may keep a third-country national in detention for the purposes of removal (see the detailed stipulations of Article 15).

The Relocation Decisions

39. Before the Relocation Decisions were adopted, the European Union took action to address what had been recognised as a global migratory crisis. Following the Commission's Recommendation of 8 June 2015(28), 27 Member States (not including Hungary) together with Iceland, Liechtenstein, Norway and Switzerland ('the Dublin States') agreed on 20 July 2015 to resettle through multilateral and national schemes 22 504 displaced persons from outside the EU who were in clear need of international protection. (29) The resettlement places were distributed between Member States and the Dublin States according to the commitments set out in the Annex to the Resolution of 20 July 2015. (30)

40. On 14 and 22 September 2015 respectively, the Council adopted Decision 2015/1523 and Decision 2015/1601, using Article 78(3) TFEU as the legal basis to introduce provisional measures in order to deal with the emergency situation faced by the frontline Member States. Both decisions were adopted following a proposal from the Commission and after consulting with the European Parliament. Decision 2015/1523 was adopted by consensus, (31) whereas Decision 2015/1601 was adopted by qualified majority. (32) The wording of both the Relocation Decisions is not identical in all respects. Pursuant to Decision 2015/1523, 40 000 applicants for international protection were to be relocated from Italy and Greece in accordance with the agreement reached between the Member States through the Resolution of 20 July 2015. Under Decision 2015/1601, 120 000

applicants for international protection were to be relocated from Italy and Greece. The annexes to that decision set out the specific numbers of people who were to be reallocated to each Member State.

41. On 15 December 2015, the Commission adopted a Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey, proposing that participating States would admit persons displaced by the conflict in Syria who were in need of international protection and who were registered by the Turkish authorities prior to 29 November 2015. Such a scheme would be a flanking measure to the mutual commitments contained in the Joint Action Plan between the EU and Turkey of 29 November 2015. (33)

Decision 2015/1523

42. The following statements were made in the recitals to Decision 2015/1523: (34)

(1) According to 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 and after consulting the European Parliament, may adopt provisional measures for the benefit of the Member State(s) concerned.

(2) According to Article 80 TFEU, the policies of the Union in the area of border checks, asylum and immigration and their implementation are to be governed by the principle of solidarity and fair sharing of responsibility between the Member States, and Union acts adopted in this area are to contain appropriate measures to give effect to this principle.

(3) The recent crisis situation in the Mediterranean prompted the Union institutions to immediately acknowledge the exceptional migratory flows in this region and call for concrete measures of solidarity towards the frontline Member States. In particular, at a joint meeting of Foreign and Interior Ministers on 20 April 2015, the Commission presented a ten-point plan of immediate action to be taken in response to this crisis, including a commitment to consider options for an emergency relocation mechanism.

(4) At its meeting of 23 April 2015, the European Council decided, inter alia, to reinforce internal solidarity and responsibility and committed itself in particular to increasing emergency assistance to frontline Member States and to considering options for organising emergency relocation between Member States on a voluntary basis, as well as to deploying European Asylum Support Office (EASO) teams in frontline Member States for the joint processing of applications for international protection, including registration and fingerprinting.

(5) In its resolution of 28 April 2015, the European Parliament reiterated the need for the Union to base its response to the latest tragedies in the Mediterranean on solidarity and fair sharing of responsibility and to step up its efforts in this area towards those Member States which receive the highest number of refugees and applicants for international protection in either absolute or relative terms.

...

(9) 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 a significant pressure on their migration and asylum systems.

(10) According to data of the European Agency for the Management of Operational Cooperation at the External Borders (Frontex), the Central and Eastern Mediterranean routes were the main areas for irregular border crossing into the Union in 2014. In 2014, more than 170 000 migrants arrived in Italy alone in an irregular manner, representing an increase of 277% compared to 2013. A steady increase was also witnessed by Greece with more than 50 000 irregular migrants reaching the country, representing an increase of 153% compared to 2013. The overall numbers further increased in the course of 2015. In the first six months of 2015, Italy witnessed a 5% increase of irregular border crossings as compared to the same period last year. Greece faced a sharp increase in the number of irregular border crossings during the same period, corresponding to a six-fold increase over the first six months of 2014 (over 76 000 in the period January-June 2015 compared to 11 336 in the period January-June 2014). A significant proportion of the total number of irregular migrants detected in these two regions included migrants of nationalities which, based on the Eurostat data, meet a high Union-level recognition rate.

...

(13) Due to the ongoing instability and conflicts in the immediate neighbourhood of Italy and Greece, it is very likely that a significant and increased pressure will continue to be put on their migration and asylum systems, with a significant portion of the migrants who may be in need of international protection. 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.

...

(16) If any Member State should be confronted with a similar emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission and after consulting the European Parliament, may adopt provisional measures for the benefit of the Member State concerned, on the basis of Article 78(3) TFEU. Such measures may include, where appropriate, a suspension of the obligations of that Member State provided for in this Decision.

(17) In accordance with Article 78(3) TFEU, the measures envisaged for the benefit of Italy and of Greece should be of a provisional nature. A period of 24 months is reasonable in view of ensuring that the measures provided for in this Decision have a real impact in respect of supporting Italy and Greece in dealing with the significant migration flows on their territories.

(18) The measures to relocate from Italy and from Greece, as set out in this Decision, entail a temporary derogation from the rule laid down in Article 13(1) of [the Dublin III Regulation] according to which Italy and Greece would have been otherwise responsible for the examination of an application for international protection based on the criteria set out in Chapter III of that Regulation, as well as a temporary derogation from the procedural steps, including the time-limits, laid down in Articles 21, 22 and 29 of that Regulation. The other provisions of [the Dublin III Regulation], including the implementing rules laid down in Commission Regulation (EC) No 1560/2003 (35) and Commission Implementing Regulation (EU) No 118/2014, (36) remain applicable, including the rules contained therein on the obligation for the transferring Member States to meet the costs necessary to transfer an applicant to the Member State of relocation and on the cooperation on transfers between Member States, as well as on transmission of information through the DubliNet electronic communication network.

This Decision also entails a derogation from the consent of the applicant for international protection as referred to in Article 7(2) of Regulation (EU) No 516/2014 of the European Parliament and of the Council. (37)

(19) Relocation measures do not absolve Member States from applying in full [the Dublin III Regulation], including the provisions related to family reunification, special protection of unaccompanied minors, and the discretionary clause on humanitarian grounds.

...

(21) The provisional measures are intended to relieve the significant asylum pressure on Italy and on Greece, in particular by relocating a significant number of applicants in clear need of international protection who have arrived in the territory of Italy or Greece following the date on which this Decision becomes applicable. Based on the overall number of third-country nationals who have entered irregularly Italy or Greece in 2014 and the number of those who are in clear need of international protection, a total of 40 000 applicants in clear need of international protection should be relocated from Italy and from Greece. This number corresponds to approximately 40% of the total number of third-country nationals in clear need of international protection who have entered irregularly in Italy or Greece in 2014. Thus, the relocation measure proposed in this Decision constitutes fair burden sharing between Italy and Greece on the one hand and the other Member States on the other. Based on the same overall available figures in 2014 and in the first four months of 2015, in Italy compared to Greece, 60% of these applicants should be relocated from Italy and 40% from Greece.

...

(24) With a view to implementing the principle of solidarity and fair sharing of responsibility, and taking into account that this Decision constitutes a further policy development in this field, it is appropriate to ensure that the Member States that relocate applicants who are in clear need of international protection from Italy or Greece pursuant to this Decision receive a lump sum for each relocated person which is identical to the lump sum foreseen in Article 18 of Regulation (EU) No 516/2014, namely EUR 6 000, and implemented by applying the same procedures. This entails a limited, temporary derogation from Article 18 of Regulation (EC) No 516/2014 because the lump sum should be paid in respect of relocated applicants rather than beneficiaries of international protection. Such a temporary extension of the scope of potential recipients of the lump sum appears indeed to be an integral part of the emergency scheme set up by this Decision.

(25) It is necessary to ensure that a swift relocation procedure is put in place and to accompany the implementation of the provisional measures by close administrative cooperation between Member States and operational support provided by EASO.

(26) National security and public order should be taken into consideration throughout the relocation procedure, until the transfer of the applicant is implemented. In full respect to the fundamental rights of the applicant,

including the relevant rules on data protection, where a Member State has reasonable grounds for regarding an applicant as a danger to its national security or public order, it should inform the other Member States thereof.

...

(32) Measures should be taken in order to avoid secondary movements of relocated persons from the Member State of relocation to other Member States which could hamper the efficient application of this Decision. In particular, applicants should be informed of the consequences of onward irregular movement within the Member States and of the fact that, if the Member State of relocation grants them international protection, in principle, they are only entitled to the rights attached to international protection in that Member State.

...

(41) In view of the urgency of the situation, this Decision should enter into force on the date following that of its publication in the *Official Journal of the European Union*.

43. Article 1 stated that Decision 2015/1523 'establishe[d] provisional measures in the area of international protection for the benefit of Italy and of Greece in view of supporting them in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries in those Member States'.

44. The following definitions were set out in Article 2:

(a) "application for international protection" means an application for international protection as defined in point (h) of Article 2 of [the Qualifications Directive];

(b) "applicant" means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

(c) "international protection" means refugee status and subsidiary protection status as defined in points (e) and (g), respectively, of Article 2 of [the Qualifications Directive];

(d) "family members" means family members as defined in point (g) of Article 2 of [the Dublin III Regulation];

(e) "relocation" means the transfer of an applicant from the territory of the Member State which the criteria laid down in Chapter III of [the Dublin III Regulation] indicate as responsible for examining his or her application for international protection to the territory of the Member State of relocation;

(f) "Member State of relocation" means the Member State which becomes responsible for examining the application for international protection pursuant to [the Dublin III Regulation] of an applicant following his or her relocation in the territory of that Member State.'

45. In accordance with Article 3(1), relocation under Decision 2015/1523 only took place in respect of an applicant who had lodged his or her application for international protection in Italy or in Greece and for whom those States would have otherwise been responsible pursuant to the criteria for determining the Member State responsible set out in Chapter III of the Dublin III Regulation.

46. Article 4 stated:

'Following the agreement reached between Member States through the Resolution of 20 July 2015 of the Representatives of the Governments of the Member States meeting within the Council on relocating from Italy and from Greece 40 000 persons in clear need of international protection:

(a) 24 000 applicants shall be relocated from Italy to the territory of the other Member States;

(b) 16 000 applicants shall be relocated from Greece to the territory of the other Member States.'

47. The relocation procedure was set out in Article 5. That provision was drafted in very similar terms to Article 5 of Decision 2015/1601, which I cite in full below. I shall not therefore duplicate the wording here.

48. Article 10 provided that 'the Member State of relocation shall receive a lump sum of EUR 6 000 for each relocated person pursuant to this Decision. This financial support shall be implemented by applying the procedures laid down in Article 18 of Regulation (EU) No 516/2014'.

49. Pursuant to Article 12, on the basis of the information provided by the Member States and by the relevant agencies, the Commission was to report to the Council every 6 months on the implementation of Decision 2015/1523. The Commission was also to report to the Council every 6 months, on the basis of the information provided by Italy and Greece, on the implementation of the 'roadmaps' referred to in Article 8. (38)

50. Article 13 stated that Decision 2015/1523 entered into force on 15 September 2015 and was to apply until 17 September 2017.

Decision 2015/1601

51. The following additional statements were made in the recitals to Decision 2015/1601: (39)

(11) On 20 July 2015, reflecting the specific situations of Member States, a Resolution of the representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40 000 persons in clear need of international protection was adopted by consensus. Over a period of 2 years, 24 000 persons will be relocated from Italy and 16 000 persons will be relocated from Greece. On 14 September 2015, the Council adopted Decision (EU) 2015/1523, which provided for a temporary and exceptional relocation mechanism from Italy and Greece to other Member States of persons in clear need of international protection.

(12) During recent months, the migratory pressure at the southern external land and sea borders has again sharply increased, and the shift of migration flows has continued from the central to the eastern Mediterranean and towards the Western Balkans route, as a result of the increasing number of migrants arriving in and from Greece. In view of the situation, further provisional measures to relieve the asylum pressure from Italy and Greece should be warranted.

...

(18) ... Decision (EU) 2015/1523 sets out an obligation for Italy and Greece to provide structural solutions to address exceptional pressures on their asylum and migration systems, by establishing a solid and strategic framework for responding to the crisis situation and intensifying the ongoing reform process in these areas. The roadmaps which Italy and Greece have presented to that end should be updated to take this Decision into account.

...

(20) As of 26 September 2016, 54 000 applicants should be proportionally relocated from Italy and Greece to other Member States. The Council and the Commission should keep under constant review the situation regarding massive inflows of third country nationals into Member States. The Commission should submit, as appropriate, proposals to amend this Decision in order to address the evolution of the situation on the ground and its impact upon the relocation mechanism, as well as the evolving pressure on Member States, in particular frontline Member States. In doing so, it should take into account the views of the likely beneficiary Member State.

...

(26) The provisional measures are intended to relieve the significant asylum pressure on Italy and on Greece, in particular by relocating a significant number of applicants in clear need of international protection who will have arrived in the territory of Italy or Greece following the date on which this Decision becomes applicable. Based on the overall number of third-country nationals who have entered Italy and Greece irregularly in 2015, and the number of those who are in clear need of international protection, a total of 120 000 applicants in clear need of international protection should be relocated from Italy and Greece. This number corresponds to approximately 43% of the total number of third-country nationals in clear need of international protection who have entered Italy and Greece irregularly in July and August 2015. The relocation measure foreseen in this Decision constitutes fair burden sharing between Italy and Greece on the one hand and the other Member States on the other, given the overall available figures on irregular border crossings in 2015. Given the figures at stake, 13% of these applicants should be relocated from Italy, 42% from Greece and 45% should be relocated as provided for in this Decision.

...

(44) Since the objectives of this Decision cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 [TEU]. In accordance with the principle of proportionality, as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives.

...

(50) In view of the urgency of the situation, this Decision should enter into force on the date following that of its publication in the *Official Journal of the European Union*. (40)

52. Article 1(1) was in identical terms to the sole sentence of Article 1 of Decision 2015/1523 (establishment of provisional measures). Article 1(2) required the Commission to keep under constant review the situation regarding massive inflows of third-country nationals and to submit proposals to amend that decision with a view to taking into account the evolution of the situation on the ground and its impact on the relocation mechanism. (41)

53. The definitions in Article 2 reflected those set out in Article 2 of Decision 2015/1523. I shall not repeat them here.

54. Article 3, ('Scope'), was likewise drafted in similar terms to Article 3 of Decision 2015/1523.

55. Article 4 was entitled 'Relocation of 120 000 applicants to Member States'. It stated:

'(1) 120 000 applicants shall be relocated to the other Member States as follows:

(a) 15 600 applicants shall be relocated from Italy to the territory of the other Member States in accordance with the table set out in Annex I;

(b) 50 400 applicants shall be relocated from Greece to the territory of the other Member States in accordance with the table set out in Annex II;

(c) 54 000 applicants shall be relocated to the territory of the other Member States, proportionally to the figures laid down in Annexes I and II, either in accordance with paragraph 2 of this Article or through an amendment of this Decision, as referred to in Article 1(2) and in paragraph 3 of this Article.

(2) As of 26 September 2016, 54 000 applicants, referred to in point (c) of paragraph 1, shall be relocated from Italy and Greece, in proportion resulting from points (a) and (b) of paragraph 1, to the territory of other Member States and proportionally to the figures laid down in Annexes I and II. The Commission shall submit a proposal to the Council on the figures to be allocated accordingly per Member State.

(3) If by 26 September 2016, the Commission considers that an adaptation of the relocation mechanism is justified by the evolution of the situation on the ground or that a Member State is confronted with an emergency situation characterised by a sudden inflow of nationals of third countries due to a sharp shift of migration flows and taking into account the views of the likely beneficiary Member State, it may submit, as appropriate, proposals to the Council, as referred to in Article 1(2).

(3a) In relation to the relocation of applicants referred to in point (c) of paragraph 1, Member States may choose to meet their obligation by admitting to their territory Syrian nationals present in Turkey under national or multilateral legal admission schemes for persons in clear need of international protection, other than the resettlement scheme which was the subject of the Conclusions of the Representatives of the Governments of the Member States meeting within the Council of 20 July 2015. The number of persons so admitted by a Member State shall lead to a corresponding reduction of the obligation of the respective Member State.

Article 10 shall apply *mutatis mutandis* for every such legal admission leading to a reduction of the relocation obligation.

Member States, which choose to use the option provided in this paragraph, shall report monthly to the Commission on the number of persons legally admitted for the purposes of this paragraph, indicating the type of scheme under which the admission has taken place and the form of legal admission used.' (42)

56. Annex I listed the allocation per Member State from Italy of applicants for international protection. Annex II lists the allocation per Member State from Greece of such applicants.

57. Article 5 stated as follows:

'(1) For the purpose of the administrative cooperation required to implement this Decision, each Member State shall appoint a national contact point, whose address it shall communicate to the other Member States and to EASO. Member States shall, in liaison with EASO and other relevant agencies, take all the appropriate measures to establish direct cooperation and an exchange of information between the competent authorities, including about the grounds referred to in paragraph 7.

(2) Member States shall, at regular intervals, and at least every 3 months, indicate the number of applicants who can be relocated swiftly to their territory and any other relevant information.

(3) Based on this information, Italy and Greece shall, with the assistance of EASO and, where applicable, of Member States' liaison officers referred to in paragraph 8, identify the individual applicants who could be relocated to the other Member States and, as soon as possible, submit all relevant information to the contact points of those Member States. Priority shall be given for that purpose to vulnerable applicants within the meaning of Articles 21 and 22 of Directive 2013/33/EU.

(4) Following approval of the Member State of relocation, Italy and Greece shall, as soon as possible, take a decision to relocate each of the identified applicants to a specific Member State of relocation, in consultation with EASO, and shall notify the applicant in accordance with Article 6(4). The Member State of relocation may decide not to approve the relocation of an applicant only if there are reasonable grounds as referred to in paragraph 7 of this Article.

(5) Applicants whose fingerprints are required to be taken pursuant to the obligations set out in Article 9 of Regulation (EU) No 603/2013 (43) may be proposed for relocation only if their fingerprints have been taken and transmitted to the Central System of Eurodac, pursuant to that Regulation.

(6) The transfer of the applicant to the territory of the Member State of relocation shall take place as soon as possible following the date of the notification to the person concerned of the transfer decision referred to in Article 6(4) of this Decision. Italy and Greece shall transmit to the Member State of relocation the date and time of the transfer as well as any other relevant information.

(7) Member States retain the right to refuse to relocate an applicant only where there are reasonable grounds for regarding him or her as a danger to their national security or public order or where there are serious reasons for applying the exclusion provisions set out in Articles 12 and 17 of Directive 2011/95/EU.

(8) For the implementation of all aspects of the relocation procedure described in this Article, Member States may, after exchanging all relevant information, decide to appoint liaison officers to Italy and to Greece.

(9) In line with the Union *acquis*, Member States shall fully implement their obligations. Accordingly, identification, registration and fingerprinting for the relocation procedure shall be guaranteed by Italy and by Greece. To ensure that the process remains efficient and manageable, reception facilities and measures shall be duly organised so as to temporarily accommodate people, in line with the Union *acquis*, until a decision is quickly taken on their situation. Applicants that elude the relocation procedure shall be excluded from relocation. (44)

(10) The relocation procedure provided for in this Article shall be completed as swiftly as possible and not later than 2 months from the time of the indication given by the Member State of relocation as referred to in paragraph 2, unless the approval by the Member State of relocation referred to in paragraph 4 takes place less than 2 weeks before the expiry of that 2-month period. In such case, the time limit for completing the relocation procedure may be extended for a period not exceeding a further 2 weeks. In addition, the time limit may also be extended, for a further 4-week period, as appropriate, where Italy or Greece show objective practical obstacles that prevent the transfer from taking place.

Where the relocation procedure is not completed within these time limits and unless Italy and Greece agree with the Member State of relocation to a reasonable extension of the time limit, Italy and Greece shall remain responsible for examining the application for international protection pursuant to [the Dublin III Regulation].

(11) Following the relocation of the applicant, the Member State of relocation shall take and transmit to the Central System of Eurodac the fingerprints of the applicant in accordance with Article 9 of [the Eurodac Regulation] and update the data sets in accordance with Article 10 of, and, where applicable, Article 18 of that Regulation.'

58. Under Article 10, the Member State of relocation received a lump sum of EUR 6 000 for each person relocated whilst Italy or Greece (as the case might be) received a lump sum of at least EUR 500.

59. Under Article 12, on the basis of the information provided by the Member States the Commission was to report to the Council every 6 months on the implementation of Decision 2015/1601.

60. Pursuant to Article 13, Decision 2015/1601 entered into force on 25 September 2015 and applied until 26 September 2017.

61. The Commission has since issued 15 reports on relocation and resettlement in accordance with Article 12 of the Relocation Decisions and point 6 of the Commission Communication of 4 March 2016 ('Back to Schengen — A Roadmap', COM(2016) 120 final). (45)

The judgment in Slovak Republic and Hungary v Council

62. On 2 and 3 December 2015 respectively, Slovakia and Hungary brought actions against the Council seeking the annulment of Decision 2015/1601. (46) Slovakia relied on 6 pleas in law, whilst Hungary advanced 10 such pleas.

63. The Court examined the pleas raised by grouping them together under subheadings. It started by assessing the allegation that Article 78(3) TFEU did not provide a proper *legal basis* for Decision 2015/1601. That assessment was divided into the following elements: (i) the legislative nature of that decision; (ii) whether the decision was provisional and whether its period of application was excessive; and (iii) whether that decision satisfied the conditions for the application of Article 78(3) TFEU.

64. Next, the Court considered the lawfulness of the *procedure* leading to the adoption of Decision 2015/1601. In so doing it examined: (i) whether the legislature had infringed Article 68 TFEU; (ii) whether there had been a breach of essential procedural requirements, such as whether the obligation to consult the Parliament had been respected; (iii) whether it was permissible for the Council not to act unanimously in accordance with Article 293(1) TFEU; (iv) whether there had been a failure to respect the rights of national parliaments to issue an opinion; and (v) whether the Council had respected rules of EU law on the use of languages when adopting Decision 2015/1601.

65. The last group of pleas examined by the Court concerned the *substantive pleas* raised by Slovakia and Hungary. These included: (i) an alleged breach of the principle of proportionality; (ii) an alleged failure to take into account the effects of that decision in Hungary; and (iii) an alleged breach of the principle of legal certainty and of the Geneva Convention.

66. In a careful and lengthy Opinion, running to 344 points, my esteemed and much regretted late colleague and friend Advocate General Bot recommended that the Court should dismiss those applications. (47)

67. On 6 September 2017, in an equally careful and lengthy judgment of 347 paragraphs, the Grand Chamber rejected all of the pleas and dismissed the actions.

68. The pre-litigation procedure in all three of the present infringement proceedings started in the summer of 2017, that is, before the judgment in *Slovak Republic and Hungary v Council* was delivered. (48) However, the applications to the Court were lodged on 21 December 2017 (*Commission v Poland*) and 22 December 2017 (*Commission v Hungary* and *Commission v Czech Republic*) respectively — thus, *after* the Court had upheld the validity of Decision 2015/1601. At the time the written procedure before the Court began, the validity of that decision was therefore beyond dispute.

69. The essential issue in the present three sets of infringement proceedings can therefore be reframed as follows: *given that* Decision 2015/1601 is valid and was therefore always binding on all the Member States to which it was addressed, are there legal arguments that the three defendant Member States can advance that absolve them of their obligations under the Relocation Decisions? (49)

Factual background

70. On 16 December 2015, Poland pledged to the Commission that it would accept relocation of 100 applicants (65 applicants from Greece and 35 applicants from Italy). On that basis, Greece and Italy identified respectively 73 and 36 applicants for relocation to Poland. However, the Commission states (without being contradicted by Poland) that none of those applicants has been relocated to Poland, and that Poland has made no further pledges to the Commission to accept applicants.

71. The Commission states (without being contradicted by Hungary) that Hungary has not pledged to the Commission to accept any applicants under the Relocation Decisions.

72. On 8 July 2015 — that is, *prior* to the Conclusions of the JHA Council meeting of 20 July 2015 (50) — the Czech Republic adopted Resolution No 556 concerning relocation from Greece and Italy. (51) On 5 February 2016, the Czech Republic pledged to the Commission that it would accept relocation of 30 applicants under Decision 2015/1523. On 13 May 2016, it supplemented that pledge by stating that it would accept a further 20 applicants under Decision 2015/1601. On that basis, Greece and Italy identified respectively 30 and 10 applicants for relocation to the Czech Republic. The Commission states (again, without being contradicted by the Member State) that of the applicants thus proposed for relocation, the Czech Republic agreed to accept 15 applicants from Greece, of whom 12 were actually relocated, and that no applicants from Italy were accepted or relocated.

73. By parallel letters of 10 February 2016 to Poland, Hungary and the Czech Republic, the Commission invited those three Member States to start relocating migrants as soon as possible and to ensure that the relocation process was implemented swiftly.

74. On 4 March 2016, the Commission issued a Communication (based on Article 12 of the Relocation Decisions) entitled 'Back to Schengen — A Roadmap'.⁽⁵²⁾ The following statements from the various Commission reports on relocation and resettlement, together with statements made in correspondence with Member States, explain the ensuing course of events.

75. In the First Report on relocation and resettlement of 16 March 2016, the Commission noted that 'only 937 people have been relocated from Italy and Greece' and that 'the unsatisfactory level of implementation of both schemes is due to a variety of factors, including the lack of political will of Member States to deliver in a full and timely manner on their legal obligations to relocate'.⁽⁵³⁾

76. In the Fourth Report on relocation and resettlement of 15 June 2016, the Commission noted that 'five Member States (Austria, Croatia, Hungary, Poland and Slovakia) have not relocated a single applicant' and that 'seven (Belgium, Bulgaria, Czech Republic, Germany, Lithuania, Romania and Spain) have relocated only 1% of their allocation'.⁽⁵⁴⁾

77. By parallel letters of 5 August 2016 to Poland and to the Czech Republic, the Commission asked these Member States 'to stand by the commitments [they had] made under [the Relocation Decisions] and to urgently provide an adequate response by engaging more actively and regularly on relocation from both Italy and Greece'. By a letter of 5 August 2016, the Commission also reminded Hungary in similar terms of its obligations.

78. During the Maltese presidency of the Council (January to June 2017), the Maltese Minister of Home Affairs and the Commission wrote jointly on 28 February 2017 to the Ministers of Home Affairs in all the other Member States.⁽⁵⁵⁾ That letter stated 'in particular, we urge those Member States that have not yet relocated anyone or have not relocated in proportion to their allocation to step up their efforts immediately, whilst we encourage those Member States that are delivering on their obligations to continue their efforts'.

79. On 1 March 2017, the Czech Republic responded to the Commission that it considered its initial relocation offer to be sufficient. On 5 June 2017, the Czech Republic adopted Resolution No 439 concerning 'the significant deterioration of the situation regarding security in the European Union and with regard to the dysfunction of the relocation system', which suspended its earlier Resolution No 556 concerning relocation from Greece and Italy under Decision 2015/1523. Resolution No 439 also thereby suspended relocation under Decision 2015/1601 and instructed the Minister of the Interior to cease activities in the areas concerned. Resolution No 439 made reference, as justification for the measures being taken, to a 'dysfunction of the [relocation] system'.

80. In the Tenth Report on relocation and resettlement of 2 March 2017, the Commission noted that 'Hungary, Austria and Poland are still refusing to participate in the relocation scheme. The Czech Republic has not pledged since May 2016 and has not relocated anyone since August 2016'.⁽⁵⁶⁾

81. In the Fifteenth Report on relocation and resettlement of 6 September 2017, the Commission noted that 'Hungary and Poland remain the only Member States that have not relocated a single person and Poland has not made any pledge since 16 December 2015. Moreover, the Czech Republic has not pledged since May 2016 and has not relocated anyone since August 2016. These countries should start pledging and relocating immediately'.⁽⁵⁷⁾

Procedure before the Court

82. In accordance with the procedure laid down in Article 258 TFEU, the Commission sent letters of formal notice to all three defendant Member States.⁽⁵⁸⁾ In the light of their replies, it then issued reasoned opinions to all three on 26 July 2017, setting 23 August 2017 as the date by which those Member States were to comply with the reasoned opinions. They did not do so.

83. By letters of 19 September 2017, the Commission reminded Poland, Hungary and the Czech Republic that 'the Court of Justice of the European Union has recently confirmed the legality of the relocation measures' in the judgment in *Slovak Republic and Hungary v Council*. The Commission invited the three defendant Member States 'to quickly initiate the steps needed to contribute to the relocation of the remaining eligible applicants in a timely manner, starting by indicating persons [they] intend to relocate to [their] territory'.

84. None of the three defendant Member States responded to the Commission.

85. The Commission thereupon brought the present actions on 21 December 2017 (Case C-715/17, *Commission v Poland*) and 22 December 2017 (both Case C-718/17, *Commission v Hungary*, and Case C-719/17, *Commission v Czech Republic*).

86. In Case C-715/17, *Commission v Poland*, the Commission seeks a declaration that Poland has failed to comply with its obligations under Article 5(2) of the Relocation Decisions to indicate at regular intervals, and at least every 3 months, the number of applicants who can be relocated to its territory and any other relevant information, and that consequently it is in breach of its further obligations under Article 5(4) to (11) of those two decisions.

87. In Case C-718/17, *Commission v Hungary*, the Commission seeks a declaration to the effect that Hungary has failed to comply with its obligations under Article 5(2) of Decision 2015/1601 and that there is a consequential breach of its further obligations under Article 5(4) to (11) of that decision.

88. In Case C-719/17, *Commission v Czech Republic*, the declaration that the Commission seeks is expressed in the same terms as the declaration sought in Case C-715/17, *Commission v Poland*.

89. There has been a full written procedure in all three cases.

90. A joint hearing was held on 15 May 2019. Poland, Hungary, the Czech Republic and the Commission attended that hearing and presented oral argument.

Admissibility

91. The three defendant Member States challenge the admissibility of the infringement proceedings brought against them. Essentially, they raise four categories of arguments: (i) lack of purpose of these proceedings, lack of legal interest in bringing these proceedings and violation of the principle of sound administration of justice; (ii) breach of the principle of equal treatment; (iii) breach of the rights of the defence, inasmuch as they were not given adequate time to respond during the pre-litigation procedure and the Commission's complaint is stated with insufficient precision; and (iv) (in Case C-719/17, *Commission v Czech Republic*) insufficient precision in the form of order sought (the *petitum*) in the Commission's application.

92. I shall therefore address those four categories of arguments in order to assess whether the actions brought by the Commission in these infringement proceedings are admissible.

Lack of purpose, absence of legal interest in bringing the proceedings and violation of the principle of sound administration of justice

93. The three defendant Member States argue that the proceedings brought by the Commission against them are inadmissible for lack of purpose, because the obligations created by Article 5(2) and (4) to (11) of the Decision 2015/1523 and Decision 2015/1601 expired definitively on 17 and 26 September 2016, respectively.

94. Poland (Case C-715/17) notes that the alleged infringement ceased to exist as of 18 and 27 September 2017 with respect to each of the Relocation Decisions respectively. Whilst acknowledging that, in the context of an action based on Article 258 TFEU, the existence of a failure to fulfil obligations must be assessed in the light of the European Union legislation in force at the close of the period prescribed by the Commission for the Member State concerned to comply with its reasoned opinion (59) (here, 23 August 2017), Poland considers that the purpose of such an action must be to *bring the infringement to an end*. Poland contends that because the Relocation Decisions have expired and the Member States concerned can no longer remedy their lack of compliance, the present action is devoid of purpose. Poland further argues that since there is no potential remedy to the alleged infringement, the Court's judgment can only have a declaratory effect.

95. Hungary and the Czech Republic adopted a similar approach in their written pleadings and at the hearing.

96. According to Hungary (Case C-718/17), such a use of infringement proceedings is improper, abusive and contrary to the principle of sound administration of justice, since it can only lead to a finding of principle without any actual legal effect. The Czech Republic (Case C-719/17) adds that the purpose of infringement proceedings is not to have an 'academic discussion' on the question of whether or not, in the past, a Member State has breached EU law.

97. In the same vein, the three defendant Member States claim that the Commission has not demonstrated sufficient legal interest in bringing these proceedings and that its action pursues a mere political goal, namely

'stigmatising' the Member States that openly challenged the relocation mechanism established by the Relocation Decisions. (60) They claim that, in so doing, the Commission has disregarded the spirit of Article 258 TFEU.

98. I reject those submissions.

99. According to the Court's settled case-law, the procedure established under Article 258 TFEU is based on the objective finding that a Member State has failed to fulfil its obligations under EU law. (61)

100. Judgments delivered by the Court under that provision are, in essence, declaratory in nature. (62) As such, the purpose of the procedure before the Court is not of itself to *eliminate* the alleged infringement. The Court merely declares that the Member State has failed to fulfil its obligations or dismisses the action. Once the infringement has been established, the Court does not issue an injunction to the Member State concerned. It is the latter's responsibility, *as the case may be*, to adopt appropriate measures to ensure its compliance with EU law, pursuant to Article 260(1) TFEU.

101. It is also settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, and the Court therefore cannot take account of any subsequent changes. (63) Thus, the Commission may bring an action before the Court even if the alleged failure to fulfil obligations has virtually ceased. (64)

102. The case-law relied on here by Poland in its written pleadings is not in point. Case C-365/97, *Commission v Italy*, (65) concerned a situation in which the applicable EU law had been amended during the course of the pre-litigation procedure. In the present case, the Relocation Decisions remained *unchanged* until the end of the period laid down in the reasoned opinion. The fact that those decisions *subsequently expired* has no bearing on the fact that the three defendant Member States had (as indeed they accept) not complied with the requirements of those decisions. In Case C-177/03, *Commission v France*, (66) the *national* legislation at issue had been amended between the expiry of the time limit set for compliance with the reasoned opinion and the lodging of the action for infringement, so that the judgment to be delivered could have become 'otiose'. The Court considered that in such circumstances, it might be preferable for the Commission not to bring an action but to issue 'a new reasoned opinion precisely identifying the complaints which it intends pursuing, having regard to the changed circumstances' (67). Self-evidently, that ruling is inapplicable to the circumstances of the present case.

103. Since it is not disputed that the infringement under the Relocation Decisions existed when the period laid down in the reasoned opinion expired (23 August 2017), the Commission is entitled to bring an action for failure to fulfil obligations under those decisions and to seek a declaration from the Court as to the existence of such an infringement. Given that the Relocation Decisions have since expired, it will not be necessary for the defendant Member States to adopt specific measures in order to comply with EU law. That does not mean that the proceedings will be devoid of purpose.

104. In accordance with the Court's settled case-law, the Commission does not have to show a legal interest in bringing proceedings or to state the reasons why it is bringing an action for failure to fulfil obligations. (68) It is true that the Court has held that in the event of an infringement that took place in the past, it must examine 'whether the Commission still has a *sufficient* legal interest' in bringing proceedings. (69) Here — as the Commission has rightly emphasised — the dispute between the Commission and the three defendant Member States raises fundamental issues, notably whether reliance may be placed on Article 72 TFEU to absolve Member States from their otherwise binding obligations under EU secondary law.

105. More broadly, these proceedings raise legitimate and important questions about respect for the rule of law, the principle of solidarity, the common asylum policy and the role of the Commission as the guardian of the Treaties. Whether or not the infringement took place in the past, those questions retain all their relevance. This is by no means — as the Czech Republic has sought to suggest — an 'academic' debate. Unfortunately, the future management of mass migration may well give rise to problems similar to those that led to the adoption of the Relocation Decisions. In my view, the Commission's interest in having infringements established and in clarifying Member States' obligations is thus beyond dispute. (70)

106. I therefore consider that the actions brought by the Commission in these cases are not devoid of purpose. The Commission has sufficient legal interest in bringing proceedings, and its approach cannot be regarded as contrary to the principle of the sound administration of justice.

Violation of the principle of equal treatment

107. Hungary (Case C-718/17) claims that by bringing infringement proceedings only against the three defendant Member States, even though the vast majority of Member States did not fully comply with the obligations defined

by the Relocation Decisions, the Commission has breached the principle of equal treatment laid down in Article 4(2) TEU and abused the discretion it enjoys under Article 258 TFEU.

108. Hungary alleges in particular that the Commission has selected the group of Member States subject to infringement proceedings arbitrarily and in a discriminatory manner. If the Commission had followed an objective approach, it would have brought such proceedings against *all* Member States that had not complied *fully* with their obligations under the Relocation Decisions, since all those Member States were in a *comparable* situation. In advancing this argument, Hungary therefore takes a binary approach. Only two groups should be considered: those States that have fully complied with their obligations and those that have failed to comply, irrespective of how serious or minor the failure in compliance may be. (71) By targeting Poland, Hungary and the Czech Republic, the Commission is trying to turn those Member States into (I quote) 'scapegoats', destined to atone for the 'fiasco' of the relocation system introduced by the Relocation Decisions.

109. Poland (Case C-715/17) takes a similar position to Hungary on these issues.

110. I reject this line of reasoning.

111. According to settled case-law, the Commission enjoys a wide margin of discretion in bringing infringement proceedings under Article 258 TFEU: 'it is for the Commission to determine whether it is expedient to take action against a Member State and what provisions, in its view, the Member State has infringed, and to choose the time at which it will bring an action for failure to fulfil obligations; the considerations which determine that choice cannot affect the admissibility of the action'. (72)

112. Thus, the absence of infringement proceedings against one Member State is irrelevant in the assessment of the admissibility of infringement proceedings brought against another Member State. (73)

113. The Court has also clearly stated that 'a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under [the TFEU]'. In the EU legal order, the implementation of EU law by the Member States cannot be made subject to a condition of reciprocity. Articles 258 and 259 TFEU provide the appropriate remedies in cases where Member States fail to fulfil their obligations under the TFEU. (74)

114. Both Hungary and Poland have stated that in raising these arguments, they do not seek to rely on other Member States' lack of compliance with their obligations under EU law as a justification for their own breaches of these same obligations. I am less than convinced by those bare statements. Both Member States' written pleadings indicate that they specifically seek to invoke *generalised deficiencies* in the application of the relocation system in order both to challenge the admissibility of the proceedings brought against them and to justify their refusal to implement the Relocation Decisions. Such generalised deficiencies, were they established, would (*ex hypothesi*) affect all Member States' ability to comply with the Relocation Decisions. Furthermore, both Hungary and Poland invoke (through their discrimination argument) the fact that many other Member States have not complied fully with their obligations under those decisions.

115. Has the Commission abused its margin of discretion in exercising its competences? Put more precisely, can it reasonably be said that the three defendant Member States were in a situation *comparable* to that of the other Member States and that the Commission *manifestly* abused its margin of discretion, thus engaging in unjustified differential treatment at the expense of the three Member States in question?

116. In my opinion, the answer to that question is 'no'.

117. As the Commission pointed out in its written and oral pleadings, the three defendant Member States were *the only ones* that made *no* formal relocation commitment (Hungary) or had not made any relocation commitments for *at least 1 year* (Poland and the Czech Republic) under Article 5(2) of the Relocation Decisions, despite repeated requests from the Commission. The Twelfth and Thirteenth Reports on relocation and resettlement provide ample evidence of these facts.

118. It follows that the three defendant Member States are in a situation that can be distinguished, by the gravity and persistence of their non-compliance, from the situation of the other Member States, which have at least pledged to relocate given numbers of applicants for international protection, even if (regrettably) those pledges have not in practice systematically materialised as effective relocations. (75)

119. I therefore consider that the Commission has not exceeded the limits of the margin of discretion conferred by Article 258 TFEU by bringing actions for failure to fulfil obligations against Poland, Hungary and the Czech Republic and also not bringing such actions against other Member States that have not fully fulfilled the obligations established by the Relocation Decisions.

120. Finally, I should mention here an additional argument advanced by Hungary in its written pleadings. That Member State questions whether it is really possible to demand compliance with the obligations arising from Decision 2015/1601 in the absence of full compliance with the obligations imposed under Decision 2015/1523. Coming from Hungary, that argument seems to me to be plainly irrelevant. Hungary was only affected by Decision 2015/1601, and the infringement proceedings brought against it concern only non-compliance with its obligations under that decision.

121. I therefore conclude that the admissibility arguments based on violation of the principle of equal treatment should be rejected.

Violation of the rights of defence

122. Hungary (Case C-718/17) claims that the Commission infringed its rights of defence during the pre-litigation phase by (i) giving it only 4 weeks to reply, both to the letter of formal notice and to the reasoned opinion and (ii) failing clearly to define the alleged infringement, inasmuch as the Commission failed adequately to explain the link between the alleged breach of Article 5(2) of Decision 2015/1601 and the alleged breaches of Article 5(4) to (11) thereof.

Deadlines for responding to the Commission's pre-litigation correspondence

123. Hungary acknowledges that in the context of infringement proceedings, the Commission undoubtedly has a wide discretion to set the time limits for the various procedural steps. It nevertheless considers that the Commission has abused its discretion here. Hungary argues that the Commission imposed 'extremely short' deadlines in the middle of the summer, without taking into account the fact that Hungary was facing other infringement proceedings during the same period. Hungary suggests that such a modus operandi was intended to make it impossible for Hungary to exercise its rights of defence.

124. Hungary argues further that the Commission could not rely on a situation of urgency that it itself had created by failing to take action earlier and that the Commission shortened the time limits solely to ensure that the infringement proceedings that the Commission was determined to bring before the Court anyway before the end of the year would be admissible. (76)

125. Finally, Hungary asserts that the short deadlines cannot be excused by the fact that it was fully aware of the alleged infringement.

126. I agree with the Commission that Hungary's rights of defence have not been infringed by the short time limits set during the pre-litigation procedure.

127. The Court has explained that the pre-litigation procedure under Article 258 TFEU has a dual purpose. Its aim is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under EU law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. (77) The proper conduct of that procedure constitutes an essential guarantee required by the TFEU not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject matter. (78) The pre-litigation procedure (letter of formal notice, followed by reasoned opinion) thus serves to delimit the subject matter of the dispute and enable the Member State to prepare its defence and also (importantly) to enable the Member State to comply with its obligations *before* proceedings are brought before the Court.

128. The Commission must therefore allow Member States a reasonable period to reply to letters of formal notice and to comply with reasoned opinions, or, where appropriate, to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of *all the circumstances* of the case. Thus, very short periods may be justified in particular circumstances, especially where there is an *urgent need* to remedy a breach or where the Member State concerned is *fully aware* of the Commission's views long before the procedure starts. (79)

129. I also recall that, according to the Court's settled case-law, it is for the Commission to 'choose the time at which it will bring an action for failure to fulfil obligations [against a Member State]; the considerations which determine that choice cannot affect the admissibility of the action'. (80)

130. So far as urgency is concerned, I note that the Relocation Decisions were adopted in response to a particularly critical and pressing situation of mass migration, justifying the adoption of the provisional measures provided for in those decisions.

131. The Commission has explained that it adopted a cooperative approach, aimed at encouraging Member States to implement the measures enshrined in the Relocation Decisions *willingly*. The Commission also wished to take into account the time that each Member State would need to prepare for the relocation process, which involved — as it rightly pointed out — complex administrative procedures requiring close cooperation between the Member States.

132. The Commission's reports on relocation and resettlement drew Member States' attention to their obligations at regular intervals.

133. Logically, therefore, it is precisely because the Commission chose to encourage Member States to comply willingly with the Relocation Decisions that it did not initiate infringement proceedings earlier during the 24-month period for implementation of the Relocation Decisions. By May 2017 it had indeed become urgent to consider initiating infringement proceedings. That fact was attributable not to the Commission, but to the persistent refusal of the three defendant Member States to comply with their obligations. The Commission cannot therefore be accused of 'relying on an urgency that it itself had created' by failing to commence the pre-litigation procedure earlier. For that reason, Hungary's reference to Case 293/85, *Commission v Belgium*, (81) is without relevance.

134. I also recall that in Case C-20/09, *Commission v Portugal*, the Court held that the Commission's function is to ensure, of its own motion and in the general interest, that the Member States give effect to EU law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing them to an end. (82) It follows that it was legitimate for the Commission to ensure — here, by setting appropriate (short) time limits for the pre-litigation procedure — that the three defendant Member States concerned were held to account before the Court for their deliberate choice not to implement the Relocation Decisions. (83)

135. The short deadlines set by the Commission also appear to be justified inasmuch as the three defendant Member States concerned were fully aware of the Commission's views well before the formal start of the infringement procedure. (84) The Commission had called on Hungary to comply with its obligations under Decision 2015/1601 in several separate letters and in its series of monthly reports, before sending the letter of formal notice. The Twelfth Report on relocation and resettlement (issued on 16 May 2017) made it crystal clear to all Member States that the Commission intended to initiate infringement proceedings in the event of persistent non-compliance. (85)

136. Finally, the argument that consideration should be given to the fact that the pre-litigation procedure took place over the summer period, when Hungary was also defending itself in other infringement proceedings, seems to me to be without merit. A Member State must have in place the necessary administrative arrangements to defend itself in pre-litigation proceedings at any time of the year, should that be required. That is a fortiori the case here, where the Commission's intention to bring infringement proceedings had been known for weeks.

137. I conclude that the time limits set by the Commission in the pre-litigation stage of these infringement proceedings were not excessively short and were not such as to impair the exercise of Hungary's rights of defence.

The definition of the alleged infringement

138. Hungary complains that the Commission failed to define the alleged infringement in a timely manner and, in particular, that it has failed to explain why, in addition to claiming that there has been a breach of Article 5(2) of Decision 2015/1601, the Commission is also alleging a violation of Article 5(4) to (11) thereof.

139. Specifically, Hungary argues here that it was not in a position to understand the connection between non-compliance with Article 5(2) of Decision 2015/1601 (pledges of the number of applicants who could be relocated) and non-compliance with Article 5(4) to (11) thereof (the subsequent implementation of the relocation). Hungary complains that the Commission failed to provide a detailed explanation of how the two were related in its reasoned opinion and, therefore, failed to define clearly the infringement that it was alleging against Hungary. That lack of clarity was allegedly exacerbated by the fact that the reasoned opinion sent to Hungary contained erroneous references to Decision 2015/1523, which Hungary considers irrelevant. (Presumably, that occurred because the reasoned opinions relating to Poland and the Czech Republic were being drafted in parallel and breaches of both Decision 2015/1523 and Decision 2015/1601 were being alleged against those two Member States.)

140. I note that the final part of both the letter of formal notice and the reasoned opinion addressed to Hungary referred to Article 5(4) to (11) of Decision 2015/1601 as well as to Article 5(2) thereof. At the risk of stating the obvious: the purpose of the Relocation Decisions was to enable the relocation of applicants arriving on the territory of Italy and Greece actually to take place. Making a pledge to accept a given number of applicants was certainly mandatory, but it was only a first step in the relocation process; it was not sufficient in itself. That also appears with great clarity from the series of reports on relocation and resettlement. Thus, the argument that

violation of Article 5(2) of Decision 2015/1601 de facto also implied violation of Article 5(4) to (11) thereof should have been self-evident to anyone reading in good faith. (86)

141. The three defendant Member States made an explicit claim — particularly at the hearing — that their status was that of ‘rebels’, who wanted to stand up and oppose the implementation of the relocation mechanism. The Commission does not gainsay that presentation of the events leading to the present proceedings. However, it also follows from the stance that those Member States have chosen to adopt that it is difficult to give credence to Hungary’s claim that it was somehow unaware of the extent of the infringement of Decision 2015/1601 that might be alleged against it.

142. Finally, it is of course regrettable that extraneous references to Decision 2015/1523 crept into the reasoned opinion addressed to Hungary. It seems probable that the errors arose from the use of ‘copy-paste’ during the simultaneous preparation of the three reasoned opinions to be sent to Poland, Hungary and the Czech Republic. I do not consider that those errors are of such a nature as to render the allegations being made against Hungary in the reasoned opinion incomprehensible. Thus, I do not consider that Hungary’s exercise of its rights of defence was adversely affected.

143. I therefore conclude that Hungary’s argument should be rejected in its entirety in so far it relates to the violation of the rights of the defence.

In Case C-719/17, insufficient precision in the form of order sought (the petitum)

144. In both the letter of formal notice and the reasoned opinion sent to the Czech Republic, the Commission identified the date on which the infringement began as 13 August 2016. In its application, the Commission pointed out that since its notification dated 13 May 2016, the Czech Republic had not provided any further indication as to the number of applicants who could be relocated, notwithstanding that it was required to do so at least once every 3 months. The Commission concluded that the Czech Republic had therefore failed to fulfil its obligations as of 13 August 2016. (87) However, the *petitum* in the application does not specify the date on which the infringement began. (88) In a subsequent procedural document, the Commission also referred to 13 August 2016 as the date on which the infringement began.

145. The Czech Republic argues that the wording of the *petitum* makes it impossible to determine the scope of the infringement alleged against it. (89) It also claims that the Commission’s written pleadings are ambiguous as to whether the infringement began on 13 May 2016 or on 13 August 2016.

146. In my opinion, the objections raised by the Czech Republic are unfounded.

147. According to the established case-law of the Court, ‘an application initiating proceedings must state the subject matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a complaint’. (90)

148. In my view, it is clear from the text of the application that the last notification made by the Czech Republic under Article 5(2) of the Relocation Decisions took place on 13 May 2016. Since that provision required Member States to make such notifications at least every 3 months, it can logically be inferred that the infringement started 3 months after that date — that is, on 13 August 2016. The Commission had, indeed, identified that precise date in both the letter of formal notice and in the reasoned opinion and it confirmed that date in its subsequent written pleadings before the Court. The logical connection between 13 May 2016 and 13 August 2016 appears expressly from the Commission’s application. (91)

149. It is obviously regrettable that the *petitum* itself does not explicitly refer to 13 August 2016. That said, the text of the application nevertheless contains the essential points of fact and of law in support of the action. Those points are set out coherently and intelligibly and are not contradicted by the correspondence exchanged during the pre-litigation procedure. (92) In those circumstances, notwithstanding the omission in the *petitum* I do not perceive any real risk that the Court might rule *ultra petita* or fail to rule on a complaint.

150. Nor do I share the Czech Republic’s view that the Commission’s allegations as regards the date on which the infringement began are worded in an ambiguous or contradictory manner. The dates given by the Commission in its written pleadings are consistent and cannot cause confusion in the mind of anyone reading attentively and in good faith.

151. I conclude that the Czech Republic's argument (Case C-719/17) based on insufficient precision in the *petitum* should be rejected as unfounded.

Conclusion on admissibility

152. In the light of the foregoing considerations, I conclude that the infringement proceedings brought against the three defendant Member States are admissible.

Substance

Preliminary remarks

153. The Court's exhaustive analysis of Decision 2015/1601 in the judgment in *Slovak Republic and Hungary v Council* concluded by dismissing the action for annulment of that measure. No challenge within time was brought against the earlier Decision 2015/1523. By necessary implication from the Grand Chamber's examination of Decision 2015/1601, if a challenge raising analogous arguments had been made to Decision 2015/1523, it would have met with the same fate.

154. The Relocation Decisions are therefore to be considered as incontestably *intra vires* and valid. The three defendant Member States accept as much in the present proceedings. (93)

155. Both the Relocation Decisions were provisional measures adopted under Article 78(3) TFEU. As the Court explained in the judgment in *Slovak Republic and Hungary v Council*, 'measures which are capable of being adopted on the basis of Article 78(3) TFEU must be classified as "non-legislative acts" because they are not adopted at the end of a legislative procedure'. (94)

156. Article 288 TFEU states that 'a decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them'. The Relocation Decisions do not specify addressees. They were binding in their entirety and clearly created legal obligations for the three defendant Member States.

157. A failure (or, a fortiori, a refusal) by any Member State to comply with its legal obligations under the Relocation Decisions necessarily has an adverse impact on the overall effectiveness of the emergency relocation operation put in place by those decisions to address the sudden inflow of migrants. It leaves the beneficiary Member States (Italy and Greece) struggling to deal with the sheer numbers of applicants for international protection arriving day and night in their territory. It hinders and/or prevents those Member States and the EU institutions from discharging their own obligations under the Relocation Decisions.

The Commission's application

158. The Court has consistently held that, in infringement proceedings brought against a Member State under Article 258 TFEU, the Commission must 'set out the complaints coherently and precisely, so that the Member State and the Court can know exactly the scope of the alleged infringement of EU law, a condition that must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged'. (95)

159. The Commission has identified the alleged breach as being, essentially, failure to pledge commitments under Article 5(2) of the Relocation Decisions, and consequently a failure to undertake relocations under Article 5(4) to (11) thereof. (96)

160. Of the three defendant Member States, Poland and the Czech Republic make a limited attempt to contest (or more accurately to nuance) the factual allegations made by the Commission. Hungary does not, essentially, challenge the Commission's account of the facts.

161. Thus, Poland argues that it was not possible, under the Relocation Decisions, to verify whether potential transferees had links to extremist or criminal organisations such that they might pose a security risk. Poland refers in general terms to incidents in other Member States where some applicants granted refugee status had subsequently been involved in assaults and crimes. Poland claims that the absence of reliable documentation, the fact that the transferees were abroad rather than in Poland, the short time available to the liaison officer and (for some potential transferees) the impossibility of holding pre-transfer security interviews made it materially impossible for Poland to be faithful to the duties incumbent upon it under Article 72 TFEU and still apply the Relocation Decisions.

162. The Czech Republic complains that many of the potential transferees selected by Greece and Italy lacked proper identity documents and that those two Member States' cooperation under the Relocation Decisions was inadequate. Consequently, it lays the blame at the door of Italy and Greece for the fact that only a tiny number of applicants were transferred.

163. None of the factual elements advanced by Poland and the Czech Republic, even if proven, would meet the Commission's case that all three defendant Member States had failed to respect their 3-monthly pledging requirement under Article 5(2) of the Relocation Decisions. Indicating how many applicants one might potentially be able to accept over a particular period is conceptually entirely different from the question of whether there is a good reason not to accept a *particular* potential transferee proposed by Italy or Greece.

164. By the same token, the specific problems highlighted by Poland and the Czech Republic might explain, in an individual case, why a *particular* applicant could not be accepted for transfer *notwithstanding* the detailed arrangements for liaison and cooperation contained in the Relocation Decisions. They are, however, wholly inadequate as a basis for justifying the almost complete failure (by all three defendant Member States) to follow through on the obligations contained in Article 5(4) to (11) of those decisions.

165. I therefore consider that the Commission has made good the factual basis for its allegations against the three defendant Member States.

166. The two relocation decisions differ in their treatment of how Member States were to participate in the relocation process. Thus, Article 4 of Decision 2015/1523 merely specified the global number of relocations to be attained (24 000 from Italy, 16 000 from Greece), leaving open how many applicants each Member State should accept for relocation. In contrast, Article 4 of Decision 2015/1601, read in conjunction with Annexes I and II thereto, contained a more precise and detailed mechanism. Article 4(1) specified how, of the 120 000 applicants to be relocated, an initial 66 000 were to be redistributed amongst other Member States (Annex I covering the 15 600 relocations from Italy; Annex II covering the 50 400 relocations from Greece). Article 4(2) then explained that the remaining 54 000 applicants were to be relocated 'proportionately to the figures laid down in Annexes I and II'. (97)

167. That said, Article 5(2) of the Relocation Decisions clearly requires pledges to be made at least every 3 months, while Article 5(4) to (11) imposes an obligation (following the procedures there set out) to accept relocations, except where specific exemptions apply, such as that provided by Article 5(7) in relation to individuals posing a threat to internal security.

168. Despite the (differing) latitude thus afforded to Member States in the two Relocation Decisions that I have identified, I have no hesitation in concluding that pledging to accept 100 applicants (Poland), (98) 50 applicants (the Czech Republic) (99) or indeed making no pledge at all (Hungary) (100) cannot conceivably be regarded as complying with either the letter or the spirit of the obligations imposed by the Relocation Decisions.

169. What of the Commission's additional claim that the three defendant Member States also breached their obligations under Article 5(4) to (11) of the Relocation Decisions?

170. It seems to me that the Commission is correct as a matter of logic in asserting that if a Member State fails to pledge the numbers of applicants that it is prepared to accept, it will then necessarily also fail, on the basis of such pledges, to accept relocations and will therefore also be in breach of its consequent obligations under Article 5(4) to (11) of the Relocation Decisions. Nor, indeed, do the three defendant Member States seriously argue to the contrary; that is borne out by the fact that all three have taken either virtually no transferees (Poland and the Czech Republic) or no transferees whatsoever (Hungary).

171. I conclude that the Commission has made out its case in the manner required by Article 258 TFEU. The question is therefore, whether the elements relied upon by the three defendant Member States constitute a defence in law to the infringement proceedings. At this point, the burden of making out that defence necessarily shifts to the Member States in question.

The arguments of the parties

172. Poland argues that complying with the Relocation Decisions would have prevented it from discharging its responsibilities under Article 72 TFEU, read with Article 4(2) TEU, with regard to the maintenance of law and order and the safeguarding of internal security, matters for which it retains exclusive competence. (101) As a provision of primary law, Article 72 TFEU takes precedence over the Relocation Decisions and guarantees Member States total control over their internal security and public order. It is not a mere check on legality during the legislative process but rather a conflict of laws rule, which gives priority to Member State competence. It is for the Member State to assess whether, in any particular set of circumstances, such a conflict exists. A Member State may thus rely on Article 72 TFEU to counter arguments about depriving the Relocation Decisions of 'effet

utile' or appeals to solidary — there is no obligation to jeopardise internal security by showing solidarity with other Member States. The judgment in *Slovak Republic and Hungary v Council* does not (and could not) remove a Member State's inalienable right to rely on Article 72 TFEU to override any other purported obligations arising from measures of EU secondary law adopted under Title V of Part Three of the TFEU. For that reason, Poland expressly does *not* seek to raise an exception of illegality under Article 277 TFEU.

173. Hungary likewise relies on Article 72 TFEU as giving it the right to disapply a decision based on Article 78(3) TFEU if it considers that that decision provides inadequate safeguards for its internal security. Hungary argues that the fact that potential transferees under Decision 2015/1601 should be persons possessing nationalities for which 75% or more of applications for international protection are granted (Article 3(1) of Decision 2015/1601) restricts its ability to rely on reasons for exclusion from protected status (as a refugee or a person enjoying subsidiary protection) linked to national security and public order. The fact that the judgment in *Slovak Republic and Hungary v Council* upheld the validity of Decision 2015/1601 is irrelevant. The question here is separate and distinct: may a Member State rely on Article 72 TFEU to exclude or limit relocations under Decision 2015/1601 when they have reservations about the impact of such relocations on national security and public order within their territory?

174. The Czech Republic argues essentially that the relocation mechanism put in place by the Relocation Decisions is dysfunctional and that it has taken other, more effective, measures to help in the fight against the migration crisis. Specifically, it has provided significant assistance to the third countries from which the exodus has been greatest and has seconded significant numbers of police to work on protecting the EU's external frontiers.

175. The Commission relies essentially on the judgment in *Slovak Republic and Hungary v Council*, the need to give 'effet utile' to the Relocation Decisions and the principle of solidarity between Member States. It insists that adequate mechanisms existed within the Relocation Decisions to enable Member States of relocation, (102) in respect of any individual applicant, to take the necessary measures to protect national security and public order within their territory.

176. For the purposes of the analysis that follows, I shall group the arguments raised by the three defendant Member States as follows: (i) the fact that the judgment in *Slovak Republic and Hungary v Council* upheld the validity of Decision 2015/1601 is irrelevant (Poland and Hungary); (ii) Member States were entitled to disapply the Relocation Decisions (even if valid) on the basis of their retained powers under Article 72 TFEU, read with Article 4(2) TEU (Poland and Hungary); and (iii) the Relocation Decisions created a dysfunctional system (the Czech Republic).

(i) the fact that the judgment in Slovak Republic and Hungary v Council upheld the validity of Decision 2015/1601 is irrelevant

177. In response to the letters of formal notice and the reasoned opinions, Poland and Hungary have argued that the Relocation Decisions were invalid. These arguments were presented prior to the judgment in *Slovak Republic and Hungary v Council*, by which the Court upheld the validity of Decision 2015/1601. Any further challenge to the validity of the Relocation Decisions under Article 263 TFEU would now be out of time.

178. On the basis of the written pleadings, the Court had asked the parties to address at the hearing the question whether a Member State in infringement proceedings under Article 258 TFEU might justify failing to apply an EU act, where an action challenging the validity of that act (here, the actions brought by Slovakia and Hungary that led to the judgment in *Slovak Republic and Hungary v Council*) did not result in automatic suspension of that act under Article 278 TFEU, and the Court had not ordered any such suspension. The Court also asked whether a Member State, in infringement proceedings under Article 258 TFEU, might justify failing to apply an EU act without relying on a claim of illegality under Article 277 TFEU, and whether the Relocation Decisions might be considered to be acts of general application under Article 277 TFEU.

179. At the hearing, the three defendant Member States expressly indicated that they were *not* contesting the validity of the Relocation Decisions or seeking to raise a claim of incidental illegality under Article 277 TFEU. Hungary left it open to the Court to evaluate its defence on the basis of that article, should the Court wish to do so.

180. It seems to me that in the light of the hearing, the points raised in relation to Article 277 TFEU are no longer in fact 'live'. Interesting though it would be, intellectually, to explore the outer reaches of that article, I shall eschew doing so. The topic should wait for another case and another day.

181. The argument advanced by Poland and Hungary in the present proceedings is that the judgment in *Slovak Republic and Hungary v Council* is *not relevant* to the defence that they raise here.

182. To evaluate that claim, it is necessary to look at what that judgment said about Article 72 TFEU and about how Decision 2015/1601 accommodated the Member States' competence to discharge their responsibilities for security and public order within their territory. That is most conveniently done within the context of discussing the defence that Poland and Hungary advance on the basis of Article 72 TFEU, read with Article 4(2) TEU. To that I now turn.

(ii) *Member States were entitled to disapply the Relocation Decisions (even if valid) on the basis of their retained powers under Article 72 TFEU, read with Article 4(2) TEU*

183. In its written questions sent to the parties before the hearing, the Court prepared the ground for discussion of this argument by asking the Commission whether the concepts of 'law and order' and 'internal security' were to be interpreted in the same manner as similar concepts applied in relation to fundamental freedoms, and were used in provisions such as Article 346 TFEU.

184. The Commission argues that Article 346 TFEU concerns the specific issues of supply of information and the trade in arms, and that the concept of security used there is irrelevant to the present proceedings.

185. The Court also asked the Commission whether a Member State might rely on Article 72 TFEU to justify non-application of a Union act adopted under Title V of Part Three TFEU, where the act concerned did not provide sufficient measures for the protection of 'law and order' and 'internal security', and also whether it should be possible to rely on Article 72 TFEU in a broader context.

186. The Commission argues that Article 72 TFEU expresses a principle of law that must be taken into consideration whenever the EU legislature acts. If the legislature should fail to do so, then a Member State may take legal action against the resulting EU legal act under the provisions of the treaties concerning the Court's procedure.

187. Further, the Commission argues that Article 72 TFEU is constrained in a similar fashion to the limitations that apply to Articles 36, 45(3) and 52(1) TFEU in respect of free movement within the internal market. While those provisions do permit Member States to place limits on free movement, any restrictions imposed remain subject to control by the EU institutions, notably by the Court.

188. Against that background, I turn to address the issues raised.

– *The case-law of the Court on Article 72 TFEU*

189. To my knowledge, the Court has so far considered Article 72 TFEU on three occasions.

190. First, in *Adil*, (103) the Court discussed the proper interpretation of Article 21(a) of the Schengen Borders Code (104) against the background of Article 72 TFEU. It recalled that 'Article 21(a) of [the Schengen Border Code] provides that the abolition of border control at internal borders is not to affect the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that is also to apply in border areas. That provision of [the Schengen Border Code] makes clear that the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures do not have border control as an objective, are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime, are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders and are carried out on the basis of spot-checks'. (105)

191. The Court concluded that the mobile security monitoring checks at issue in that case were not 'border checks' prohibited by Article 20 of the Schengen Borders Code but checks within the territory of a Member State, covered by Article 21 thereof. (106) Later in the same judgment, the Court reaffirmed that 'the provisions of Article 21(a) to (d) of [the Schengen Border Code] and the wording of Article 72 TFEU confirm that the abolition of internal border controls has not affected the responsibilities of the Member States with regard to the maintenance of law and order and the safeguarding of internal security'. (107)

192. Then, in *A*, (108) the Court essentially confirmed its ruling in *Adil* (this time, in respect of a similar system of mobile security controls being operated in Germany).

193. Finally, in the judgment in *Slovak Republic and Hungary v Council*, the Court examined Poland's argument in that case that 'the contested decision is contrary to the principle of proportionality since it does not allow the Member States to ensure the effective exercise of their responsibilities with regard to the maintenance of law and order and the safeguarding of internal security as required under Article 72 TFEU'. (109)

194. The Court pointed out that recital 32 of Decision 2015/1601 states expressly that 'national security and public order should be taken into consideration throughout the relocation process, until the transfer of the applicant is implemented' and that Article 5(7) expressly preserved Member States' right to refuse to relocate an applicant, albeit only where there were reasonable grounds for regarding him or her as a danger to their national security or public order. If that mechanism 'were ineffective because it requires Member States to check large numbers of persons in a short time, such practical difficulties are not inherent in the mechanism and must, should they arise, be resolved in the spirit of cooperation and mutual trust between the authorities of the Member States that are beneficiaries of relocation and those of the Member States of relocation. That spirit of mutual trust and cooperation must prevail when the relocation procedure provided for in Article 5 of [Decision 2015/1601] is implemented'. (110)

195. To some extent, therefore, the judgment in *Slovak Republic and Hungary* foreshadows the arguments being raised by the three defendant Member States in the present proceedings. That said, since reliance on retained competence under Article 72 TFEU is the centrepiece of their defence, it is necessary for me now to explore that argument in greater detail.

– *The concepts of public order and security*

196. The concept of *public order* was addressed in *N.*, (111) where the Court held that 'the concept of "public order" entails, in any event, the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.

197. Earlier, in *Zh. and O.*, (112) the Court held that in relation to the fundamental rights of third-country nationals, concepts such as *security* 'cannot be determined unilaterally by each Member State without any control by the institutions of the European Union'.

198. I shall take those two citations as my starting point for the analysis that follows.

199. In general terms, it seems to me that the existing case-law of the Court on the fundamental freedoms — notably, on free movement of persons — does provide a secure foundation for approaching the concepts of public order and security in the present sets of proceedings. I recall that the asylum *acquis* — notably, the Dublin III Regulation (113) and the Qualifications Directive (114) — addresses matters from the perspective of the *individual applicant*. Just as the Court explained long ago in *Bouchereau*, it is the *personal conduct of the individual concerned* that must be assessed in order to determine whether there is a threat to the community of the Member State in question. (115)

200. I agree with the Commission that Article 346 TFEU is a specific Treaty provision governing a specific situation. For that reason, I do not think that it cannot usefully be extended to assist in the present proceedings.

201. However, I also recall that Article 78(3) TFEU exists *specifically* to enable the Council to adopt provisional measures to help a Member State that is 'confronted by an emergency situation characterised by a sudden inflow of nationals of third countries'. To the extent that sheer numbers of persons entering a Member State may create an emergency situation (and I understand that term to encompass also a situation presenting a threat to public order or national security), Article 78(3) TFEU provides the necessary legal basis for appropriate measures to be taken that respect both Member States' international obligations under the Geneva Convention and *all applicable fundamental principles of EU law*. Those latter principles include both solidarity and respect for the rule of law, to which I shall return at the end of this Opinion.

– *The role of Article 72 TFEU*

202. Article 72 TFEU forms part of Chapter 1, entitled 'General provisions', of Title V of the TFEU ('Area of freedom, security and justice'). With its clear recognition of Member States' powers and responsibilities in relation to the maintenance of law and order and the safeguarding of internal security, Article 72 TFEU most obviously serves to remind the EU legislature of the need to make appropriate provision, in any secondary legislation enacted under Title V, for Member States to be able to discharge those responsibilities. Were the EU legislature to disregard that obligation when drafting, Article 72 TFEU would provide a clear basis for a Member State to bring an action for annulment (to that extent, I agree with the Commission's submission). But there was no such omission here.

203. An immediate answer to the central argument advanced by Poland and Hungary is to be found in two key provisions of the Relocation Decisions themselves. The final sentence of Article 5(4) thereof provided that 'the Member State of relocation may decide not to approve the relocation of an applicant only if there are reasonable grounds as referred to in paragraph 7 of this Article'. Article 5(7) thereof then stated that 'Member States retain the right to refuse to relocate an applicant only where there are reasonable grounds for regarding him or her as a

danger to their national security or public order or where there are serious reasons for applying the exclusion provisions set out in Articles 12 and 17 of [the Qualifications Directive]’.

204. I add in parentheses that recital 26 of Decision 2015/1523 and recital 32 of Decision 2015/1601 both state that ‘national security and public order should be taken into consideration throughout the relocation procedure, until the transfer of the applicant is implemented’ and indicate that ‘where a Member State has reasonable grounds for regarding an applicant as a danger to its national security or public order, it should inform the other Member States thereof’. By so doing, the potential Member State of relocation demonstrates its solidarity with its fellow Member States, who — like it — have a responsibility to safeguard national security and public order within their respective territories.

205. Read together, those two substantive paragraphs of the Relocation Decisions *expressly recognised* that the Member State of relocation retained the right to refuse to relocate *a particular applicant* where (i) reasonable grounds existed for regarding that person as a danger to its national security or public order or (ii) serious reasons existed for thinking that that person could lawfully be excluded from the international protection sought.

206. To the extent that the Member State of relocation entertained reasonable doubts as to whether it should accept relocation of applicant X, the Relocation Decisions thus provided that Member State with a clear, obvious and lawful basis for refusing to accept the relocation of that particular applicant.

207. On a restrictive view of the issues raised by the present infringement proceedings, that might be deemed sufficient to dispose of the three defendant Member States’ principal argument in defence of their conduct. It was perfectly possible for them to preserve the safety and welfare of their citizens by refusing (on the basis of the Relocation Decisions themselves) to take applicant X, thereby exercising ‘the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’ (Article 72 TFEU).

208. In fairness to the three Member States concerned, however, I should not leave matters there. The cross-reference, in Article 5(7) of the Relocation Decisions, to the Qualifications Directive provides a convenient bridge to the more fundamental issue at stake. The retained powers of the Member States under Article 72 TFEU need to be viewed in the context of the extensive and uniform EU secondary legislation regulating the process for examining applications for international protection and the substantive criteria for determining such applications (the asylum *aquis*). Against that background, can a Member State rely on Article 72 TFEU (read in conjunction, Hungary submits, with Article 4(2) TEU) in order simply to *disapply* a valid EU measure taken (116) under Article 78(3) TFEU, with which it disagrees?

209. In addressing that question, I thus deliberately leave to one side any procedural issues (for example, relating to the time limits for direct challenges, or the parameters of an incidental plea of illegality) in order to concentrate on the fundamental issue at stake.

210. The international obligations of the individual Member States under the Geneva Convention are given uniform expression, at EU level, by the intricate web of directives covering the processing and substantive consideration of applications for international protection, specifically the Qualifications Directive, the Procedures Directive and the Reception Directive. The legal basis for those measures is Article 78(2) TFEU, which appears in Chapter 2 of Title V, entitled ‘Policies on border checks, asylum and immigration’. We are therefore here squarely within a matter that is regulated in detail both by the TFEU itself and by EU secondary law, based on EU primary law.

211. In such circumstances, where the Treaties recognise a competence, duty or obligation that remains with the Member States, Member States must exercise their powers in a way that does not run counter to relevant principles of EU law.

212. Article 72 TFEU is therefore not — as Poland and Hungary contend — a *conflict of laws rule* that gives priority to Member State competence over measures enacted by the EU legislature or decision-maker; rather, it is a *rule of co-existence*. The competence to act in the specified area remains with the Member State (it has not been transferred to the European Union). Nevertheless, the actions taken must respect the overarching principles that the Member State signed up to when it became a Member State and any relevant rules contained in the Treaties or in EU secondary legislation.

213. Two examples will suffice to make good that proposition.

214. In the events leading up to the ‘Factortame litigation’, (117) the United Kingdom enacted the Merchant Shipping Act 1988. That act of Parliament made radical changes to the British shipping register, thereby stripping Spanish-owned fishing vessels of their right to be listed on that register, to wear (118) the British maritime ensign and hence to fish against the UK’s fish quotas. (119) In so doing, the UK (subsequently supported before this

Court by Belgium and Greece) relied on the competence of each State under public international law to define as it thinks fit the conditions under which it grants to a vessel the right to wear its flag. (120)

215. The first question referred by the High Court simply asked: 'Does [EU] law affect the conditions under which a Member State lays down rules for determining which vessels are entitled to register in that State, to fly its flag and to carry its nationality?'

216. In answering that question, the Court expressly recognised that 'as [EU] law stands at present, competence to determine the conditions for the registration of vessels is vested in the Member States' (121) but that 'nevertheless, powers which are retained by the Member States must be exercised consistently with [EU] law'. (122) The United Kingdom's argument under international law 'might have some merit only if the requirements laid down by [EU] law with regard to the exercise by the Member States of the powers which they retain with regard to the registration of vessels conflicted with the rules of international law'. (123) It is clear that the Court did *not* consider there to be such a conflict, because the very next paragraph of the judgment goes on to state that 'consequently, the answer to the first question must be that, as [EU] law stands at present, it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag but, in exercising that power, the Member States must *comply* with the rules of [EU] law'. (124)

217. The Court went on to hold that the nationality requirements contained in the Merchant Shipping Act 1988 were precluded by the Treaty provisions on freedom of establishment and free movement of capital and the general prohibition on discrimination on grounds of nationality.

218. More recently, the Court has dealt with a number of cases involving the exercise of Member States' (unquestioned) power to legislate in relation to direct taxation — a matter that is not harmonised at EU level. Sometimes, however, the national rules laid down have the effect of disadvantaging taxpayers located in a different Member State. It is unnecessary to go into the technical detail of those cases. The Court has consistently held that, whilst the Member States enjoy power to set direct taxes, that power must be exercised within the parameters laid down by EU law. (125)

219. In my view, in the situation with which the present sets of infringement proceedings are concerned, Member States are likewise required to exercise their competence under Article 72 TFEU to discharge their responsibilities for the 'maintenance of law and order and the safeguarding of internal security' *in a way that respects other relevant provisions of EU law*. Those provisions are, on the one hand, the Relocation Decisions themselves (which, as we have already seen, offered an adequate legal basis for any such action that needed to be taken by a Member State in an *individual case*) and, on the other hand, the entire framework that already exists in EU law governing the processing of an individual application for international protection and the substantive decision to be taken by the Member State in determining that application.

220. Thus, Articles 12 and 17 of the *Qualifications Directive* echo the Geneva Convention and lay down detailed grounds on which an applicant may be *excluded* from refugee status or subsidiary protection. Those provisions are reinforced by Articles 14 and 19 thereof, (126) which enable a Member State to terminate protected status if the person in question constitutes a danger to the community or security of the Member State in which he or she is present. Under the *Procedures Directive*, applicants may be examined at the border or in transit zones if, for serious reasons, they may be considered a danger to the national security or public order of the Member State (Article 31(8)(j)) (127) and even an unaccompanied minor may, on the same basis, be subjected to stricter processing arrangements (Article 25(6)(a)(iii) and (b)(iii)). (128) The *Reception Directive* allows Member States to decide on the residence of an applicant (derogating from his normal liberty to move freely) for reasons *inter alia* of public interest and public order (Article 7(2)). (129) An applicant may be detained where protection of national security or public order so requires (Article 8(3)(e)). (130) And the *Returns Directive* authorises a Member State not to give a period for voluntary departure, to detain a failed applicant for international protection and to impose an extended entry ban where these (more coercive) measures are justified on grounds of national security or public order (see Articles 7(4), 8(4), 11(2) and 15).

221. In short, therefore, EU secondary law within the asylum *aquis* provides an adequate legislative framework within which a Member State's legitimate concerns as to national security, public order and the protection of the community can be met *in relation to an individual applicant* for international protection. Against that background, I can find no scope for accommodating the argument that Article 72 TFEU gives Member States *carte blanche* to disapply a valid measure of EU secondary law with which they happen not to be in perfect agreement.

222. In this connection, Poland's reliance on the ruling of the European Court of Human Rights ('the Strasbourg Court') in *N. v. Finland* (38885/02) (131) takes its argument no further forward. The Strasbourg Court there held that 'Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including their obligations under the Convention, to control the entry, residence and expulsion of aliens'. That is undisputed. But the way in which a Member State exercises that right is constrained by the

obligations that it freely entered into under international law when it acceded to the European Union, namely, to comply with obligations flowing from EU law.

223. As I have shown, EU law itself provides the Member State with abundant means of protecting its legitimate national security or public order concerns *in relation to a particular applicant* within the framework of its EU law obligations. EU law does not, however, permit a Member State peremptorily to disregard those obligations and, as it were, to put up a sign reading '*chasse gardée*' (roughly translatable as, 'private hunting — keep out').

– Article 4(2) TEU

224. Poland and Hungary have both recalled that Article 4(2) TEU refers to 'national identities' and states that '[the EU] shall respect ... [Member States'] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'. To varying degrees, they seek to rely on that provision read in conjunction with Article 72 TFEU as entitling them to disapply the Relocation Decisions in order to ensure social and cultural cohesion, as well as to avoid potential ethnic and religious conflicts.

225. I can deal shortly with that proposition.

226. In *Commission v Luxembourg* (132) the Court was presented with a similar argument in relation to applying a nationality condition to civil-law notaries. Luxembourg argued, *inter alia*, that that condition was justified by the need to ensure the use of the Luxembourgish language when notaries performed their duties. In rejecting that proposition, the Court held that 'while the preservation of the national identities of the Member States is a legitimate aim respected by the legal order of the European Union, as is indeed acknowledged by Article 4(2) TEU, the interest pleaded by the Grand Duchy can, however, be effectively safeguarded otherwise than by a general exclusion'.

227. For the same reason, Article 4(2) TEU cannot provide grounds for simply refusing to relocate applicants under the Relocation Decisions. The Member States' legitimate interest in preserving social and cultural cohesion may be safeguarded effectively by other and less restrictive means than a unilateral and complete refusal to fulfil their obligations under EU law.

(iii) *The Relocation Decisions created a dysfunctional system*

228. Poland and Hungary have placed emphasis on the security risks inherent in processing large numbers of applicants for international protection, some of whom may in fact have links to international terrorism. In that context, Poland refers to the Annual Risk Analysis for 2016 produced by the European Agency for the Management of Operational Cooperation at the External Borders (Frontex), which noted that 'ensuring the rescue, safety, registration and identification of thousands of vulnerable individuals is an extremely onerous task and one that implies a certain level of inherent risk and vulnerability at the external borders'. (133)

229. The Czech Republic raises the same argument. It claims that Greece and Italy were designating applicants for relocation who did not possess personal documents. The Czech Republic would have been unable to assess the risk that such undocumented persons might present for national security. It would therefore have been pointless for the Czech Republic to have indicated to the Commission numbers of applicants that it was prepared to receive. The system put in place by the Relocation Decisions was, it asserts, 'dysfunctional'.

230. I reject the argument that the risks inherent in processing large numbers of applicants absolved the three defendant Member States from their legal obligation to participate in the arrangements put in place by the Relocation Decisions.

231. The recitals to those decisions expressly indicate that 'where a Member State has reasonable grounds for regarding an applicant as a danger to its national security or public order, it should inform the other Member States thereof'. (134) The substantive articles then imposed specific obligations on the Greek and Italian authorities in relation to identifying and processing potential applicants for relocation. (135)

232. Moreover, Article 5(7) of the Relocation Decisions expressly preserved Member States' right to refuse to relocate an *individual* applicant where there were 'reasonable grounds for regarding him or her as a danger to their national security or public order or where there are serious reasons for applying the exclusions provisions set out in Articles 12 and 17 of [the Qualifications Directive]'.

233. In the judgment in *Slovak Republic and Hungary v Council*, the Court specifically held that practical difficulties must 'be resolved in the spirit of cooperation and mutual trust between the authorities of the Member States that are beneficiaries of relocation and those of the Member States of relocation. That spirit of cooperation

and mutual trust must prevail when the relocation procedure provided for in Article 5 of [Decision 2015/1601] is implemented'. (136)

234. That seems to me to provide a complete answer to the argument being advanced here. The applicable law (the Relocation Decisions) did provide an appropriate mechanism for addressing the complex issues and logistics of relocating very large numbers of applicants for international protection from the frontline Member States to other Member States. The decisions themselves cannot therefore sensibly be described as 'dysfunctional'. In what was clearly an emergency situation, it was the responsibility of *both* the frontline Member States *and* the potential Member States of relocation to make that mechanism work adequately, so that relocation could take place in sufficient numbers to relieve the intolerable pressure on the frontline Member States. That is what solidarity is about.

235. I add, for the sake of good order, that it is also clear from certain of the reports on the implementation of the Relocation Decisions that other Member States facing problems with their relocation obligations, such as Austria and Sweden, *applied for and obtained temporary suspensions of their obligations under those decisions*, as provided for by Article 4(5) and (6) thereof. (137) If the three defendant Member States were really confronting significant difficulties, that — rather than deciding unilaterally not to comply with the Relocation Decisions was not necessary — was clearly the appropriate course of action to pursue in order to respect the principle of solidarity. I shall return to this issue at the end of my Opinion.

236. I also note the various claims made by the three defendant Member States that they have sought to assist Greece and Italy by means other than relocation. That argument is plainly irrelevant. The Relocation Decisions contain no legal basis for substituting other measures in place of the pledging requirement and the consequent relocation obligations.

237. I therefore reject the claim that because the relocation system was (allegedly) dysfunctional, that entitled a Member State unilaterally to suspend compliance with the pledging requirement and relocation obligations imposed by the Relocation Decisions.

Concluding remarks

238. Over and above the specific issues that I have dealt with thus far (most notably, the scope and interpretation of Article 72 TFEU), these infringement proceedings raise fundamental questions about the parameters of the EU legal order and the duties incumbent upon Member States. In these concluding remarks, I shall therefore address three important strands of that legal order: the 'rule of law', the duty of sincere cooperation and the principle of solidarity.

The rule of law

239. The preamble to the TEU stresses that the rule of law is a 'universal value' that is part of 'the cultural, religious and humanistic inheritance of Europe' (138) — a value to which the Member States confirm their attachment. (139) Article 2 TEU gives substantive effect to those recitals, explaining that 'the Union is founded on the values of respect for ... the rule of law ... These values are common to the Member States'.

240. In its seminal judgment in *Les Verts v Parliament*, the Court first affirmed the principle that the EEC (as it then was) 'is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'. (140)

241. The rule of law has many important sub-components, such as respect for the proper balance of power between the different branches of government (141) and ensuring the independence of the judiciary by protecting their tenure in office. (142) At a deeper level, respect for the rule of law implies compliance with one's legal obligations. Disregarding those obligations because, in a particular instance, they are unwelcome or unpopular is a dangerous first step towards the breakdown of the orderly and structured society governed by the rule of law which, as citizens, we enjoy both for its comfort and its safety. The bad example is particularly pernicious if it is set by a Member State.

The duty of sincere cooperation

242. Article 4(3) TEU states:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

243. The Grand Chamber set out very clearly in *Achmea* what that implies: 'EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the *Member States are obliged, by reason inter alia of the principle of sincere cooperation* set out in the first subparagraph of Article 4(3) TEU, to *ensure in their respective territories the application of and respect for EU law*, and to take for those purposes any appropriate measure, whether general or particular, to *ensure fulfilment of the obligations* arising out of the Treaties or *resulting from the acts of the institutions of the EU*. (143)

244. The Court has also said clearly that the fact that a Member State has doubts about the validity of an EU measure or believes that it may have plausible reasons for doing something that goes against that measure does not relieve that Member State of its duty to respect the principle of sincere cooperation. (144)

245. Moreover, under the principle of sincere cooperation, each Member State is *entitled* to expect other Member States to comply with their obligations with due diligence. (145) That is, however, manifestly not what has happened here.

Solidarity

246. The founding fathers of the 'European project' — Robert Schuman, Jean Monnet, Konrad Adenauer — were statesmen from countries that had recently been embroiled (aggressor and victims, victors and vanquished alike) in 6 years of devastating and destructive conflict. Had it not been for their initial vision and openness of spirit, the European Coal and Steel Community (ECSC) and (6 years later) the European Economic Community and Euratom would not have come into being.

247. The Schuman Declaration of 9 May 1950 famously recognised that 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity'. (146) That statement found an echo in the third recital to the Treaty establishing the European Coal and Steel Community — ECSC Treaty (the precursor to the EEC Treaty, of which the present TEU and TFEU are direct descendants), which spoke expressly of 'recognising that Europe can be built only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development'. (147)

248. Article 2 TEU continues to remind us that the European Union is founded on shared values and that 'these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, *solidarity* and equality between women and men prevail' (emphasis added).

249. The Court has, over the years, echoed that call to solidarity. Thus, as early as 1983, in the context of steel quotas, the Court explained that 'it is in fact impossible to entertain the concept of necessity in relation to the quota system provided for by Article 58 of the ECSC Treaty, which is based on *solidarity* between all Community steel undertakings in the face of the *crisis* and seeks an *equitable distribution* of the sacrifices arising from unavoidable economic circumstances'. (148) *Mutatis mutandis*, those words could readily be transposed to the present context.

250. A little later, in the context of the elaborate arrangements for disposing of surplus sugar, (149) the Court was called upon in *Eridania zuccherifici nazionali and Others* (150) to decide whether a quota system alleged to bear more heavily, in financial terms, on Italian producers than on producers from other Member States was unlawful. The Commission, defending the system, argued that fixing quotas on the basis of the actual production of undertakings was consistent with the principle of solidarity between producers. The Court held that 'the Council was justified in dividing the quotas between the individual undertakings on the basis of their actual production ... such a distribution of the burden is ... consistent with the principle of solidarity between producers, since production is a legitimate criterion for assessing the economic strength of producers and the benefits which they derive from the system' (151).

251. In so ruling, the Court made it clear that the principle of solidarity necessarily sometimes implies accepting burden-sharing.

252. More recently, in *Grzelczyk* (152) the Court invoked citizenship of the Union in conjunction with solidarity as the basis for Belgium's obligation to give Mr Grzelczyk access to the same benefit (the *minimex*) as his Belgian fellow students for the final year of his studies. In *Bidar*, (153) the Court built on that decision to say that, whilst a Member State might legitimately require 'a certain degree of integration' with the host Member State before it showed financial solidarity, it could not impose additional conditions that made it impossible for citizens of the Union from other Member States who *did* satisfy those residence requirements to obtain student loans.

253. Solidarity is the lifeblood of the European project. Through their participation in that project and their citizenship of European Union, Member States and their nationals have obligations as well as benefits, duties as well as rights. Sharing in the European 'demos' is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also requires one to shoulder collective responsibilities and (yes) burdens to further the common good.

254. Respecting the 'rules of the club' and playing one's proper part in solidarity with fellow Europeans cannot be based on a penny-pinching cost-benefit analysis along the lines (familiar, alas, from Brexiteer rhetoric) of 'what precisely does the EU cost me per week and what exactly do I personally get out of it?' Such self-centredness is a betrayal of the founding fathers' vision for a peaceful and prosperous continent. It is the antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship. If the European project is to prosper and go forward, we must all do better than that.

255. Let me conclude by recalling an old story from the Jewish tradition that deserves wider circulation. A group of men are travelling together in a boat. Suddenly, one of them takes out an auger and starts to bore a hole in the hull beneath himself. His companions remonstrate with him. 'Why are you doing that?' they cry. 'What are you complaining about?' says he. 'Am I not drilling the hole under my own seat?' 'Yes,' they reply, 'but the water will come in and flood the boat for all of us'. (154)

Costs

256. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs in relation to the infringement actions against each of the three defendant Member States and each of those Member States was unsuccessful in its action, Poland, Hungary and the Czech Republic must be ordered to bear their own costs and to pay those incurred by the Commission.

257. In accordance with Article 140(1) of the Rules of Procedure Member States which intervene in proceedings are to bear their own costs.

Conclusion

258. Having regard to all the above considerations, I am of the opinion that the Court should:

Case C-715/17 Commission v Poland

- (1) Declare that by failing to indicate at regular intervals, and at least every 3 months, the number of applicants who could be relocated swiftly to Polish territory and any other relevant information in accordance with Article 5(2) of 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, and of Article 5(2) of 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, the Republic of Poland has failed to fulfil its obligations under Article 5 of those decisions.

Accordingly, the relocation of applicants as set out in both Article 4 of Decision 2015/1523 and Article 4 of Decision 2015/1601 has not taken place pursuant to the relocation procedure provided in Article 5 of those decisions. The breach of Article 5 has in particular hindered Italy and Greece from identifying the individual applicants who could be relocated to Poland under Article 5(3) and from taking decisions to relocate such applicants pursuant to Article 5(4), thus contravening the principle of sincere cooperation in Article 4(3) TEU.

Consequently, Poland is also in breach of its obligations under Article 5(5) to (11) of Decision 2015/1523 and Decision 2015/1601, notably to complete the relocation procedure as swiftly as possible as laid down in Article 5(10) thereof.

- (2) Order the Republic of Poland to pay the costs.

- (3) Declare that the Czech Republic and Hungary should bear their own costs.

Case C-718/17 Commission v Hungary

- (1) Declare that by failing to indicate at regular intervals, and at least every 3 months, the number of applicants who could be relocated swiftly to Hungarian territory and any other relevant information in accordance with Article 5(2) of Decision 2015/1601, Hungary has failed to fulfil its obligations under Article 5 of that decision.

Accordingly, the relocation of applicants as set out in Article 4 of Decision 2015/1601 has not taken place pursuant to the relocation procedure provided in Article 5 of that decision. The breach of Article 5 has in particular hindered Italy and Greece from identifying the individual applicants who could be relocated to Hungary under Article 5(3) and from taking decisions to relocate such applicants pursuant to Article 5(4), thus contravening the principle of sincere cooperation in Article 4(3) TEU.

Consequently, Hungary is also in breach of its obligations under Article 5(5) to (11) of Decision 2015/1601, notably to complete the relocation procedure as swiftly as possible as laid down in Article 5(10) thereof.

- (2) Order Hungary to pay the costs.
- (3) Declare that the Czech Republic and Poland should bear their own costs.

Case C-719/17 Commission v Czech Republic

- (1) Declare that by failing to indicate at regular intervals, and at least every 3 months, the number of applicants who could be relocated swiftly to the Czech Republic and any other relevant information in accordance with Article 5(2) of Decision 2015/1523 and Article 5(2) of Decision 2015/1601, the Czech Republic has failed to fulfil its obligations under Article 5 of those decisions.

Accordingly, the relocation of applicants as set out in both Article 4 of Decision 2015/1523 and Article 4 of Decision 2015/1601 has not taken place pursuant to the relocation procedure provided in Article 5 of those decisions. The breach of Article 5 has in particular hindered Italy and Greece from identifying the individual applicants who could be relocated to the Czech Republic under Article 5(3) and from taking decisions to relocate such applicants pursuant to Article 5(4), thus contravening the principle of sincere cooperation in Article 4(3) TEU.

Consequently, the Czech Republic is also in breach of its obligations under Article 5(5) to (11) of Decision 2015/1523 and Decision 2015/1601, notably to complete the relocation procedure as swiftly as possible as laid down in Article 5(10) thereof.

- (2) Order the Czech Republic to pay the costs.
- (3) Declare that Hungary and Poland should bear their own costs.

¹ Original language: English.

² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31). The Dublin III Regulation is the third such measure designed to govern which Member State is to take responsibility for examining an application for international protection, following the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities — (OJ 1997 C 254, p. 1) ('the Dublin Convention'), which was replaced by Council Regulation No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application in one of the Member States by a third-country national (OJ 2003 L 50, p. 1; 'the Dublin II Regulation').

³ For a more detailed description of these events, see my Opinion in *A.S. and Jafari* C-490/16 and C-646/16, EU:C:2017:443, points 1 to 18.

4 Substantial entry also took place via the 'West Balkans route', as described in my Opinion in *A.S. and Jafari*, C-490/16 and C-646/16, EU:C:2017:443, points 7 to 18.

5 Article 13 of the Dublin III Regulation provides that 'where ... an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection'. Broadly speaking, most of the persons seeking international protection who entered Italy and Greece were covered by that provision.

6 In my Opinion in *Mengesteab* (C-670/16, EU:C:2017:480, points 69 to 73), I drew attention to some of the underlying problems associated with ascribing automatic responsibility under Article 13 of the Dublin III Regulation to a 'coastal' Member State which receives persons disembarking after a maritime search and rescue ('SAR') operation. Those (difficult) issues are still unresolved.

7 As long ago as 2011 the Court had recognised, in the judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 81 to 94) that circumstances could arise in which a Member State (*in casu*, the United Kingdom) could *not* return an asylum seeker to Greece because the system in that Member State for processing claims for international protection was close to breaking point.

8 Decision of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ 2015 L 239, p. 146).

9 Decision of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80).

10 Judgment of 6 September 2017, *Slovak Republic and Hungary v Council*, C-643/15 and C-647/15, EU:C:2017:631 (the judgment in *Slovak Republic and Hungary v Council*). See further points 62 to 69 below.

11 See further points 86 to 88 below for the declaration sought in each application.

12 Proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly Resolution 217 A.

13 Although the Universal Declaration of Human Rights is not legally binding, it forms a point of reference for both international law and EU law. See Zamfir, I., *The Universal Declaration of Human Rights and its relevance for the European Union*, European Parliament, 2018, EPRS_ATA (2018)628295_EN.

14 Signed at Geneva on 28 July 1951 and which entered into force on 22 April 1954 (United Nations, *Treaty Series*, vol. 189, p. 137), as supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967 (United Nations, *Treaty Series*, vol. 606, p. 267), which entered into force on 4 October 1967 (together, 'the Geneva Convention').

15 Recital 2 to the Dublin III Regulation describes a common policy on asylum, including the CEAS, as 'a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in [the EU]'.

16 OJ 2012 C 326, p. 391.

17 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9). The Qualifications Directive repealed the earlier Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12). Directive 2004/83 likewise contained provisions governing exclusion from refugee status (Article 12) or subsidiary protection (Article 17) and provisions enabling such status, if granted, to be terminated or revoked (Article 14 (refugees) and Article 19 (persons granted subsidiary protection)) where reasonable grounds existed for considering that person to be a danger to the security of the Member State in which he or she was present.

18 The principal differences are that Article 12(2)(b) refers to 'serious non-political crime', stating that 'particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes' and that Article 12(2)(c) refers explicitly to the committing of 'acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations' as a ground for exclusion.

19 See also recital 37, which explains that 'the notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association'.

20 The wording in Article 19(2) is in fact '*should* have been excluded from being eligible ... in accordance with Article 17(3)' (emphasis added). However, since the latter provision gives Member States the *facility* to exclude an applicant, rather than *requiring* them to do so, I have used the word 'could' — which seems more logical — in the text of my Opinion.

21 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

22 The drafting of Article 25 is, to use a kind word, convoluted; I refer interested readers who wish to pursue this point further to the full text of the Procedures Directive.

23 See also, in that context, recital 20: 'In well-defined circumstances ... where there are serious national security or public order concerns, Member States should be able to accelerate the examination procedure, in particular by introducing shorter, but reasonable, time limits for certain procedural steps, without prejudice to an adequate and complete examination being carried out and to the applicant's effective access to basic principles and guarantees provided for in this Directive'.

24 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96).

25 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

26 Member States are entitled not to apply the directive to third-country nationals falling within one of the two exceptions listed in Article 2(2), that is, persons who '(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Border Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State' or '(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures'. Additionally, the directive does not apply to 'persons enjoying the [EU] right of free movement as defined in Article 2(5) of the Schengen Border Code' (an exception unlikely to be relevant for present purposes).

27 Defined in Article 3(4) as 'an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return' (the latter being a term further defined in detail in Article 3(3)).

28 Commission Recommendation of 8 June 2015 on a European resettlement scheme, C(2015) 3560 final.

29 See the Explanatory Memorandum to the Commission's proposal for a Council Decision amending 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 (COM(2016) 171 final), p. 2. The Dublin States participated with the EU Member States in the subsequent initiative.

30 Council document 11130/15: 'Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection' ('the Resolution of 20 July 2015').

31 See Council document 11969/15, PRESSE 53, PR CO 45 on session 3498 of the Council. In accordance with Protocol Nos 21 and 22 of the Union treaties, Denmark, Ireland and the United Kingdom took no part in the adoption of Decision 2015/1523.

32 See judgment in *Slovak Republic and Hungary v Council*, paragraph 11. The Commission's original proposal for that decision was amended by the Council, at Hungary's request, so as to remove all reference to Hungary as a beneficiary Member State. In the subsequent vote, the Czech Republic, Hungary, Romania and Slovakia voted against the adoption of the amended proposal. Finland abstained. As with Decision 2015/1523, in accordance with Protocols Nos 21 and 22 of the Union treaties, Denmark, Ireland and the United Kingdom took no part in the adoption of Decision 2015/1601.

33 COM(2016) 171 final, point 1.2, p. 2.

34 Recitals 1 to 5 of Decision 2015/1601 mirror recitals 1 to 5 of Decision 2015/1523. I shall therefore not repeat them later in point 51 below. After the statements made in the first five recitals, the numbering diverges but the content is often substantially the same.

35 Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Regulation No 343/2003 (OJ 2003 L 222, p. 3).

36 Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation No 1560/2003 (OJ 2014 L 39, p. 1).

37 Regulation of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decision No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC (OJ 2014 L 150, p. 168).

38 Article 8 described the complementary measures to be taken by Italy and Greece, which were to be presented to the Commission by each Member State by 16 September 2015 in a 'roadmap'.

39 Recitals 1 to 5 of Decision 2015/1601 repeated recitals 1 to 5 of Decision 2015/1523, set out in point 42 above.

40 The recitals in Decision 2015/1601 corresponding to those already set out in point 42 in relation to Decision 2015/1523 are recitals 10, 16, 21, 22, 23, 24, 30, 31, 32 and 38. To avoid repetition of material, I have not set them out a second time.

41 Decision 2015/1601 was duly amended by Council Decision (EU) 2016/1754: see point 55 and footnote 42 below.

42 Article 4(3a) was inserted by Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision 2015/1601 (OJ 2016 L 268, p. 82). The purpose of that amendment consisted in counting the efforts made by Member States by admitting Syrians present in Turkey through resettlement, humanitarian admission or other forms of legal admission towards the total number of applicants for international protection to be relocated to their territory under

Decision 2015/1601. In relation to the 54 000 applicants referred to in Article 4(1)(c) of Decision 2015/1601, the amendment enabled Member States to subtract from their allocated number of relocated applicants the number of Syrians present in Turkey admitted to their territory through resettlement, humanitarian admission or other forms of legal admission under national or multilateral schemes *other* than the resettlement scheme established under the Conclusions of the Representatives of the Governments of the Member States meeting within the Council of 20 July 2015. Article 10 of Council Decision (EU) 2015/1601 applied, which meant the Member States which used this facility received the sum of EUR 6 500 per relocated applicant. See COM(2016) 171 final, point 2.1.

43 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation 604/2013 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, p. 1; 'the Eurodac Regulation'). Article 9(1) thereof provides that 'each Member State shall promptly take the fingerprints of all fingers of every applicant for international protection of at least 14 years of age'.

44 Article 5(9) of Decision 2015/1601 was essentially a more elaborate version of Article 5(9) of Decision 2015/1523.

45 See further point 74 below. I list those reports here for reference: First Report of 16 March 2016, COM(2016) 165 final; Second Report of 12 April 2016, COM(2016) 222 final; Third Report of 18 May 2016, COM(2016) 360 final; Fourth Report of 15 June 2016, COM(2016) 416 final; Fifth Report of 13 July 2016, COM(2016) 480 final; Sixth Report of 28 September 2016, COM(2016) 636 final; Seventh Report of 9 November 2016, COM(2016) 720 final; Eighth Report of 8 December 2016, COM(2016) 791 final; Ninth Report of 8 February 2017, COM(2017) 74 final; Tenth Report of 2 March 2017, COM(2017) 202 final; Eleventh Report of 12 April 2017, COM(2017) 212 final; Twelfth Report of 16 May 2017, COM(2017) 260 final; Thirteenth Report of 13 June 2017, COM(2017) 330 final; Fourteenth Report of 26 July 2017, COM(2017) 405 final; and Fifteenth Report of 6 September 2017, COM(2017) 465 final. Subsequently, on the basis of the Commission Communication of 13 May 2015 on the European Agenda on Migration, COM(2015) 240 final, the Commission has issued a first Progress Report of 15 November 2017, COM(2017) 669 final, a second Progress Report of 14 March 2018, COM(2018) 250 final, a third Progress Report of 16 May 2018, COM(2018) 301 final, and a fourth Progress Report of 6 March 2019, COM(2019) 126 final.

46 Poland intervened in support of Slovakia and Hungary. Belgium, France, Germany, Greece, Italy, Luxembourg, Sweden and the Commission supported the Council in defending Decision 2015/1601.

47 Opinion of Advocate General Bot in *Slovak Republic v Council and Hungary v Council*, C-643/15 and C-647/15, EU:C:2017:618.

48 See points 82 to 90 below on the pre-litigation procedure.

49 For the sake of accuracy, I recall that the judgment in *Slovak republic and Hungary v Council* concerned only Decision 2015/1601. The time limit for challenging its predecessor, Decision 2015/1523, has long since expired, and in their essential mechanism the two decisions are alike. Poland and the Czech Republic are the only Member States whose non-compliance with Decision 2015/1523 is presently at issue before the Court. At the risk of being pragmatic rather than purist, I cannot see how it is realistic to suppose — against the background of the careful and lengthy judgment in *Slovak Republic and Hungary v Council* — that either could advance some new argument that would succeed in undermining the validity of Decision 2015/1523 (and indeed neither Member State has sought to do so).

50 See point 39 and footnote 29 above.

51 No material has been placed before the Court regarding the content of that resolution. See further point 79 below.

52 Communication from the Commission to the European Parliament, the European Council and the Council, COM(2016) 120 final. That Communication formed the basis for the reports referred to above in footnote 45 and cited in points 75, 76, 80 and 81 of the main text.

53 See above footnote 45, section 1, p. 2 of that report.

54 See above footnote 45, section 2, p. 3 of that report.

55 Ref. Ares(2017)2738421-31/05/2017.

56 See above in footnote 45, section 2, p. 4 of that report.

57 See above in footnote 45, section 2, p. 3 of that report.

58 The dates of the respective letters were 15 June 2017 (both Case C-718/17, *Commission v Hungary*, and Case C-719/17, *Commission v Czech Republic*) and 16 June 2017 (Case C-715/17, *Commission v Poland*).

59 See judgment of 24 May 2011, *Commission v Greece*, C-61/08, EU:C:2011:340, paragraph 122 and the case-law cited.

60 See also points 107 to 110 below, concerning the alleged violation of the principle of equal treatment.

61 Judgment of 24 April 2007, *Commission v Netherlands*, C-523/04, EU:C:2007:244, paragraph 28.

62 See von Bardeleben, E., Donnat, F. and Siritzky, D., *La Cour de justice de l'Union européenne et le droit du contentieux européen*, La Documentation française, Paris, 2012, p. 196.

63 See judgment of 19 September 2017, *Commission v Ireland*, C-552/15, EU:C:2017:698, paragraph 35 and the case-law cited.

64 Judgment of 9 July 1970, *Commission v France*, 26/69, EU:C:1970:67, paragraphs 9 and 10.

65 Judgment of 9 November 1999, *Commission v Italy*, C-365/97, EU:C:1999:544.

66 Judgment of 9 December 2004, *Commission v France*, C-177/03, EU:C:2004:784.

67 Judgment of 9 December 2004, *Commission v France*, C-177/03, EU:C:2004:784, paragraph 21.

68 Judgments of 3 March 2016, *Commission v Malta*, C-12/14, EU:C:2016:135, paragraph 26, and of 6 October 2009, *Commission v Spain*, C-562/07, EU:C:2009:614, paragraph 25 and the case-law cited.

69 Judgment of 9 July 1970, *Commission v France*, 26/69, EU:C:1970:67, paragraph 10 (emphasis added).

70 As the Court puts it in its judgment of 15 November 2012, *Commission v Portugal* (C-34/11, EU:C:2012:712, paragraph 36), cited by Poland in its pleadings, the Commission has an *advantage* to gain from such a clarification, even if it concerns a past situation.

71 Hungary raises a further technical argument, peculiar to its case, which I discuss briefly in point 120 below.

72 See judgment of 19 September 2017, *Commission v Ireland*, C-552/15, EU:C:2017:698, paragraph 34 and the case-law cited.

73 Judgment of 3 March 2016, *Commission v Malta*, C-12/14, EU:C:2016:135, paragraph 25.

74 See judgment of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraph 106 and the case-law cited.

75 Thus, for example, the Thirteenth Report on relocation and resettlement indicates that Austria made its first and last formal commitment to relocate in May 2017. That commitment apparently involved 50 people from Italy, 15 of whom were actually relocated to Austrian territory (see Annex 2 to the Thirteenth Report).

76 In its written pleadings, Poland similarly complained about the short periods afforded to it to reply to pre-litigation correspondence, without however claiming that its rights of the defence were violated. I read that part of Poland's pleadings as being aimed at demonstrating that the Commission was seeking to establish infringements by the three defendant Member States in order to stigmatise them for their resistance to the relocation mechanism imposed by the Relocation Decisions.

77 See judgment of 19 September 2017, *Commission v Ireland*, C-552/15, EU:C:2017:698, paragraph 28 and the case-law cited.

78 See judgment of 19 September 2017, *Commission v Ireland*, C-552/15, EU:C:2017:698, paragraph 29 and the case-law cited.

79 Judgment of 13 December 2001, *Commission v France*, C-1/00, EU:C:2001:687, paragraph 65 and the case-law cited, emphasis added.

80 See judgment of 19 September 2017, *Commission v Ireland*, C-552/15, EU:C:2017:698, paragraph 34 and the case-law cited.

81 Judgment of 2 February 1988, *Commission v Belgium*, 293/85, EU:C:1988:40.

82 Judgment of 7 April 2011, *Commission v Portugal*, C-20/09, EU:C:2011:214, paragraph 41.

83 I recall that in Hungary's case only Decision 2015/1601 is at issue.

84 See also points 138 to 143 of this Opinion in respect of the definition of the alleged infringement.

85 For the sake of completeness, I note that the arguments advanced before the Court by the three defendant Member States (in their defences, rejoinders and statements in intervention) are similar to those raised in their replies to the letters of formal notice and to the reasoned opinions. That confirms my conclusion that, notwithstanding the relatively short periods set for replying to the Commission's correspondence during the pre-litigation period, there was no impairment of the Member States' rights of defence.

86 See further points 169 to 171 below.

87 Paragraph 21 of the Commission's application explains the link between the two dates concerned (13 May and 13 August 2016).

88 Notice published in the *Official Journal of the European Union* (OJ 2018 C 112, p. 19).

89 The Czech Republic has pointed out that the *petitum* in the application against Hungary (Case C-718/17) similarly fails to mention the date on which the infringement began. Hungary did not raise this point in its defence. I note that, whereas Poland and the Czech Republic have both made limited notifications under Article 5(2) of the Relocation Decisions, Hungary has *never* fulfilled, even in part, its obligations under Decision 2015/1601. It was therefore not necessary (unless purely pro forma) to specify a starting date for the infringement in respect of Hungary.

90 See judgment of 19 September 2017, *Commission v Ireland*, C-552/15, EU:C:2017:698, paragraph 38 and the case-law cited.

91 In paragraphs 21 and 33 thereof.

92 I reiterate that 'the subject-matter of an action ... for failure to fulfil obligations is delimited by the pre-litigation procedure ... so that the application must be based on the same grounds and pleas as the reasoned opinion' (see judgment of 8 December 2005, *Commission v Luxembourg*, C-33/04, EU:C:2005:750, paragraph 36).

93 See points 172 to 176 below.

94 In paragraph 66. Later, in paragraphs 70 to 74, the Court examined more closely the nature of 'provisional measures' adopted under Article 78(3) TFEU and explained that Article 78(2) and (3) are two distinct provisions of EU primary law, pursuing different objectives. Measures adopted under Article 78(3) TFEU are 'provisional, non-legislative, measures intended to respond swiftly to a particular emergency situation facing Member States' (in paragraph 73). See also points 64 to 68 of Advocate General Bot's Opinion in those cases, EU:C:2017:618.

95 See judgments of 22 October 2014, *Commission v Netherlands*, C-252/13, EU:C:2014:2312, paragraph 34; of 16 January 2014, *Commission v Spain*, C-67/12, EU:C:2014:5, paragraph 42; and of 16 July 2009, *Commission v Poland*, C-165/08, EU:C:2009:473, paragraph 43.

96 For the exact allegation and *petitum* in each of the three infringement procedures, see points 86 to 88 above.

97 As to the impact of Article 4(3a) of Decision 2015/1601, inserted by Decision 2015/1754, see footnote 42.

98 See point 70 above.

99 See point 72 above.

100 See point 71 above.

101 Poland here cites judgment of 9 December 1997, *Commission v France*, C-265/95, EU:C:1997:595, paragraph 33.

102 'Member State of relocation' is the term used in the judgment in *Slovak Republic and Hungary v Council* to describe the Member State to which relocation would take place from a frontline Member State. See, for example, paragraph 290.

103 Judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508.

104 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

105 Judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraphs 53 and 54.

106 Judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 56.

107 Judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 66.

108 Judgment of 21 June 2017, *A*, C-9/16, EU:C:2017:483.

109 Poland's argument as recorded in paragraph 306 of that judgment.

110 Paragraph 309 of the judgment in *Slovak Republic and Hungary v Council*.

111 Judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 65.

112 Judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 48.

113 See point 4 of my Opinion in *A.S. and Jafari*, C-490/16 and C-646/16, EU:C:2017:443.

114 See point 19 above.

115 See (*passim*) judgment of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172 (a case concerning the interpretation of Articles 2 and 3 of Directive 64/221/EEC). See now, in that same context of free movement of persons, Article 27(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; 'the Citizens' Rights Directive').

116 The validity of Decision 2015/1601 has of course been upheld by the Grand Chamber in the judgment in *Slovak Republic and Hungary v Council*.

117 The references for preliminary rulings to this Court that that litigation spawned were judgments of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257 (the interim relief issue); of 25 July 1991, *Factortame and Others*, C-221/89, EU:C:1991:320 (the substantive case); and of 5 March 1996, *Brasserie du Pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79 (the damages claim). The careful Opinion of Advocate General Mischo in *Factortame and Others* (C-221/89, not published, EU:C:1991:113) in particular repays study. The Commission also brought infringement proceedings against the United Kingdom (judgment of 4 October 1991, *Commission v United Kingdom*, C-246/89, EU:C:1991:375) and, in parallel, a (successful) application for interim measures (judgment of 10 October 1989, *Commission v United Kingdom*, 246/89 R, EU:C:1989:368).

118 Speaking as an (old-fashioned) sailor: technically a vessel 'wears' a flag, rather than flying it. However, the official English translation of the Court reports has consecrated 'fly' as the verb to be used, so I shall retain that term in any direct citations.

119 The proceedings concerned 95 vessels that until then were registered on the register of British vessels under the Merchant Shipping Act 1894. Of those vessels, 53 were originally registered in Spain and had flown the Spanish flag, but on various dates as from 1980 they were registered in the British register. The remaining 42 vessels had always been

registered in the United Kingdom, but were purchased at various dates by Spanish companies. One company, Rawlings Trawling — famously described by Nicholas Forwood QC (as he then was) at the hearing in the interim measures case (Case C-213/89) as ‘the by-catch’ — was not Spanish but somehow got caught up in the ensuing legal mess. See further judgment of 25 July 1991, *Factortame and Others*, C-221/89, EU:C:1991:320, paragraphs 3 to 10.

120 The Member States referred to Article 5(1) of the Geneva Convention of 29 April 1958 on the High Seas (United Nations, *Treaty Series*, vol. 450, p. 11): ‘Each State shall fix the conditions for the grant of nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag’.

121 Judgment of 25 July 1991, *Factortame and Others*, C-221/89, EU:C:1991:320, paragraph 13. The Court had already held in judgment of 19 January 1988, *Pesca Valentia v Minister for Fisheries and Forestry* (223/86, EU:C:1988:14, paragraph 13), that the Council regulation laying down a common structural policy for the fisheries industry left the terms ‘flying the flag of a Member State’ or ‘registered’ in that regulation to be defined in the national legislation of the Member States.

122 Judgment of 25 July 1991, *Factortame and Others*, C-221/89, EU:C:1991:320, paragraph 14 and the case-law cited.

123 Judgment of 25 July 1991, *Factortame and Others*, C-221/89, EU:C:1991:320, paragraph 16.

124 Judgment of 25 July 1991, *Factortame and Others*, C-221/89, EU:C:1991:320, paragraph 17 and the first paragraph of the operative part, emphasis added.

125 See judgments of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 43, and of 23 February 2016, *Commission v Hungary*, C-179/14, EU:C:2016:108, paragraph 171 and the case-law cited.

126 I note in particular Article 14(4)(a) and (b) (see point 23 above) and Article 19(3)(a) (see point 25 above).

127 See point 30 above.

128 See point 29 above.

129 See point 32 above.

130 See point 33 above.

131 Judgment of 26 July 2005, CE:ECHR:2005:0726JUD003888502, § 158.

132 Judgment of 24 May 2011, *Commission v Luxembourg*, C-51/08, EU:C:2011:336, paragraph 124.

133 *Risk Analysis for 2016*, Frontex, 2016, ISBN 978-92-95205-47-5, p. 5.

134 See recital 26 of Decision 2015/1523 and recital 32 of Decision 2015/1601.

135 See in particular Article 5(4), (5) and (9) thereof. Additionally, Article 5(8) permits the appointment of liaison officers to facilitate the process of relocation.

136 Paragraph 309. The principle of mutual trust is by now part of the bedrock of EU law and underpins a large part of the cooperation between Member States within the AFSJ. See Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 191. The Court has also made it clear that mutual trust is not blind trust: see judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 78 to 82.

137 See 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 2015/1601 (OJ 2016 L 74, p. 36) and 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 2015/1523 and Article 9 of Decision 2015/1601 (OJ 2016 L 157, p. 23).

138 Second recital.

139 Fourth recital.

140 Judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23.

141 A striking recent example from my Member State of origin is provided by the judgment of the UK Supreme Court in *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

142 See judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531.

143 Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 34 and the case-law cited, emphasis added. See, in similar terms, judgment of 14 September 2017, *The Trustees of the BT Pension Scheme*, C-628/15, EU:C:2017:687, paragraph 47.

144 See the long and detailed judgment of 27 March 2019, *Commission v Germany*, C-620/16, EU:C:2019:256, and, in particular, the conclusion reached in paragraphs 98 to 100.

145 See, for example, judgments of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 42, and of 3 March 2016, *Commission v Malta*, C-12/14, EU:C:2016:135, paragraph 37.

146 The full text of the Declaration is available on the following website:
https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en.

147 CELEX:11951K.

148 Judgment of 14 December 1983, *Klöckner-Werke v Commission*, 263/82, EU:C:1983:373, paragraph 17 (emphasis added). Paragraphs 18 to 20 also repay study.

149 It has been my doubtful privilege since I joined the Court in 2006 to examine some aspects of those arrangements in a series of Opinions and the reader curious to discover more about the workings of the market in sugar is referred to those texts. See, for example, my Opinions in *Zuckerfabrik Jülich* (C-5/06 and C-23/06 to C-36/06, EU:C:1007:346), and in *Zuckerfabrik Jülich and Others* (C-113/10, C-147/10 and C-234/10, EU:C:2011:701).

150 Judgment of 22 January 1986, *Eridania zuccherifici nazionali and Others*, 250/84, EU:C:1986:22.

151 Judgment of 22 January 1986, *Eridania zuccherifici nazionali and Others*, 250/84, EU:C:1986:22, paragraph 20.

152 Judgment of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458. See the extensive and careful analysis in paragraphs 31 to 46 and the specific reference to 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States' in paragraph 44.

153 Judgment of 15 March 2005, *Bidar*, C-209/03, EU:C:2005:169. See, in particular, paragraphs 56 to 63.

154 From the teachings of Rabbi Shimon bar Yochai ("Rashbi": 2nd century C.E.), quoted in Midrash, *Vayikra Rabbah* 4:6. See https://www.sefaria.org/Vayikra_Rabbah.1.1?lang=bi&with=all&lang2=en. I have made the translation read a little more smoothly.