

Emergency measures on migration: Article 78(3) TFEU

Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) provides for the adoption of provisional measures in emergency migratory situations at the EU's external borders. It was first used during the 2015 migration crisis. On the basis of that article, the Council of the EU adopted binding decisions providing for the relocation from Italy and Greece of 160 000 people so as to ensure a fair and balanced distribution of, and sharing of responsibility for, asylum-seekers who were already present in the EU. However, despite most Member States' willingness to relocate asylum-seekers, some challenged the Council's decision before the Court of Justice of the EU (CJEU) or refused to help implement the decision. On 1 March 2020, in the light of events on its Turkish border, Greece announced that it wanted Article 78(3) TFEU to be used to ensure full EU support in the situation of a sudden influx of third-country nationals into the EU.

Article 78(3) TFEU as legal basis

[Article 78\(3\)](#) TFEU offers a specific legal basis for measures implementing the principle of solidarity in the area of international protection, if read together with [Article 80 TFEU](#). It reads: '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'.

The article allows the Council to take decisions by qualified majority; it does not apply the ordinary legislative procedure, common for decisions in the area of border checks, asylum and immigration. While Denmark opts out of measures adopted pursuant to Article 78(3) TFEU ([Protocol No 22](#)), Ireland may opt in ([Protocol No 21](#)). Associated states (Iceland, Liechtenstein, Norway and Switzerland) have no obligation to take part but may decide voluntarily to participate.

As stated in 2017 by the [CJEU](#), Article 78(3) can be used in exceptional circumstances in the event of a sudden inflow of nationals of third countries, inasmuch as it makes the normal functioning of the EU common asylum system impossible. As regards the scope of the provision, the Court confirmed in the same ruling the possibility for the Council to derogate, on the basis of Article 78(3), from secondary law; however, according to [experts](#), the measures should still be in compliance with primary EU law. Furthermore, [experts](#) note the EU institutions have a certain discretion as regards the length of time during which the provisional measures should temporarily apply. This marks a change from previous [Article 64\(2\) of the Treaty establishing the European Community \(TEC\)](#), where measures were limited to a maximum of six months. There is also discretion regarding the definition of an 'emergency situation' justifying the use of Article 78(3) TFEU, as well as a margin of appreciation when deciding upon the substance of support measures.

2015 migration crisis

Article 78(3) TFEU was first used during the 2015 migration crisis, when Italy and Greece, situated at the EU's external borders, were confronted with unprecedented arrivals of asylum-seekers fleeing persecution or serious harm. To alleviate [migratory pressure](#) on both frontline Member States, which had borne the brunt of the influx of refugees, the European Commission tried to ensure a fair and balanced distribution and sharing of responsibility for asylum-seekers who were already present in the EU. On the basis of the Commission proposals, the Council adopted two decisions for a duration of two years, regarding:

- a temporary relocation scheme applying to a total of 40 000 people from Italy (24 000) and Greece (16 000) ([Decision 2015/1523](#)); and
- a second emergency mechanism designed to relocate a further 120 000 people seeking international protection from Italy and Greece ([Decision 2015/1601](#)).

The decisions involved a limited and temporary derogation from certain provisions of the [Dublin Regulation](#), a derogation already accepted by the [CJEU](#), in particular as regards the criterion for determining

the Member State responsible for examining an asylum application. According to that criterion, Italy and Greece would be responsible for examining the applications of the vast majority of asylum-seekers, based on their point of irregular entry into the EU.

In 2019, the European Court of Auditors [reported](#) that, by November 2019, 34 705 eligible migrants had been relocated to 22 Member States and 3 associated countries (Liechtenstein, Norway and Switzerland), a figure falling far short of the obligations set out in the two decisions.

Challenges to Article 78(3) TFEU as a legal basis

Despite most Member States' willingness to [relocate](#) asylum-seekers based on the two emergency relocation schemes, Slovakia and Hungary objected and challenged Council [Decision 2015/1601](#), which had been adopted by qualified majority. The CJEU rejected their case in a [judgment](#) of September 2017 ([C-643/15 and C-647/15](#)) focusing on the legal basis for the adoption of the decision as well as procedural and substantive issues.

According to [experts](#), the judgment takes an innovative approach in that it reaffirms solidarity between the Member States as a binding principle and the distribution of applicants for international protection as mandatory, thus confirming the principle of solidarity going beyond financial measures. Similar views were expressed by [Henri Labayle](#), who stated that the CJEU judgment regarding the Council's decision to use a binding mechanism based on Article 78(3) TFEU, read in the light of the principle of solidarity enshrined in Article 80 TFEU, clearly confirms the binding nature of the principle of solidarity in EU migration policy.

Furthermore, Hungary, Czechia and Poland decided not to cooperate in the implementation of the decision, which resulted in the European Commission [referring](#) them to the CJEU for non-compliance with their legal obligations on relocation. Following the Commission's referral, in November 2019 the Advocate General issued the [opinion](#) that, by refusing to comply with the mechanism for the mandatory relocation of applicants for international protection, the three Member States had failed to fulfil their obligations under EU law, including by not complying with the principle of solidarity, which 'necessarily sometimes implies accepting burden-sharing'. The CJEU has still to pronounce the final ruling on the case.

European Parliament position

The European Parliament has been a strong supporter of the mandatory emergency relocation measures proposed by the Commission. It [voted](#) in favour of the Commission's first relocation proposal and decided to follow a fast-track procedure as well as to advance in parallel all other measures proposed by the Commission. As regards the second emergency measure, Parliament adopted a [resolution](#) by urgent procedure, approving the Commission's proposal without amendments. The Parliament's approval in such a short time was designed to send a strong signal to Member States that there was no time to waste and that urgent action was needed. On 18 May 2017, owing to the low level of relocations by Member States (11 % of the total obligation by April 2017), Parliament issued a [resolution](#) urging Member States to fulfil their obligations regarding relocation. It acknowledged that some progress had been made, but expressed its disappointment regarding Member States' unfulfilled commitments to solidarity and responsibility-sharing.

Renewed use of Article 78(3)

The March 2016 [EU-Turkey agreement](#) between the European Council and Turkey was designed to stem irregular migratory flows to Europe via Turkey. The Turkish authorities' decision in February 2020 to stop implementing the agreement has led to a significant increase in [migrant arrivals](#) along the Greek-Turkish border and rising tensions. This prompted Greece to announce that it will not be accepting any new asylum applications for one month, and that it was '[invoking](#) Article 78(3) TFEU to ensure full European support'. The [European Council on Refugees and Exiles](#) and the [United Nations High Commissioner for Refugees](#) have warned that Article 78(3) TFEU, if invoked, should lead to provisions in compliance with EU primary law, including the Charter of Fundamental Rights. The article 'cannot ... provide a legal basis for the suspension of the right to asylum' or for expulsions against the principle of *non-refoulement*. As the European Parliament has to be consulted it must be 'prepared to promote positive alternatives when this happens'.

The migration situation remains fragile, as shown by continuing [flows](#) of refugees, especially in the eastern Mediterranean. Instability in neighbouring regions, such as Syria and Libya, is further increasing refugee movements towards Europe and could eventually lead to Article 78(3) TFEU being used again.

