

# **An approach towards the judgment rendered by the Court of Justice of the European Union on September 6, 2017 regarding the European Immigration Crisis\*\***

## **Una aproximación a la sentencia judicial emitida por el Tribunal de Justicia de la Unión Europea el 6 de septiembre de 2017 en relación con la crisis migratoria europea**

### ABSTRACT

Migrations flows are not a brand-new phenomenon. Nonetheless, in these last years, the findings are worrying. In fact, at the end of the year 2016, a record was reached as the number of displaced people amounted to 65.6 million. In this connection, it must be stressed that the European continent has been particularly affected by this crisis. Bearing this in mind, we have to mention that some Member States of the European Union have adopted their

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own strategies, which -in some occasions- have deviated far from the position imposed by the mentioned international organization. At this juncture, it is relevant to examine the approach that the Court of Justice of the European Union has had in one particular case, which resulted in the long-awaited judgment rendered on September 6, 2017.

#### KEYWORDS

Relocation system; principle of solidarity; migratory movements; Court of Justice of the European Union.

#### RESUMEN

Los flujos migratorios no constituyen un fenómeno nuevo. No obstante, en la actualidad, los datos arrojados son alarmantes. De hecho, a finales del año 2016 se alcanzó un récord en la medida en que el número de personas desplazadas ascendió a 65,6 millones. En este sentido, debe señalarse que el continente europeo se ha visto especialmente afectado por esta crisis. Teniendo en cuenta lo anterior, debemos mencionar que algunos Estados Miembros de la Unión Europea han adoptado sus propias medidas, las cuales se han alejado -en ocasiones- de las premisas impuestas por la referida organización internacional. Ante esta situación, es relevante examinar la postura que mantuvo el Tribunal de Justicia de la Unión Europea en un determinado caso que dio lugar a la esperada sentencia del 6 de septiembre de 2017.

#### PALABRAS CLAVE

Sistema de reubicación, principio de solidaridad, movimientos migratorios, Tribunal de Justicia de la Unión Europea.

#### SUMMARY

INTRODUCTION; 1. ANALYSING THE JUDICIAL DECISION RENDERED BY THE CJEU ON SEPTEMBER 6, 2017; 1.1. A detailed background of the judgment issued on September 6, 2017; 1. 2. Analysing the parties' objections to the Decision 2015/1601 and the most relevant arguments provided by the CJEU regarding the judgment issued on September 6, 2017; 2. RELEVANT CONSIDERATIONS REGARDING THE JUDICIAL DECISION RENDERED ON SEPTEMBER 6, 2017; 2.1. Is the principle of solidarity firmly endorsed through the judicial decision rendered on September 6, 2017; 2.2. Which is the *status quo* of Schengen after the judgment rendered on September 6, 2017; CONCLUSIONS.

## INTRODUCTION

Migratory flows are not a new phenomenon. Moreover, human displacements made with the purpose of improving living conditions, as well as broadening personal horizons have always existed<sup>1</sup>. However, at present, the data thrown by diverse organisms and institutions are alarming insofar as the number of displaced persons, at the end of the year 2016, amounted to 65.6 million<sup>2</sup>. Specifically, in Europe, the number of migrants has exponentially increased<sup>3</sup>. Following all these observations and beyond the dramatic humanitarian considerations that can and should be made, it must be emphasized that this constant and growing wave of people trying to reach European Union soil is, *inter alia*, eroding one of the European Union essential pillars: the Schengen area; a space that began to take shape in 1985 when only five countries decided to sign the Schengen Agreement with the aim of gradually eliminating European Union internal borders<sup>4</sup>. In this regard, it is worth noting that this process culminated, ten years later, with the elimination of those<sup>5</sup>. Thus, during the past decades, in general terms, the rule that refers to the abolition

1 During the second millennium B.C., migratory movements were a concern for territorial rulers in the Ancient Middle East, since the exercise of their power was strongly linked to the number of people on whom they deployed it. This has been recognized by Sánchez Sánchez when saying the following: “en los tratados internacionales, cartas diplomáticas y otros textos procedentes del antiguo mundo hitita y egipcio, ha sobrevivido una información muy significativa que evidencia la existencia de continuos flujos de población (...) [en los que se explicitaba] la voluntad de fijar un régimen internacional que los regulara”. *Vid.* Sánchez Sánchez, Víctor, *Refugiados, cautivos, esclavos y otros emigrados en el Antiguo Oriente Medio*, Madrid, Tecnos, 2017, p. 60.

2 The amount of people nowadays displaced exceeds post-World War II numbers. Information available here: <https://edition.cnn.com/2016/06/20/world/unhcr-displaced-peoples-report/index.html>

(last access: 22/12/2018)

3 Information available in the following link:

<http://www.europarl.europa.eu/news/es/headlines/society/20170629sto78629/la-respuesta-de-la-ue-a-la-crisis-migratoria>

(last access: 22/12/2018)

Frontex, in charge of monitoring the European borders, has indicated that in these previous years the arrival on immigrants has made an important pressure on Southern European States. Information available in the following link:

[https://www.euractiv.com/topics/illegal-migration/?type\\_filter=news](https://www.euractiv.com/topics/illegal-migration/?type_filter=news)

(last access: 22/12/2018)

Resulta también de interés la siguiente información:

<https://data2.unhcr.org/en/situations/mediterranean>

(last access: 22/12/2018)

4 We are referring, obviously, to Belgium, Germany, France, Luxembourg and the Netherlands. *Vid.* González, José María Luque, “Schengen. Un espacio de seguridad libertad y justicia”, *Revista de Derecho*, 21, 2004, p. 140.

5 The milestone referred to in the main body of the text was supported by a set of measures, mostly directed towards the promotion of judicial and police cooperation between Member States, as well as to enable the granting of visas for short stays and asylum.

of internal border controls has been implemented within a large part of the European Union territory.

In light, then, of what it has been previously reflected, it is not extremely complex to note that the current European Union migration crisis is causing a challenge to the European Union. Moreover, it is shaking, as already anticipated, one of its most essential pillars, consisting in the promotion of a concrete physical space in which people have the possibility to move freely<sup>6</sup>. Faced with this risky situation, European Union institutions have designed various strategies<sup>7</sup>, such as: emergency actions aimed at achieving a more exhaustive control of external borders; attempts to adjust the European Union Asylum System so that asylum seekers are treated equally; measures designed to promote the implementation of coordinated and joint actions amongst different European Union countries; etc. Nevertheless and regardless of whether the mentioned efforts are or not suitable ones, the accent needs to be also placed on the fact that this particular phenomenon is causing struggles between Member States and this is, of course, jeopardizing -once again- the attainment of the objectives set out in the Schengen *acquis*, which is enshrined in the Schengen Borders Code of 2006 (sbc)<sup>8</sup>. This instrument indicated that the signatory States had to eliminate the obstacles introduced to protect internal borders, although limitations could be established on the ground of protecting their public policy or internal security. These conditions considered, at first, as exceptional were invoked with greater assiduity than expected due

6 The aforementioned freedom constitutes the cornerstone of the figure created as a result of the adoption of the Maastricht Treaty of 1992: the citizenship of the Union. Martín Martínez argues in this regard the following: “El derecho de libre circulación y residencia ha constituido desde sus orígenes la clave de bóveda del proceso de integración europea, primero en la consecución del mercado interior y, desde su inclusión en el estatuto de la ciudadanía europea, para el reconocimiento de un status jurídico común a todos los nacionales de los Estados miembros que les permite disfrutar del mismo tratamiento con independencia de su nacionalidad”. *Cfr.* Martín Martínez, Magdalena, “Los límites a la libre circulación de personas en la UE por razones de orden público, seguridad o salud pública en tiempos de crisis: una reevaluación a la luz de la jurisprudencia del TJUE”, *Revista de Derecho Comunitario Europeo*, 18 (49), 2014, p. 768.

7 Information available in the following link:  
<https://www.consilium.europa.eu/en/policies/migratory-pressures/>  
 (last access: 22/12/2018)

8 To this respect we should take into account a relevant statement made by Mangas Martín, as she understands that the implementation of the Schengen Borders Code has meant that borders throughout the European Union have visibly smoothed away. *Vid.* Mangas Martín, Araceli, “Territorio, integridad territorial y fronteras del Estado en la Unión Europea”, *Revista Jurídica de la Universidad de León*, 2, 2015, p. 230. In this spirit, it is advisable to highlight the impact that the sbc has, which is considered to be “(...) a crucial element in charge of updating and amending the existing regulation concerning border checks carried out on people”. Likewise: *Cfr.* Hellman, Jacqueline et Molina, María José, “The erosion of the European integration process due to certain restrictions of the free movement of persons”, *Revista Universitaria Europea*, 22, 2015, p. 32.

to the repercussion of certain events<sup>9</sup>. As it can be envisaged, this not only gives the idea that the Schengen project has been subjected to changes, but also suggests the reason of many existing conflicts between countries: there have been States that supported the imposition of border controls against others who thought that a free physical space had to be necessarily ensured<sup>10</sup>.

Given this situation, the European Union Commission firmly stated, in 2011, that the strategies that affected Schengen in one way or another had to be devised and executed at a supranational level “(...) in a spirit of solidarity and/or at national level, to better comply with the common rules”<sup>11</sup>. Therefore, at that point, the imposition of borders was considered to be an internal measure of last resort that could only be applied when a threat to the national security or to the public policy, recognized by European Union institutions, occurred. This caused a strong controversy amongst States that was seriously aggravated after the incident of Lampedusa (whereby more than three hundred refugees died near the Italian coasts), which led to the modification of the SBC through the Regulation 1051/2013.

Within this context, we have to highlight that, for some time now, many debates and proposals have proliferated with the objective of claiming a restriction of the European Union area of free movements<sup>12</sup>. As a consequence of this, in September 2017, the European Union Commission proposed to

9 This is especially palpable in the face of events of a certain magnitude. In this sense, the Arab spring, which began in 2010 and led to an increase in the arrival of immigrants to Europe -particularly Tunisian nationals- is an example worth mentioning. At that time, the Italian government tried unsuccessfully to find a solution for those individuals fleeing from poverty, conflict, persecution, etc., and decided to grant them a residence permit for a period of six months, being able to move around the Schengen area. Immediately after, the French government disappointed with such measure agreed to block trains coming from the Italian city of Vintimille as a consequence of the exceptional situation that aroused at that precise moment.

10 In this regard, Lehne has insisted that the European Union has been divided: “at the beginning of the 2015–2016 crisis, EU member states divided into sharply opposed camps. Some Northern and Western European countries -such as Austria, Belgium, the Netherlands, and Sweden- joined Germany in prioritizing humanitarian concerns and allowing hundreds of thousands of migrants to cross their borders. Other Western European countries, such as France and the UK, responded more cautiously and took far fewer migrants. The Central European states immediately opted for restrictive policies”. *Cfr.* Lehne, Stefan, “The EU Remains Unprepared for the Next Migration Crisis”, *Carnegie Europe*, 3, 1-7, 2018:

<https://carnegieeurope.eu/2018/04/03/eu-remains-unprepared-for-next-migration-crisis-pub-75965>

(last access: 22/12/2018)

11 Information hereby available:

[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/pdf/1\\_en\\_act\\_part1\\_v11\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/pdf/1_en_act_part1_v11_en.pdf)

(last access: 22/12/2018)

12 In other words, the above circumstances have resulted in initiatives that have one specific aim: expanding border controls on an exceptional basis. *Vid.* Dandashly, Assem, “The European Union’s response to the Syrian conflict. Too little, too late [...]”, *Global Affairs*, 2 (4), 2016, p. 397.

extend to a maximum of three years the period in which States would be able to reintroduce checks at the internal borders of the Schengen area. Governments would only implement this measure in cases of security threat<sup>13</sup>. This initiative seemed to be justified in the terrorist risk that Europe has been suffering lately, although certainly the massive migratory arrival is another essential reason. Obviously, the complex and long Syrian conflict is stretching positions to the limit, as this has meant a considerable increase in the number of people trying to arrive to Europe.

At this juncture, we must stress that European Union institutions have been traditionally reluctant to admit more exceptions to one of the most precious symbols of the European Union integration: the free movement in the Schengen area<sup>14</sup>. Therefore, the aforementioned proposal determined that the referred temporal extension should not operate in an automatic way and, also, it stated that the Council had to intervene. Being things as they are nowadays, it seems crucial to analyse the position adopted quite recently by the Court of Justice of the European Union (CJEU) in order to find out if, at present, the mentioned institution is stopping or, instead, “unleashing” the actions of some European Member States, manifestly inclined to put a drastic end to the migrant movement through measures that contradict the

13 Information below available:

[http://europa.eu/rapid/press-release\\_IP-17-3407\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3407_en.htm)

(last access: 22/12/2018)

The proposal stated the following: “Member States will also be able to exceptionally prolong controls if the same threat persists beyond one year and when commensurate exceptional national measures within the territory, such as a state of emergency, have also been taken to address this threat. Such prolongation would require a Recommendation of the Council, which would need to take into account the opinion given by the Commission and would be strictly limited to 6 month periods with the possibility to prolong no more than three times up to a maximum period of two years”.

14 This has been supported by the European Union in many occasions. Bearing this in mind, we should take into account a recent communication made by the European Commission in September, 2017: “In an area without internal border control, the temporary reintroduction of internal border control may only be decided in exceptional circumstances to provide a response to situations seriously affecting the public policy or internal security of that area, of parts thereof, or of one or more Member States. Overall, the use of temporary reintroduction of border control shows that the Member States apply this measure in a responsible manner. (...) While the Schengen area faced these critical and unprecedented challenges, the EU and its Member States have worked together to take action to reinforce the external borders and ensure security and public order to secure the Schengen area of free movement. The ultimate objective remains to go back to a normally functioning Schengen area without controls at internal borders”. Document hereby available:

[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927\\_communication\\_on\\_preserving\\_and\\_strengthening\\_schengen\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927_communication_on_preserving_and_strengthening_schengen_en.pdf)

(last access: 22/12/2018)

spirit and purpose of Schengen regulations. Consequently, we must carry out an in-depth analysis of the judgment rendered on September 6, 2017<sup>15]</sup>

1. ANALYSING THE JUDICIAL DECISION RENDERED  
BY THE CJEU ON SEPTEMBER 6, 2017

*1.1. A detailed background of the judgment issued on September 6, 2017*

As already indicated, the CJEU on September 6, 2017, rendered —at an especially difficult time— a ruling that referred to the increase of migratory flows within the European Union territory. In fact, by means of the mentioned sentence, the Court had the opportunity to adopt a position regarding the relocation system established for applicants who came from third countries and were seeking for international protection in Member States. More specifically, it is necessary to clarify that the Council of the European Union designed the referred mechanism of relocation as a result of the undeniable migratory pressure that some Mediterranean countries of the EU have been suffering in the last few years<sup>16</sup>. Thus, the timing of the referred court ruling could not have been more opportune taking into account the challenges that this international organization has, in recent times, faced when dealing with this particular “hazard”. Consequently, it is extremely useful to reach back to the root causes of the cases that gave birth to the aforementioned judicial decision in order to understand the strategies addressed by the EU institutions in a moment in which, as it has been explained before, the migrants’ movements was reaching its peak.

Bearing the above in mind, firstly, we have to mention that, a few years ago, the European Union Commission called “(...) 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 [European] Commission presented a 10-point plan of immediate action to be taken in response

15 Joined Cases C-643/15 and C-647/15, *Slovak Republic, Hungary v. Council of the European Union*. Document hereby available:

[https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3Aoj.C\\_.2017.374.01.0004.01.ENG](https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3Aoj.C_.2017.374.01.0004.01.ENG)

16 The European Union Commission has recently declared that the relocation system is finally coming to an end after a splendid period of time where mostly every single individual has been duly relocated, underpinning the magnificent results obtained with the mentioned procedure. The EU Migration Commissioner, Avramopoulos, said the following words: “With the EU relocation scheme successfully coming to an end, we have made enormous progress on relocation over the past two years. This shows that responsibility can be successfully shared within the EU. We are committed to provide financial support to those Member States who continue to show solidarity with Greece and Italy”. Information hereby available:

[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114\\_relocation\\_eu\\_solidarity\\_between\\_member\\_states\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_relocation_eu_solidarity_between_member_states_en.pdf)  
(last access: 22/12/2018)

to the crisis, including a commitment to consider options for an emergency relocation mechanism”<sup>17</sup>. Within this context, the Council of the European Union adopted the Decision 2015/1523<sup>[18]</sup> which meant the establishment of provisional measures of international protection for the benefit of Italy and Greece in order to reinforce solidarity and responsibility among all Member States. As said before, this temporal and exceptional instrument, addressed to support the countries that severely suffered the effects of unprecedented migratory movements, had one specific objective: the imposition of a relocation system from Italy and Greece to other European Member States regarding people likely to be subjected to international protection. In a nutshell, the significant pressure made towards the migration and asylum system of the two listed countries, led to the setting up of a solidarity regime that undoubtedly intended to alleviate their burden<sup>[19]</sup>.

In the same vein, the European Commission ascertained that there was a need to confer protection to Italy, Greece and Hungary. All this resulted in the “Commission’s initial proposal” by which a relocation process of 120 000 applicants for international protection had to take place in the following terms: from Italy (15 600 persons), Greece (50 400 persons) and Hungary (54 000 persons), to the other Member States<sup>[20]</sup> Not long after, on September 22, the Council through qualified majority adopted the mentioned Commission’s initiative by means of the Decision 2015/1601 with the same objectives contained in the Decision 2015/1523<sup>[21]</sup> It should be observed that article 4 of

17 Document below available:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=194081&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=605480>  
(last access: 22/12/2018)

18 Document below available:

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015D1523&from=EN>  
(last access: 22/12/2018)

19 According to article 4 of the mentioned Decision, “(...) 24 000 applicants shall be relocated from Italy to the territory of the other Member States; 16 000 applicants shall be relocated from Greece to the territory of the other Member States”.

20 In parallel, the referred institution on the basis of article 78 (3) of the Treaty on the Functioning of the European Union (TFEU) made a proposal to modify Regulation number 604/2013 with the aim of establishing appropriate mechanisms for determining Member States responsibility when examining an application made to obtain international protection by a national from a third country or a stateless person.

21 Document below available:

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015D1601&from=EN>  
(last access: 22/12/2018)

It must be mentioned that the Decision 2016/1754 of 2016 amended the cited Decision of 2015/1601 stating the following: “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”. In this context,



the former determined the way in which 120 000 applicants had to be relocated by other Member States. In this respect, we have to highlight that, strikingly, Czech Republic, Hungary, Romania and the Slovak Republic voted against its adoption and, hence, contested its content. Likewise, it may be of interest to note that the main difference between the two cited Decisions lies in the existence of “(...) an intricate mix of intergovernmental and Union decision making”<sup>22</sup> in the first legal instrument mentioned in the present paper, whereas the referred feature cannot be detected in the second one.

Be that as it may, it must be stressed that Slovakia, in Case C-643/15, claimed for the annulment of the Decision 2015/1601 and Hungary, in Case C-647/15, had a similar request, culminating in a joint and single judicial process in which they received the support of Poland<sup>23</sup>. They denounced -among other things- that the contested Decision violated the principle of subsidiarity, proportionality, certainty, etc., whereas, Belgium, Germany, Greece, France, Italy, Luxembourg, Sweden and the Commission fully underpinned the Council’s position, materialized in the controversial legal instrument. Thus, within this context, below we will analyse in detail the concrete and assertive parties’ objections made towards the disputed Decision and, of course, the Court’s reasoning geared towards those with the intention of determining how and in which way the European Union is facing the European migration crisis that, undoubtedly, has become an on-going challenge<sup>24</sup>.

### *1.2. Analysing the parties’ objections to the Decision 2015/1601 and the most relevant arguments provided by the CJEU regarding the judgment issued on September 6, 2017*

In view of the above, we must firmly acknowledge that the Decision 1215/1601 entailed the implementation of an emergency relocation scheme which tried to alleviate the strain caused to certain countries by the significant rise of migrant arrivals through sea and land —around a million people along the

it is important to take into account the statement issued the 18<sup>th</sup> of May of 2016 by the EU and Turkey about immigration.

Document below available:

<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>  
(last access: 22/12/2018)

22 Cfr. Timmermans, Christiaan, “The Competence Divide of the Lisbon Treaty Six Years After”, en: *The Division of Competences between the EU and the Member States*, 19-33, S. Garben & I. Goavere, Oxford, Hart Publishing, 2017, p. 29.

23 Regarding the legislative procedure followed, Slovakia, Romania, Hungary and Czech Republic opposed to the content of the mentioned Decision, which was finally adopted through qualified majority.

24 Information hereby available:

<http://www.europarl.europa.eu/news/en/headlines/society/20170629sto78630/eu-migrant-crisis-facts-and-figures>  
(last access: 22/12/2018)

year 2015—<sup>25</sup>, constituting -for some authors- a “(...) timid step forward in addressing the central controversies of the current refugee debate in Europe”<sup>26</sup>.

That being so, the first concern that the CJEU had when dealing with the validity of the mentioned legal instrument was to determine, as argued by the Slovak Republic —in its second plea— and Hungary —in its first plea—, if article 78.3 of the TFEU (Treaty on the Functioning of the European Union)<sup>27</sup> was or not a suitable legal basis for the contested Decision in accordance with article 289 of the TFEU, which refers to the European Union legislative procedure. For that matter, the countries that expressed its opposition to the mentioned legal tool argued that it should be considered a non-legislative act that —inexplicably, from their point of view— derogated a legislative one. To this effect, the Court firstly understood, in paragraphs 65 and 66, that “article 78(3) TFEU (...) does not contain an express reference to either the ordinary legislative procedure or the special legislative procedure”; therefore, “(...) it must be held that 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”. Following on from that, Ovádek declares that “it is rare for the Council to lay down binding rules in a non-legislative act in an area covered by the TFEU; such acts are more commonly associated with the provenance of the CFSP [Common Foreign and Security Policy] or implementing measures adopted by the Commission. The interpretation of this point confirmed the Court’s preference for a formal approach to assessing the nature of EU acts which is consistent with Article 289 TFEU, leaving to the side the fact that the procedure in Article 78(3) TFEU provides for the involvement (consultation) of the European Parliament in a way similar to the special legislative procedure”<sup>28</sup>.

Anyhow, once the above clarification was made, the Court promptly examined if the legal provision was or not an appropriate one. In this regard,

25 There is no doubt that the recent and critical situation generated by the immigration crisis in the EU entailed the implementation of many different strategies and, of course, the relocation procedure proved to be an accurate idea from the standpoint of European institutions, whom decided to firmly opt to it. In this regard, it must be mentioned that the Decision 2015/1601 has been considered as the ultimate expression of the same. Information hereby available:

<http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-permanent-eu-relocation-mechanism>

26 Cfr. BRSAKOSKA BAZERKOSK, JULIJA, “The refugee relocation system in EU and its implications to the countries in the Western Balkans route: the aftermath of the flawed reception conditions in the EU”, *La Revue des Droits de l’Homme*, 13, 2018, p. 3.

27 Article 78 (3) of the TFEU enables the Council to adopt emergency actions regarding an exceptional situation: the sudden influx of nationals from third countries.

28 Cfr. OVÁDEK, MICHAL, “Legal basis and solidarity of provisional measure in Slovakia and Hungary v. Council”, *European Database of Asylum Law*, 2017:

<http://www.asylumlawdatabase.eu/en/journal/legal-basis-and-solidarity-provisional-measures-slovakia-and-hungary-v-council>  
(last access: 22/12/2018)

the CJEU stated that the TFEU provided the possibility of temporary derogating legislative acts of EU law<sup>29</sup>, including articles contained in the Dublin III Regulation, as it can be evidenced through the following statement contained in paragraph 77: “(...) the concept of ‘provisional measures’ within the meaning of Article 78(3) TFEU must be sufficiently broad in scope to enable the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of nationals of third countries”.

Accordingly, the Court — in paragraph 79 — added that the disputed Decision was not willing to neither replace nor permanently amend provisions of legislative acts. In other words, the measures adopted by the Council were designed to ensure a quick and effective response through a temporary and, therefore, provisional arrangement. All these arguments lead the CJEU to declare that the contested legal instrument was not violating the analysed and previously mentioned legal provision of the TFEU despite the fact that the migratory events were — as Slovakia claimed — reasonably foreseeable. On this last point, the CJEU endorsed — in paragraph 113 — that while the earlier reasoning was a true one — by admitting that the inflow of nationals from third countries to Italy and Greece could not classify as “(...) ‘sudden’ for the purposes of Article 78 (3) TFEU, since it represented the continuation of what was already a large inflow of such nationals in 2014 and was therefore foreseeable” —, it was likewise so that there was a sharp influx of people fleeing to those countries during the summer of 2015<sup>30</sup> emphasizing that article 78.3 of the TFEU was not randomly applied. Hence, the CJEU moved far away from the approach that Slovakia had.

29 The CJEU insists on the idea of temporariness, highlighting that the period of twenty-four months given in order to ensure the effectiveness of the measures contained in the Decision 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”.

30 In this respect, in paragraph 123, we find a similar statement: “It must be held that in such circumstances the Council could, without making a manifest error of assessment, classify such an increase as ‘sudden’ for the purposes of Article 78(3) TFEU even though that increase represented the continuation of a period in which extremely high numbers of migrants had already arrived”. Additionally, the CJEU argues — in paragraph 128 — the following: “the inflow of migrants with which the Greek and Italian asylum systems were confronted in 2015 was on such a scale that it would have disrupted any asylum system, even one without structural weaknesses”. In the same vein, the judicial body makes some clarifications regarding the argument posed by Slovakia by which the mentioned Decision was not adopted under a real emergency framework: “(...) [the] situation had patently arisen before the date on which the contested decision was adopted even though it is apparent from paragraph 16 of the decision that the Council also took account of the fact that the emergency situation would very probably continue owing to the ongoing [sic] instability and conflicts in the immediate vicinity of Italy and Greece”. This corresponds to paragraph 130.

Moving on to other arguments, the Court examined if the European Union institutions when adopting the referred Decision violated the principle of proportionality. Slovakia considered that “(...) the relocation mechanism [designed by the mentioned instrument] (...) is not capable of redressing the structural defects in the Greek and Italian asylum systems”<sup>31</sup>. In reference to this, the CJEU argued, in paragraph 213, that “the mechanism for relocating a significant number of applicants in clear need of international protection (...) cannot be considered a measure that is manifestly inappropriate for working towards that objective”<sup>32</sup>. When analysing the arguments given by Hungary based on the same idea of the other mentioned country, the Court declared that the temporary relocation system was not only adjusted pursuant to the situation of Member States, but also quotas were established through an allocation key, ensuring “(...) that the distribution of the persons relocated (...) [was] proportionate to the economic weight of each of those States and to the migration pressure on their asylum systems”<sup>33</sup>.

Likewise, as a key outcome, the CJEU understood that the measure adopted by the Council was a necessary one due to the inflow of migrants on an unprecedented scale. For that matter, the Court concluded -in paragraph 252- that: “the Council, when adopting the contested decision, was in fact required (...) to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented”; clarifying immediately after that “article 78(3) TFEU seeks to ensure that effective action is taken and does not prescribe for that purpose any period within which provisional measures must be implemented”. Hence, the Court recognized in some way the undisputable role that the principle of solidarity has within the framework of the European Union immigration policy<sup>34</sup>. However, at this point, the question is if, in the present case, the

31 This corresponds to paragraph 210. In this regard, it must be pointed out that the Council is truly aware about the structural defects of the Greek and Italian asylum systems.

32 In line with the above, the CJEU adds -in paragraph 221- that “(...) the legality of an EU act cannot depend on retrospective assessments of its efficacy. Where the EU legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question”.

33 This corresponds to paragraph 301. Hence, there is no doubt about the position held in this respect by the Court of Justice of the EU, understanding that it was an appropriate one regarding “(...) the situation that was created by a large refugee influx in frontline states and that it contributes to enabling Greece and Italy to deal with the impact of the crisis, and that it was proportionate”. *Cfr. ŠABIĆ, ŠELO, “The relocation of refugees in the European Union”, Friedrich Ebert Stiftung, 2017, p. 8.*

34 Within this context, it must be noted that the CJEU referred also to other important principles, such as the principles of legal certainty and of normative clarity. In this vein, the Court declared —in paragraphs 327 and 328— the following: “the contested decision refer, with sufficient detail and precision, to the measures that may be taken by the Member States, on the

CJEU is sufficiently categorical in giving the above its due “weight”. Bearing this in mind, we have no option but to point out, in the following heading, main legal considerations of the latter.

## 2. RELEVANT CONSIDERATIONS REGARDING THE JUDICIAL DECISION RENDERED ON SEPTEMBER 6, 2017

In previous paragraphs we have analysed the judicial resolution rendered as a result of the opposition expressed by certain European Member States towards the temporal measures adopted by the Council in 2015, which had as objective the establishment of a relocating system in charge of “sweetening” the significant migrant pressure that Italy and Greece have suffered during years. Now, we should stress the impact and the extent that the mentioned sentence might likely have in a not too distant future, linking it with the principle of solidarity and, somehow, with the commitment undertaken by the EU decades ago of ensuring a space without borders.

### *2.1. Is the principle of solidarity firmly endorsed through the judicial decision rendered on September 6, 2017?*

As many have argued, the court ruling rendered on September 6, 2017, was awaited with high hopes. In fact, some understood that Slovakia and Hungary “(...) ironically gave the CJEU the necessary platform to make a rather lengthy statement endorsing the majoritarian position among the Member States as regards the validity and necessity of the relocation mechanism”<sup>35</sup>. Thus, the mentioned judicial decision “(...) is bound to be invoked in future disputes and policy”<sup>36</sup>.

Moreover, even before the judgment in question was issued, there was -in previous years- a great discussion around the principle of solidarity and fair sharing responsibility within the EU migration policy, emerging entrenched positions on the subject. Obviously, European Union secondary tools that were referring to these ideas helped to stimulate the debate. In this regard, Obradovic declares that the Decision adopted by the Council in 2015 “(...) represents a concrete expression of the principle of solidarity, it is capable of imposing the legal obligation of solidarity. Consequently, the duty of solidarity in this domain of EU law is enforceable when it is transformed into a valid,

basis of a number of EU legislative acts forming part of the *acquis* relating to the common asylum policy (...). In addition, Article 6 (5) of the contested decision provides, clearly and precisely, that an applicant for, or beneficiary of, international protection who enters the territory of a Member State other than the Member State of relocation without fulfilling the conditions for stay in that other Member State shall be required to return immediately to the Member State of relocation”.

<sup>35</sup> Cfr. OVÁDEK, MICHAL, *op. cit.*

<sup>36</sup> *Ibidem.*

legally binding obligation through the process of the adoption of concrete measures in accordance with a Treaty-based legislative procedure”<sup>37</sup>. Thereupon, when the court case aroused it gained prominent attention, as many legal experts anticipated that relevant legal considerations were going to be made by the CJEU regarding this specific topic.

Within this context, we cannot fail to mention relevant statements contained in the opinion delivered in the present case by the Advocate General Bot, who argued (in paragraph 17) that the mentioned principle must be envisaged as “(...) the quintessence of what is both the *raison d’être* and the objective of the European Project”<sup>38</sup>. Additionally, Bot highlighted the following idea: “the requirement of solidarity remains at the heart of the process of integration pursued by the Treaty of Lisbon. Although surprisingly absent from the list in the first sentence of Article 2 TEU of the values on which the Union is founded, solidarity is, on the other hand, mentioned in the Preamble to the Charter of Fundamental Rights of the European Union as forming part of the ‘indivisible, universal values’ on which the Union is founded.”<sup>39</sup> Furthermore, Article 3(3) TEU states that the Union is to promote not only ‘solidarity between generations’ but also ‘solidarity among Member States’<sup>40</sup>. Thus, the message provided by the mentioned Advocate General was a clear one: solidarity has to be considered a fundamental EU value and principle; in other words, the latter should be contemplated as a key pillar of the historic European Union project that appeared after the end of the Second World War. In this spirit, it must be stressed that, undoubtedly, the Treaty of Lisbon promotes a common policy of migration based on, among others, solidarity<sup>41</sup>.

37 Cfr. OBRADOVIC, DANIELA, “Cases C-643 and C-645/15: Enforcing solidarity in EU migration policy”, *European Law blog*, 2017:

<https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/>

(last access: 22/12/2018)

38 Document available below:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=193374&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1439527>

(last access: 22/12/2018).

39 Vid. CHETAÏL, VICENT, “The Common European Asylum System: Bric-à-brac or System?”, in: *Reforming the common European asylum system: the New European refugee law*, Vincent, Chetail, De Bruycker, Philippe and Maiani, Francesco (eds), Brill, 2016, p. 21.

40 Within this context, we must mention article 1 a) from the Lisbon Treaty, which states that “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. 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”.

41 Vid. GOIG MARTÍNEZ, JUAN MANUEL, “La política común de inmigración en la Unión Europea en el sesenta aniversario de los tratados de Roma (o la historia de un fracaso)”, *Revista de Derecho de la Unión Europea*, 32, 2017, p. 79.

In the light of all the above and considering that the Court dismissed the actions brought by Slovakia and Hungary against the measures adopted by the Council in 2015 in charge of relocating asylum seekers that came from third States, it must be emphasized that surprisingly no robust nor overwhelming thinking was made of the principle of solidarity by the judicial body. This is especially noteworthy if we bear in mind that the provisional mechanism of relocation was addressed to help Greece and Italy under solidarity terms, just as the CJEU admitted in paragraph 252: “(...) the Council, when adopting the contested decision, was in fact required, as is stated in paragraph 2 of the decision, to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented”. In this regard, it is important to mention that article 80 of the TFEU clearly establishes that the referred principle should be considered as a main guideline that has to be fully accomplished when defining the strategies that refer to the field of asylum and migration; however, it must be underlined, at the same time, that the latter legal provision is somewhat diffuse<sup>42</sup>. In fact, some authors argue that the concept of solidarity is solely related with European Union citizens or a European Union “ingredient” involved<sup>43</sup>.

Of course, as it could not be otherwise, the European Union judicial organ acknowledges that the principle of solidarity governs the EU asylum policy. Hence, it does not deny it; however, sadly, the CJEU did not add anything of substance to the present discussion. Inexplicably, there is no rotund statement made in one or other way. As Labayle claims, the present case should have deserved a stronger commentary from the Court<sup>44</sup>. In this regard the

42 *Vid.* KOGOVŠEK ŠALAMON, NEZA, “The principle of solidarity in asylum and migration within the context of the European Union accession process”, *Maastricht Journal of European and Comparative Law*, 24 (5), 2017, p. 689. In this regard, Kogovšek Šalamon stated the following: “The provision contained in Article 80 TFEU is written in broad and undefined way, providing for a wide scope of interpretation. Hence, the operationalization of the principle of solidarity can result in many different forms of burden-sharing instruments”. *Ibidem*.

43 *Vid.* MITSILEGAS, VALSAMIS, “Humanizing solidarity in European refugee law: The promise of mutual recognition”, *Maastricht Journal of European and Comparative Law*, 24 (5), 2017, 723.

44 *Vid.* LABAYLE, HENRI, “Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v. Council)”, *Asylum, European Court of Justice, Solidarity*, 2017:

<http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/>

(last access: 22/12/2018)

In the same vein, other authors have proclaimed the following idea: “From the wording of [article 80] (...) the provision, it is clear that it does not impose concrete and practical legal obligations on the EU institutions and the Member States, but rather defines a binding guiding

mentioned author proclaims that “the Court of Justice could have opted for a direct approach, similar to that of its Advocate General, to deliver one of the praetorian phrases of which it alone has the secret, consisting in conspicuously recognizing all its legal strength to the principle formulated in article 80 TFEU”<sup>45</sup>. In fact, pursuant to his opinion, the CJEU is giving meaning to the “term of solidarity enshrined in the Treaty [...] only in theoretical terms”<sup>46</sup>. Consequently, we can conclude that the hereto-analysed judicial decision has a limited added value with, unfortunate, obvious statements, as according to the mentioned legal provision, immigration policies should be governed by the referred principle<sup>47</sup>. Hence, we strongly consider that the Court should have done more forceful statements.

Once we have clarified that the Court is not properly supporting the mentioned principle, it is worth exploring the position that the same holds within the European Union law framework. Having said so, we must bear in mind that some scholars suggest that the principle of solidarity is not only a prescriptive one<sup>48</sup>, but also -in accordance with relevant statements made by the CJEU -contained in paragraph 291- it cannot be split up. Others have declared that the Court’s approach towards the referred principle may vary or have different effect if a legislative measure has been or not applied<sup>49</sup>. Likewise, it has been said that solidarity depends very much “(...) on the specific circumstances of the sector in which it shall apply”<sup>50</sup>. Following this line of thought, the next statement can be easily understood: “a EU immigration policy based on solidarity and fairness is not only a normative requirement enshrined in the Treaties, but also a functional necessity arising from the general objective of a single market without internal frontiers, one in which the free movement of person is realised. This is so because once internal borders between EU Member States are removed, the decision of migrants to enter the EU becomes a common concern to all Member States”<sup>51</sup>. According to this thesis, it seems that the effectiveness of the principle of solidarity depends, in a large extent, on the existence of a particular context; relying, thus, its enforcement on particular and concrete circumstances<sup>52</sup>. This, however, does

principle for policymaking and policy implementation, and it also introduces solidarity as an interpretative tool for use by the CJEU”. *Cfr.* KOGOVŠEK ŠALAMON, NEZA, *op. cit.*, p. 700.

45 *Ibidem.*

46 *Cfr.* LABAYLE, HENRI, *op. cit.*

47 *Vid.* GOIG MARTÍNEZ, JUAN MANUEL, *op. cit.*, p. 81.

48 *Ibid.*

49 *Vid.* OBRADOVIC, DANIELA, *op. cit.*

50 *Ibid.*

51 *Cfr.* KUKUK, ESIN, “The Principle of Solidarity and Fairness in Sharing Responsibilities: More than Window Dressing?”, *European Law Journal*, 22, 2016, p. 448.

52 In this respect, Noll admits that the principle of solidarity contained in article 80 of the TFEU must be interpreted in the following way: “The prevailing interpretation of article 80 is that it concerns solidarity merely between Member States and not between Member State



not fit with the mentioned opinion of the Advocate General Bot, who argued that the referred principle has to be considered a value of the EU<sup>53</sup>.

Either way, as said before, it is undisputed that serious attention was given to the analysed sentence, especially once the Advocate General of the case expressed a vigorous endorsement towards the mentioned principle. However, a grim feeling rapidly aroused among those who realized that “(...) solidarity was a notable absentee from the grand chamber judgment of the Court of Justice, released on 6 September 2017”<sup>54</sup>. Accordingly, the CJEU missed a relevant opportunity to take a strong stand towards the above. This leads us to the following idea: if a deep analysis of the mentioned principle would have been made, the judicial decision could have been a first-class point of reference<sup>55</sup>.

## 2.2. Which is the status quo of Schengen after the judgment rendered on September 6, 2017?

Regardless of what it has been explained in the previous heading, it should not be forgotten the way in which the court ruling has been praised by European Union institutions. In this regard, the European Union Commissioner for Migration and Home Affairs, Dimitris Avramopoulos, proclaimed that the latter had to be considered an important bulwark of defence and commitment towards one of the basic principles in charge of promoting a physical space without obstacles.<sup>56</sup> Furthermore, the mentioned Commissioner stated that it “was the time to work in unity and implement solidarity in full”, glorify-

and refugee, or Member States and other recipient states in crisis regions”. *Cfr.* NOLL, GREGOR, “Security in a Liberal Union: EU Asylum and Migration Control Policies”, en: *The European Union: Facing the Challenges of Multiple Security Threats*, 1-21, Bakardjieva-Engelbrekt, A., A. Michalski, N. Nilsson, L. Oxelheim, United Kingdom, Edward Elgar Publishing, 2018, p. 6. Accordingly, Noll states that “(...) article 80 TFEU is so contradictory in its legal construction that it cannot lead to any practical results -neither in policy nor before the CJEU”. *Ibid.* 7.

53 In paragraph 18, the Advocate General declares that the principle of solidarity is a founding and existential value of the Union. Other authors share the same opinion: *Vid.* Uçarer, Emek, “Mare Nostrum or Solidarity of Inaction? European Union’s Responses to the Unfolding Refugee and Burden-Sharing Crisis”, Paper prepared for Biennial Conference of the European Union Studies Association, Miami, May 4-6.

54 *Cfr.* ARRIBA-SELLIER, NATHAN, “Welcome refugees, adieu solidarité”, *Public Law*, 2017: <https://leidenlawblog.nl/articles/welcome-refugees-adieu-solidarite> (last access: 22/12/2018)

55 *Vid.* ABRISKETA URIARTE, JUAN ANTONIO, “La reubicación de los refugiados: un déficit de solidaridad y una brecha en la Unión Europea. Comentario a la sentencia del Tribunal de Justicia de 6 de septiembre de 2017, asuntos C-643 y C-64/15 Hungría y Eslovaquia contra el Consejo”, *Revista General de Derecho Europeo*, 44, 2018, p. 128.

56 Information available below:  
<https://www.efe.com/efe/espana/mundo/la-justicia-de-ue-falla-contra-hungria-y-eslovaquia-por-no-acoger-demandantes-asilo/10001-3371148>  
(last access: 22/12/2018)

ing the content of the mentioned judicial decision. In the same vein, other organizations, such as Caritas Europa, argued that the judgment “sends a powerful message on EU’s values of solidarity and responsibility sharing”<sup>57</sup>. Taking into account those statements, one could consider that the Schengen *acquis* is properly backed through the analysed judicial decision.

However, we firmly think that the recent resolution has to be approached with due caution when arguing that it has served as a stimulus to enforce the Schengen values and principles. In the same vein, Bamberg and De Somer state that “while the multiple crises of recent years are slowly but surely giving way to a renewed optimism about the European project, one of the European Union’s most symbolic and tangible achievements, the Schengen area, is not out of the danger zone yet”<sup>58</sup>; adding, also, that “(...) the EU’s policies on Schengen are strongly dominated by intergovernmental interests”<sup>59</sup>.

The above is supported by recent events that are putting on the table -once again- a strong discussion about the most important challenges that are nowadays threatening Schengen. Obviously, the migratory movement towards Europe is seen, in this respect, as a main obstacle when fulfilling the objectives set out in the latter legal framework. Within this context, it must be highlighted that fresh strategies implemented by some governments on migration policy leaves much to be desired; reaching a point in which Schengen is clearly at risk. In this sense, we should refer to the Italian Prime Minister, Giuseppe Conte, who refused to receive -this last month of June- ships with migrants that finally were rescued in Spain once their access was denied in Italy and Malta. Clearly, this kind of episodes of special relevance is stressing vigorously the following idea: denying or drastically limiting the free movement of persons is putting in danger the existence of the European Union itself.

Furthermore, as an epilogue of all the above, it is important to be aware about the data shown by the International Organization for Migration, which cannot be worse: “88,736 migrants and refugees entered Europe by sea in 2018 through 14 October, with 40,598 to Spain, the leading destination this year”<sup>60</sup>. Hence, massive populations movements are not only an on-going

Of course, it has to be highlighted that Slovakia and Hungary have negatively reacted to the court ruling. Information hereby available:

<https://www.theguardian.com/world/2017/sep/06/eu-court-dismisses-complaints-by-hungary-and-slovakia-over-refugees>

(last access: 22/12/2018)

57 Cfr. BAMBERG, KATHARINA et DE SOMER, MARIE, “Policy Update October 2017”, *European Policy Centre*, 2, 2017: [http://www.epc.eu/pub\\_details.php?cat\\_id=3&pub\\_id=8785](http://www.epc.eu/pub_details.php?cat_id=3&pub_id=8785)

(last access: 22/12/2018)

58 Cfr. BAMBERG, KATHARINA et DE SOMER, MARIE, *op. cit.*

59 *Ibid.*

60 Information hereby available:

<https://reliefweb.int/report/spain/mediterranean-migrant-arrivals-reach-88736-2018-deaths-reach-1839>

conflict, but also it is clear that the alarming situation that those generate is not going to be solved overnight. Consequently, if we combine these last statements with the undeniable fact according to which the CJEU has lost an opportunity to uphold and ensure consistency towards what should be recognized as a basic EU value and principle, we must receive with disappointment the judicial decision rendered on September 6, 2017.

## CONCLUSIONS

There is no doubt that the migrant flows occurred in recent years, considered one of the gravest since World War II, has threaten the EU stability. Of course, European Union institutions have reacted to this. Disregarding if the form of confrontation has been adequate or not<sup>61</sup>, different kind of measures were adopted in order to face the referred challenge. In this regard, it has to be mentioned that many of those strategies, designed to ease and help countries of first arrival located at the external borders of the EU, were accompanied with strong controversy<sup>62</sup>. This is the case of the Decision 2015/1601 by which Dublin norms'-addressed to indicate that European countries are in charge of examining asylum applications- were suspended and replaced by a specific relocation system of migrants imposed to Member States<sup>63</sup>.

Simultaneously, due to the referred migratory crisis, actions have been implemented unilaterally by States, which have sadly materialised on the implementation of internal border controls<sup>64</sup>. This has happened despite the fact that the free movement of persons has been, during decades, not only a key achievement of the Union, but also an essential aspect of the referred international organization insofar as it is closely linked to the establishment of the main objective of the European Union integration project, underpin-

(last access: 22/12/2018)

61 The Red Cross EU office and others have severely criticized many strategies that have been addressed by the EU. Information hereby available:

<https://reliefweb.int/report/world/no-time-waste-ngos-call-upon-eu-institutions-and-member-states-expand-use-safe-and>

(last access: 22/12/2018)

62 *Vid. LEHNE, STEFAN, op. cit.*

63 As it has been explained, the referred instrument, as many others, "(...) intended to reinforce internal solidarity in the EU and show the commitment of all EU Member States to share the migration burden with the two Mediterranean countries. *Cfr. OBRADOVIC, DANIELA, op. cit.*

64 This unilateralism has been severely criticized. In this sense, we must take into account the following statements: "Given the current fragility of EU cooperation on migration -not least within the Schengen area- the EU institutions cannot afford to offer national governments further excuses to withdraw into unilateralism. Building stronger tools to help Member States manage future uncertainty is the surest path to rebuilding public confidence and fostering the resilience of the European Union more broadly". *Cfr. COLLET, ELIZABETH et LE COZ, CAMILLE, "After the storm. Learning from the EU response to the migration crisis," Migration Policy Institute Europe, 2018, p. 2.*

ning in turn the very concept of citizenship of the Union. Within this context, we cannot forget that the tragic aftermath of the Second World War led to the elimination of obstacles between Member States, making this feature an identity mark of the EU. Therefore, the gradual loss of this characteristic has suggested the return to other temporal moments, such as, the Age of Hadrian; a period in which limitations were imposed with the purpose of dividing the world<sup>65</sup>.

In this situation, the judicial decision rendered by the CJEU on September 6, 2017 turned out to be a relevant one as it referred to all the above-mentioned issues although the reasoning was not a vigorous one. As previously explained, the mentioned institution could have provided a more incisive analysis regarding the principle of solidarity, just as the Advocate General of the case did by underlining, *inter alia*, the following conclusion: “solidarity is both a pillar and at the same time a guiding principle of the European Union’s policies on border checks, asylum and immigration”<sup>66</sup>. In short, it is noticeable the expedite and convincing arguments brought by the latter, whereas the Court of Justice of the European Union made basic and tenuous considerations. Bearing this in mind, maybe we should consider that the intention of the CJEU was to encourage Member States to adopt their own strategy<sup>67</sup>. Be that as it may, we truly think that the European Union judicial institution could have either confirmed the approach brought by the former or provide its own distinct perspective but it should not have remained silent, taking into account the tragic events that migratory movements in Europe are entailing.

We have to be aware that the number of migrants is not going to decrease significantly in the near future. As we have seen, those will surely be accompanied with the implementation of domestic strategies addressed, in many cases, to prevent or curb illegal migratory flows as much as possible. And those will contribute to the existence of hostilities between Member States of the European Union. Within this context, the following statement is a relevant one: “Mutual trust between Member States and trust in the EU institutions on which the EU is built are crumbling. This is the cumulative result of the inability and occasional reluctance to perform by the EU Member States at the external borders combined with the free-riding attitudes and restrictive practices of others, including Hungary and some other Visegrad countries”<sup>68</sup>. The picture does not look encouraging. Clearly, a powerful response should

65 We are referring to the wall that Emperor Hadrian built in order to separate Romans from barbarians; a construction whose main task, according to some specialists, consisted in limiting migratory movements.

66 *Vid. Supra*. Nota 42.

67 *Vid.* ABRISKETA URIARTE, JUAN ANTONIO, *op. cit.*

68 Cfr. BOLDIZSÁR, NAGY, “Sharing the responsibility or shifting the focus? The responses of the EU and the Visegrad countries to the Post-2015 Arrival of Migrants and Refugees”, *IAI*, 17, 2017, p. 15.

be issued sooner or later by the European Union institutions encouraging Member States to adopt appropriate initiatives in this field.

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