

Enforcement of EU law in the field of asylum

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Background

- ▶ Article 78(2)(d) TFEU gives the EU the competence to establish a Common European Asylum System (CEAS)
- ▶ Since 1999 (special meeting European Council in Tampere) EU has established this CEAS in several phases
- ▶ 1st phase was achieved through the adoption of the first relevant instruments, in particular Directive 2003/9/EC (RCD), Directive 2004/83/EC (QD) and Directive 2005/85/EC (APD)
- ▶ Purpose = achieve the objective of a common area of protection and solidarity and a uniform status for those granted international protection
- ▶ However, in 2004 considerable disparities between MS in the CEAS remained when the European Council adopted the Hague Programme
- ▶ By this programme, the Commission had been invited:
 - ▶ 1/ to conclude the evaluation of the first-phase legal instruments
 - ▶ 2/ to submit the second-phase instruments to the Parliament and the Council “*with a view to their adoption before the end of 2010*” (recital 7 QD).

2nd phase of CEAS (current legal framework)

- ▶ 1st-phase instruments have been recasted in 2010, 2011 and 2013
- ▶ EASO Regulation (EU) 439/2010
- ▶ 3 Asylum Directives : QD 2011/95/EU, APD 2013/32/EU, RCD 2013/33/EU
- ▶ + Dublin Regulation (EU) No 604/2013
- ▶ + EURODAC Regulation (EU) 603/2013 (for the comparison of fingerprints for the effective application of Dublin Regulation)
- ▶ = EU Asylum acquis
- ▶ CEAS does not preclude some adjustments for particular MS (opt-out for JHA):
 - ▶ UK (prior to its withdrawal)
 - ▶ IE (case-by-case basis)
 - ▶ DK more rigid opt-out e.g. DK not bound by APD (which should be kept in mind when criticising the new system on externalisation of assessment of asylum applications)

New Pact on Migration and Asylum... ?

- ▶ In 2020, the European Commission proposed to reform the system through a comprehensive approach to migration and asylum policy based on three main pillars:
 - ▶ efficient asylum and return procedures,
 - ▶ solidarity and fair share of responsibility and
 - ▶ strengthened partnerships with third countries.
- ▶ Ongoing discussions between EU institutions

Role of European Commission: Guardian of the Treaties

- ▶ **Article 17(1) TUE:** The Commission shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.
- ▶ **Article 258 TFEU:** If the Commission considers that a **Member State has failed** to fulfil an obligation under the Treaties, it shall deliver a **reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations**. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.”
- ▶ **Article 260 TFEU:** 1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
- ▶ 2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court **after giving that State the opportunity to submit its observations**. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 259.
- ▶ 3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Role of the Member States and the Commission

- ▶ The treaties clearly define the roles of the Member States and the Commission:
- ▶ **MS** are responsible for:
 - ▶ the correct application of the *acquis*
 - ▶ the timely and correct transposition of directives
- ▶ The **Commission monitors the application of Union Law** as the guardian of the Treaties.
- ▶ The Commission works in partnership with the Member States to **try to solve** in an efficient and satisfactory manner, in accordance with EU law, problems and complaints from citizens and businesses concerning the application of EU law.

Infringement proceedings : what doctrine for EC?

- ▶ *EU law: Better results through better application* (2016 Communication) which pleads for a “*more strategic approach to enforcement in terms of handling infringements*” (Juncker Commission's commitment to be ‘bigger and more ambitious on big things, and smaller and more modest on small things’)
- ▶ Various actions to achieve this goal (excerpts 2016 Communication):
 - ▶ “Dialogue - Infringements of EU law are not routine matters and should be discussed at an appropriately high level and in a timely manner”
 - ▶ “Infringements must be dealt with promptly.”
 - ▶ “In exercising this role, the Commission enjoys discretionary power in deciding whether or not, and when, to start an infringement procedure or to refer a case to the Court of Justice
- ▶ Consequence: : individuals will not succeed in actions brought against the Commission where it declines to pursue an infringement procedure (T-571/93, 14 September 1995, Lefebvre and others v Commission)

- ▶ The Commission normally pursues as a matter of priority cases where MS have:
 - ▶ **failed to communicate transposition measures**
 - ▶ **incorrectly transposed directives**
 - ▶ **failed to comply with a judgment** of the Court of Justice as referred to in Article 260(2) TFEU
 - ▶ **caused serious damage to the EU's financial interests**
 - ▶ **adopted national rules which impede the procedure for preliminary rulings** by the Court of Justice
 - ▶ **adopted national rules which prevent national courts from acknowledging the primacy of EU law**
 - ▶ **failed to provide for redress procedures** for a breach of EU law or otherwise prevent

- ▶ Subject to political approval (decisions adopted by College)

- ▶ How to detect infringements? The infringement procedure can be initiated:
 - ▶ following a failure to communicate transposition measures
 - ▶ as a result of **own investigations** ("own initiative" cases) of the Commission
 - ▶ following **complaints** by individual citizens or by businesses

Role of complainants

- ▶ Crucial role of complainants (NGO, citizens, TCN...) who raise the issues before COM
- ▶ Obligation for COM to handle promptly
- ▶ However, pursuant discretionary power to pursue and applying its doctrine, COM would normally not pursue where:
 - ▶ Complaints on individual cases of incorrect application of EU law where there are **insufficient indications of a general practice, of a problem of compliance of national legislation with EU law or of a systemic failure to comply with EU law**, and there are appropriate means for the complainant to seek redress which is not available through the infringement process, unless the case raises a question of wider principle to be assessed in the general interest.
 - ▶ **Preliminary ruling proceedings under Article 267 TFEU are pending** on the same issue and the Commission action would not significantly accelerate the resolution of the case.
 - ▶ Complaints the pursuit of which would be in **contradiction with the line taken by the College of Commissioners in a legislative proposal**. *This refers to a legislative proposal that has already been adopted by the College, which would address the complainant's problem.*
 - ▶ **Generic complaints** which raise Member States' shortcomings in the transposition of a directive in a general way **without raising particular aspects affecting the complainant**, if the national legislation is subject to a compliance assessment, since the subject of such complaint would be covered by the compliance assessment.
- ▶ Recent example September 2020: The European Commission should trigger an infringement procedure against Greece for its systematic breach of EU law in its treatment of people seeking asylum in Europe, a coalition of human rights groups said in a legal complaint NGO Oxfam
- ▶ <https://www.oxfam.org/en/press-releases/rights-groups-press-european-commission-investigate-violations-eu-law-greece-over>

Infringement procedures

- ▶ Non communication = LFN + RO + referral with fines
- ▶ Non conformity = LFN + RO + referral + LFN + referral with fines
- ▶ Bad application = LFN + RO + referral + LFN + referral with fines

- ▶ LFN in order to ensure the principle that both sides must be heard
- ▶ RO: crystallisation of the grievances

- ▶ + possible informal dialogue via EU-Pilot + political/administrative letters signed at appropriate level (Csser, DG...) for non conformity and bad application cases

Infringement solved during pre-litigation phase

- ▶ **Non communication case (INFR(2019)2187):** LFN + RO against PT for failure to transpose APD
- ▶ Reply to RO was considered satisfactory and COM decided to close the case on June 2021
- ▶ Caveat: this assessment is without prejudice to any separate step regarding the *conformity* of the national legal framework with the APD

- ▶ **Bad application (INFR(2014)2126):** LFN against IT for concerns related to the denial of access to asylum and Dublin procedures for certain third-country nationals coming from Greece of the Adriatic ports
- ▶ Practices were no longer reported after 2017 and COM decided to close the case on February 2017

Infringements at the level of the Court - Relocation cases

- ▶ SK and HU (supported by PL) had asked in 2015 the annulment of the Council Decisions Council imposing an obligation for MS to relocate a number of applicants for international protection from EL and IT
- ▶ Actions dismissed by CJEU in cases C-647/15 and C-643/15 on 6 September 2017
- ▶ Opening in June 2017 of 3 cases against CZ, HU and PL for failure to implement correctly the obligation of relocation (lack of solidarity)
- ▶ On 2 April 2020 the Court delivered its judgment in Joined Cases C-715/17, C-718/17 and C-719/17 declaring the infringements: CZ, PL and HU have failed to fulfil their obligations
- ▶ The period of application of the decisions and, consequently, the obligations which it imposes, definitively expired on 26 September 2017
- ▶ Cases should be closed by COM without any procedural follow-up (decisions no longer in force)

Infringement against HU - Judgment of ECJ in case C-808/18

- ▶ Following a complaint, COM decided to open in December 2015 a case against HU for failure to comply with asylum acquis and Return Directive as regards the situation of asylum seekers in the transit zones in HU (INFR(2015)2201)
- ▶ Burden of proof on the COM: how to prove the infringements in case of bad application of the acquis?
- ▶ **Opinion of AG Pikamäe**
 - ▶ As for the Commission's claim that progressively severe restrictions were imposed on access to the transit zones, **it should be noted that at no stage in these proceedings did Hungary cast doubt on the accuracy of the data contained in reports drawn up by various international bodies, according to which:** - in September 2015, the Hungarian Minister for the Interior informed the UNHCR that the maximum number of admissions to the transit zone was set at 100 persons per day, a number that was subsequently reduced to 50 in February 2016 and thereafter to 30 in March 2016; - in November 2016, only 10 persons per day were allowed to enter the transit zone, a number that was reduced to 5 per day in 2017 (that latter figure was moreover confirmed by a report of the Secretary General of the Council of Europe and, since January 2018, now stands at a single person per day; - in May 2018, 10 persons per week were admitted to the transit zones; - because of that progressive limitation on access to the transit zones, persons wishing to apply for international protection are required to wait several months before being admitted to those zones, a wait that may last between 11 and 18 months.
 - ▶ **On the basis of that information**, it may therefore be considered that persons wishing to apply for international protection at the Serbian-Hungarian border are required to wait between 11 and 18 months before they are admitted to one of the transit zones and are thus able to make an application.
- ▶ **Opinion confirmed by the Judgment on 17 December 2020**

- ▶ In case C-808/18 on 17 December 2020 the Court declared that Hungary has failed to fulfil its obligations as regards:
 - ▶ access to the international protection procedure in transit zones
 - ▶ systematic detention of applicants in the transit zones
 - ▶ removal of third-country nationals staying illegally in its territory without observing the procedures and safeguards laid down in the Return Directive
 - ▶ making the exercise by applicants for international protection who fall within the scope of Article 46(5) of APD of their right to remain in its territory subject to conditions contrary to EU law
- ▶ Article 260 LFN sent to HU on 9 June 2021 before eventual referral with fines
- ▶ HU might raise its Constitution in order to justify not to comply with ECJ
- ▶ Trend? DE Constitutional Court in the European Central Bank case (ultra vires) + PL Constitutional Court in the disciplinary actions against judges) ...which goes beyond the field of asylum and raises concerns in terms of rule of law!

Thanks for your attention