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Poland, Hungary and the Czech Republic violate EU Law by failing to fulfill their obligation to relocate migrants

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On April 2, 2020, the Court of Justice of the European Union delivered a judgment in a case against Poland, Hungary and the Czech Republic referred to it by the European Commission in connection with a refugee relocation procedure proposed in 2015. The judgment prohibits the Member States from invoking their right to maintain public order and safeguard national security to justify limitations on the application of EU law in the area of freedom, security and justice. Measures taken in the exercise of this right are subject to scrutiny by the EU institutions - the Commission and the CJEU. The judgement reflects the key structural issue faced by the EU. Whereas the Union is empowered to pass secondary legislation, including decisions, it is not responsible for its implementation in individual Member States or for the social, economic and cultural consequences of such implementation. In addition, the responsibility to the citizens for ensuring law and order in individual Member States rests with the national political parties holding power in their respective states.

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The 2015 relocation program

By the Council's relocations decisions of September 2015, EU Member States committed to admit ca. 160,000 applicants for international protection from Greece and Italy over a two-year period (until September 2017).

The decisions were based on Article 78(3) of the Treaty on the Functioning of the EU (TFEU), which states: "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." Invoked additionally was Article 80 TFEU, which envisages the application of the principle of solidarity and fair sharing of responsibility through policies on border control, asylum and migration.

The relocation was to be carried out in two phases:

- the relocation of 40,000 persons from Italy and Greece, 1,100 of whom to be admitted by Poland ("Council Decision 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece"), on the basis of an earlier consensual "Resolution by the representatives of the Governments of the Member States, meeting within the Council, on relocations from Italy and from Greece."
- the relocation of 120,000 persons from Italy and Greece, 5082 of whom to be admitted by Poland, in the first phase of implementation ("Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece").

The allocation principles were based on four criteria: the size of the population, GDP, the average number of asylum applications, the number of resettled refugees per 1 million inhabitants in the previous four years, and unemployment rate. The Member States participating in the relocation mechanism would receive a €6,000 lump sum for each relocated person. Meanwhile, a resettlement scheme was agreed concerning 20,000 persons from outside the EU who, in agreement with their countries of origin, would be moved directly into the Member States.

Given the emergency, the adoption of these measures resulted in the suspension of the Dublin system, under which Greece and Italy were to be responsible for examining applications for international protection. The existing Dublin III system, which is based on the Regulation of the EP and the Council of 26 June 2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining applications for international protection, provides migrants with protection in the first state they reach after crossing the external border of the EU, until their status and the type of protection they can count on in the Schengen area are determined.

The migration crisis has become a reality check for the Dublin Regulations, which did not provide for the sharing of responsibility for the processing of asylum applications. A reform of the Dublin system has been under negotiation since May 2016. The EC proposed that a corrective mechanism for the allocation of applications for international protection be included in the Dublin system, such a mechanism to be triggered should a Member State be faced with a disproportionate number of asylum seekers. Due to opposition from numerous Member States, especially from Visegrad Group members, negotiations on this matter have been delayed.

It is worth noting that the massive influx of immigrants into the territories of EU Member States seen in the second half of 2015 can undoubtedly be attributed to the unilateral decision by German Chancellor Angela Merkel to open the German border for immigrants crossing the external borders of EU Member States. To this day, this decision is the subject of heated political controversies, including those over the lack of consultations with the leaders of other Member States, despite its serious consequences for the entire EU, as well as legal controversies over the decision's non-conformity with both German and EU law.

According to Eurostat, Germany has been continuously receiving the highest numbers of asylum applications since 2012. The proposed relocation mechanism that was supported by the Merkel administration sought to encourage other Member States to engage in cooperation in the area of asylum policy in the spirit of solidarity.

The implementation of refugee relocation decisions

The relocation program was never fully implemented, partly because the number of eligible persons in Greece and Italy proved to be significantly lower than the quotas specified in Council decisions. The September 2017 progress report mentions the successful relocation of only 27,695 people. The second phase of the relocation program, which was handled differently and without the prior consent of Member State governments in the form of a resolution, encountered great difficulties and sparked opposition from several Member States. It is also worth noting that Slovakia and Hungary lodged complaints with the CJEU regarding the incompatibility of the relocation decisions with EU law. Their complaints were dismissed in September 2017. At the time, the Court concluded that the EU institutions were entitled to take the proposed measures because the Treaty requires them to take any provisional measures in response to emergencies (Judgment in Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the European Union).

Furthermore, the need to relocate migrants has lost much of its urgency following the entry into force of the agreement with Turkey in March 2016 and the reduction of migration flows towards the EU. Some of the people who were to be relocated to Member States were redirected to Turkey. Thus, individual quotas were ultimately much smaller than expected, saving the states that only took part in the relocation symbolically, such as Slovakia, from prosecution before the CJEU.

Complaint to the CJEU

The Polish and Hungarian governments refused to admit refugees altogether, while the Czech Republic only agreed to accept a small number. Therefore, on December 7, 2017, the Commission referred these three Member States to the CJEU for non-compliance with EU law. While the countries themselves argued that their relocation commitments had expired, the Commission claimed that the Council's decisions on relocation applies to all eligible persons who had arrived either in Greece or Italy by 17 and 26 September 2017. This means that the benchmark in the relocation program was the absence of any persons eligible for relocation within that time, not the elapse of the time limit itself.

Poland, the Czech Republic and Hungary argued that their refusal to accept refugees was based on Art. 72 of the TFEU under which Member States continue to fulfill their obligations to maintain public order and safeguard internal security. The Member States argued that safeguarding internal security was essential as they were not in a position to establish the identities of many of the relocated migrants. The Polish Minister of Foreign Affairs in 2015-2018, Witold Waszczykowski, also stated that while the EU considered every person staying in Greece and Italy at the time as a refugee, and made this consideration a basis for establishing the quota system, Poland was of the view that the ranks of such refugees included a substantial number of illegal migrants.

In comments to the press, the injured parties stated that Poland, Hungary and the Czech Republic were used as "scapegoats" in connection with the relocation decision, even though the actual relocations to EU Member States amounted to a mere fraction of the Commission's initial plan. The Polish government spokesman emphasized that the decision to only challenge three countries "raises doubts as to the equality of the treatment afforded by the Commission to Member States on this very sensitive issue."

The EC claimed that by refusing to accept refugees, Member States infringed upon EU law, and in particular on the principle of solidarity which lies at the foundation of the EU's migration and asylum policy. In turn, in her opinion of October 2019, TSUE Advocate General Eleanor Sharpston said that the defendant Member States cannot use their obligations to maintain law and order and safeguard internal security as an excuse for declining to comply with a binding EU law with which they happen to disagree. She also pointed out that the countries in question chose to refrain from implementing the decision instead of reporting problems with the processing of applications or requesting a suspension of their relocation obligations, as did other Member States. Some of the states that applied for the postponement of their relocation obligations were Austria and Sweden, both of which faced a growing number of applications for international protection that increasingly overwhelmed their asylum systems.

Although the opinions of Advocate General are not binding on the CJEU, the Court commonly agrees with them in its judgments, as it did in its judgment of 2 April 2020.

Key points of the CJEU judgment of 2 April 2020

In view of the CJEU, by refusing to comply with the temporary scheme for the relocation of applicants for international protection, Poland, Hungary and the Czech Republic failed to fulfill their obligations under EU law. In particular, the infringement of EU law consisted in failing to commit to accept an appropriate number of applicants seeking international protection in Greece and Italy, who could quickly be relocated to these three countries.

The CJEU dismissed the arguments of Poland, Hungary and the Czech Republic that, given that the September 2017 time limit for the decision's application had expired, the Commission's complaints were both contrary to the purpose of the proceeding, as laid down in art. 258 TFEU (complaint about a breach of EU law by a state) and futile, especially that the Member States were no longer in a position to remedy the situation. The EU Court of Justice replied that "an action for failure to fulfil obligations is admissible if the Commission confines itself to asking the Court to declare the existence of the alleged failure, in particular in a situation, such as that before the Court, in which the secondary EU legislation whose infringement is alleged definitively ceased to be applicable (...) "(Para 57 of the CJEU judgment). It is important, also for the future, to determine the unlawfulness of a Member State's action under EU law. Therefore, the judgment in question is not only of historical significance. On the contrary, its origin and tenor should be examined in-depth by the Member States with a view to reforming the EU's asylum policy. Furthermore, according to the CJEU, to uphold the inadmissibility of the action "would be detrimental (...) to the respect for the values on which the European Union, in accordance with Article 2 TEU, is founded, one such being the rule of law" (Para 65 of the CJEU judgment).

Another argument raised by Poland and Hungary concerned a breach by the Commission of the principle of equality of Member States before the Treaties (Article 4(2)1 TEU), as the Commission only brought action against three Member States, despite the fact that the vast majority of them failed to fully fulfill their obligations under Decisions 2015/1523 and 2015/1601. In this case, the CJEU recognized the discretion of the Commission stating that "it is for the Commission to determine whether it is expedient to take action against a Member State (...)" (Para 75 of the CJEU judgment). Unfortunately, the CJEU did not comment on whether the Commission's discretion in this respect is consistent with the legal principle enshrined in art. 2 TEU.

However, the most vital argument raised by Poland, Hungary and the Czech Republic was the application of Art. 72 TFEU in connection with art. 4(2) TEU (a clause of Member State liability for ensuring public order and national security on its territory)

as grounds for refusing to cooperate in the forced relocation to the territories of those Member States of persons who could commit acts of violence if not terrorism. The respondent states indicated that the relocation scheme invoked in such decisions, in particular by Greece and Italy, failed to include mechanisms for establishing the identity and origin of applicants for international protection with sufficient certainty. Neither was it possible for host country liaison officers to interview the applicants prior to relocation. The CJEU dismissed these arguments stating that Poland, Hungary and the Czech Republic may not rely on their obligations to maintain law and order and safeguard internal security nor the malfunctioning of the relocation scheme as a reason to prevent its implementation.

The CJEU interpreted Art. 72 TFEU, which is essential for determining the authority of the Member States in the area of the EU policy that is as crucial for the security of citizens as the area of freedom, security and justice (hereinafter FSJ). The EU court stated that "the scope of the requirements relating to the maintenance of law and order or national security cannot therefore be determined unilaterally by each Member State, without any control by the institutions of the European Union" (Para 146 of the CJEU judgment). This means that it is the EU, and in particular the Commission and the CJEU, that will decide whether the measures taken by a Member State to maintain public order and safeguard national security are justified and will do so not from the perspective of the national interest of a given country, but from that of the EU law. The CJEU applied the same interpretation as it did for the provisions of the treaties that allow a Member State to limit the freedoms of its internal market on the grounds of public policy, public security and public health (Articles 36, 45 (3), Article 53 TFEU).

In this case, however, one should recognize the specific nature of the area of FSJ. The control over the legitimacy of restrictions on the movement of goods between Member States and the prohibition of the employment of citizens of one Member State in another differs fundamentally from control over restrictions applied by a Member State to admit third-country nationals of unknown identity onto its territory, if such entry is the result, on the one hand, of the EU's protracted inaction in the field of long-term immigration policy and, on the other, of a unilateral decision by a Member State. In view of the very general nature of the Treaty provisions, their interpretation requires accounting not only for legal considerations (especially that such provisions are secondary EU law that in many cases falls outside of the scope of the Treaties) but also for considerations that are factual and even political. The CJEU positions itself as an objective court of law, even though it has long been referred to as the "driver of integration". The problem lies not only in the Court acting as an independent entity that seeks tighter integration, but also in the very course of such integration, which is dangerously in conflict with the fundamental precepts that underlie the Treaty.

The CJEU pointed out that "the applicant's fundamental rights, including the relevant rules on data protection, must be fully respected" (Para 149 of the CJEU judgment), and that a Member State can refuse to relocate a person "only where there are reasonable grounds for regarding him or her as a danger to their national

security or public order" (Para 150 of the CJEU judgment). However, the Court did not explain how to practically implement these evidential requirements in view of the difficulties faced in establishing the identities of the persons to which the Member States were referring.

The CJEU judgment is relevant for at least two reasons. Until recently, tensions on the Turkish-Greek border were among the most shocking news reported by the media. After Turkish President Recep Tayyip Erdoğan allowed migrants to cross the Greek-Turkish border to, as he himself put it, ease the excessive burden on the Turkish immigration service and respond to the EU's breach of the migration agreement of 18 March 2016, a prospect of another wave of migrations loomed over the EU. It appears that, five years on, despite the EU Council's decision as well as countless Commission documents and CJEU judgments, the EU remains just as helpless in the face of the influx of immigrants. At this time, citing public interest and specifically public health, public order and national security concerns, and in the face of the coronavirus outbreak, the Member States have limited the application of the fundamental principles of the functioning of the EU, in particular those governing the free movement of persons. In the light of the judgment in question, this means that any future decisions of the Member States may be scrutinized by the EU institutions, which will assess the legitimacy of national restrictions from the perspective of EU law and will do so on a discretionary basis, because, in accordance with the judgment of the CJEU, the powers the Commission is using are of a discretionary nature. The CJEU judgment is yet another decision that stacks the relations between the EU and the Member State in favor of the union without resorting to the Treaty-prescribed method of changing the legal basis for the functioning of the EU.

Reactions to the judgment of the CJEU

The importance of the emphasis of the EU institutions on the application of the principle of solidarity in migration and asylum policy in the judgment in question lies in the fact that the proposed reform of asylum policy under negotiation relies on a mechanism similar to that envisioned for crises of the kind seen in 2015. Therefore, the European Union seeks to enforce the application of the principle of solidarity in this area. The decision of the CJEU was welcomed by the President of the European Commission Ursula von der Leyen as one that sends a good message regarding the shape of future asylum policy in the EU, for which all Member States are responsible.

German MEPs from across the political spectrum were equally welcoming of the judgement. MEPs from Die Linke party were particularly emphatic stressing that the EUCJ opposed considering asylum seekers as a potential security threat. Christian Democrats, in their turn, emphasized that the judgment points to solutions that should be adopted in formulating the EU's future asylum policy. Each Member State should bear a comparable burden so as to relieve those under the greatest asylum pressure.

A *Süddeutsche Zeitung* commentator stated emphatically that "the judgment is leading us straight into the swamp of European asylum policy reform[1]." The reform has ground to a halt mainly over the proposed fair allocation of asylum applications among Member States in emergencies. Due to the lack of consensus, the EC seems to be gradually abandoning the idea. What it will propose in return will become clear after it announces the new asylum pact, whose publication – scheduled for the first quarter of 2020 – is being increasingly delayed.

The views expressed in this publication belong solely to the authors.

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[1] T. Kirchner, "Solidarität geht nur freiwillig", *Süddeutsche Zeitung*, April 2, 2020, https://www.sueddeutsche.de/politik/eugh-fluechtlinge-kommentar-1.4865595, (accessed April 15, 2020).