Unleashing Horizontal State Liability

Financial Solidarity in the Common European Asylum System

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The Common European Asylum System is under attack. In a recent Judgment against Hungary, the European Court of Justice has unambiguously stated that non-compliance with the rules of the Common European Asylum System (CEAS) undermines solidarity between Member States and strikes at the very heart of EU law. Traditional means of enforcement, however, seem insufficient to foster compliance with these rules. Against this backdrop, this blogpost argues for the unexplored avenue for enforcing the CEAS via horizontal state liability.

Systematic and deliberate evasion of the common policy on asylum

Victor Orban is undoubtedly a savvy bargainer. Over the years, he has held various dossiers hostage to get European funds flowing to Hungary. His latest move, however, entails a twist to the usual plot, as this time, he is not bargaining for money to flow down the Danube to Budapest but rather for money not to flow upwards to Brussels. The unprecedented lump sum of 200 million in addition to a daily penalty of 1 million for not taking all necessary measures to implement a prior judgment imposed by the ECJ are indeed no small change.

With the Commission laying the groundwork for deducting the penalty from Hungarian EU funds, the rhetoric from Budapest is also gearing up. Hungary, according to recent news, is not only conducting its own calculations on how much money ought to be deducted for its expenses securing its external EU borders but is also toying with less subtle ideas of establishing a free refugee bus line from Hungary to Brussels.

The chances for an amicable settlement between Budapest and Brussels are slim. This seems all the more so, as the lump sum and the daily penalty are non-negotiable. It is worth recalling that this was the Court's biding. After clarifying that Hungary's "failure to comply with the 2020 *Commission* v *Hungary* amounted to a systematic and deliberate evasion of the application of the common policy on asylum, undermining the principle of solidarity and thus striking at the very core of EU membership", the Court raised the lump-sum from a little over 1 million and the daily penalty from some nineteen thousand as requested by the Commission to the levels at hand.

Neither the lump sum nor the daily penalty – if and once paid or deduced – will, however, do anything to alleviate the solidarity imbalances felt by other Member States that bear the brunt of Hungary's disregard for the rules of the CEAS. After all, Article 260(2) TFEU only allows the Commission to start proceedings for financial penalties, which are then diverted to the budget of the EU and are not meant to reimburse other Member States.

In any event, the response to Hungary's disregard for the CEAS has been strangely muted in most Member States. Given the political mood, it seems that ideas of an EU law-defying fortress, where refugees have no place, are more regarded as a sort of role model than a vice. Instead of solidarity, it seems that Orbanisation is gaining hold of the CEAS, making a mockery of the prefix *common* in the CEAS.

In the overriding logic of one national political imperative against another, adherence to EU law has become optional and begets an escalating spiral, where the illegality of one Member State breeds the illegality of another. The first losers in this development are the virtually rightless individuals pushed around and bus-loaded to somewhere else, but not here. The attack on the rule of law and solidarity among Member States –

as the Court aptly pointed out – will however more steadily than slowly undermine the foundations of the European Union. Because, after all, what is the Union but the idea of adherence to common rules?

Money makes things go round

Adherence to these common rules is, of course, more often than not underpinned by financial interests and imperatives. Answers to European crises have been often as much about establishing common rules as about creating financial incentives. From this vantage point, tentative answers to the rule of law crisis, the climate crisis, the Euro crisis, the Corona crisis and, last but not least, the so-called migration crisis have all been formulated on the basis that money makes things go around. On this note, one is indeed tempted to take Orban's ferocious reaction to the lofty penalty instigated by the Court as a good sign that money is at long last starting to do its bidding. There is, though, always the risk that Orban's gamble in Brussel's big political bargaining processes could somehow lead to a loosening of strings attached to other EU funds, effectively reducing or offsetting the penalties.

In this context it seems worthwhile adding that the Commission, the expertocratic institution entrusted with upholding the Treaties and EU law in general, is – not only in its self-ascribed understanding but also in the general perception – an increasingly political operator. Actions of the Commission in its supervisory function, it seems, are thus ever more entrenched in and subjected to political consideration, curtailing its willingness to enter into legal battles with Member States.

Against this backdrop it is interesting to note that disputes between Member States are increasingly straying from the diplomatic into the juridical sphere. While the initiation of infringement proceedings from one Member State against another was once an ostensibly rare occurrence, there is a notable uptick in the willingness of Member States to bring their grievances against other Member States before the European Court of Justice. The normalisation of horizontal judicial proceedings is not only prompted by the restraint of the Commission but arguably also spurred by a wider tendency to subject issues of compliance with EU law to horizontal means of supervision. In the given orthodoxy, this horizontalisation can, nevertheless, only be taken so far. As one can infer from the example of Hungary, ideas ventilated in Austria to sue Hungary under Article 259 TFEU for its breach of CEAS rules amount to little more than a judicially fought-out naming and shaming at the inter-Member State level. Means of instigating pecuniary pressure, in other words, still remain beyond the realm of inter-EU-Member State relations – that is to say that Member States have no standing to start proceedings under Article 260(2) TFEU.

Upon closer inspection, the judgment against Hungary, however, may be taken to offer some insights into a more consequential approach. It is obvious that the Court levied the penalties based on Hungary's wilful and blatant disregard for the CEAS:

> *"[T]he failure to comply with the 2020 Commission v Hungary judgment [constitutes] an extraordinarily serious impact on both the public interest and private interests," [para 118] "[b]y unilaterally upsetting the balance between the advantages and obligations arising from its membership of the European Union [this] calls into question observance of the principle of equality of the Member States before EU law" [para 117] and "the duty of solidarity accepted by the Member States by the fact of their accession to the European Union" [para 117]. "[It] strikes at the very root of the EU legal order" [para 117].*

In the judgment against Poland, Hungary and the Czech Republic for their failure to fulfil their obligations under the temporary reallocation scheme, the Court established a basis for the Member State's (financial) responsibility. It declared in the infringement proceedings that a Member States has failed to fulfil its obligations. [Such] declaration is "of substantive interest, inter alia, as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the European Union or private parties" [para 66].

Read in conjunction with the cited case law above, one is almost inadvertently driven to the conclusion that a case like the one against Hungary could set the scene for a claim to horizontal state liability.

Francovich horizontalized

Along the lines of the classic doctrine of state liability – vis-à-vis individuals – this suggests that a Member State could be held liable for the qualified breach of EU norms that, inter alia, aim to protect the individual rights and where this breach directly causes a financial loss. Can one transpose this logic to inter-state claims?

According to the judgment against Hungary, it is evident that Hungary, ever since the first judgment in 2020, has not taken appropriate measures to ensure its obligations under the CEAS. Hungary "is systematically and deliberately evading the application of the common policy on asylum" [para 113]. This, as the Court noted, constitutes "an exceptionally serious breach of EU law" and thus clearly indicates that there can be no doubt that Hungary's actions and inactions must be characterised as a qualified breach of EU law.

The breach of EU norms intended to ensure that there is an orderly process under which migrants have an effective right to make an application for international protection and are not illegally removed from the territory of the responsible Member State, in the first place, concern the protection of individual rights. However, the Court also highlighted how the breach of these norms directly affects the financial interests of the other Member States:

> *The breach of these norms has the "effect, inter alia, of transferring to the other Member States its responsibility, including financial responsibility, for ensuring the reception of applicants for international protection in the European Union, for examining applications in accordance with the procedures for granting and withdrawing that protection, and for ensuring arrangements for the return of illegally staying third-country nationals that comply with EU law." [para 114] Hungary's "conduct [thus] seriously undermines the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which governs, in accordance with Article 80 TFEU, the common policy on asylum, subsidiary protection and temporary protection and the common immigration policy" [para 118].*

While it is true that norms of the CEAS managing migration flows in the EU cannot be easily subsumed as norms aimed at protecting individual rights under the classic doctrine, it is important to see that these norms – read in conjunction with the principle of solidarity enshrined in Art 80 TFEU – are part and parcel of a system that relies on the adherence and engagement of all Member States. To this end, they are also aimed at protecting the financial interests of all Member States within this system. This is also supported by the historical context of the Dublin regime, which was originally conceived as an international agreement between the Member States. Although the 1990 Dublin Convention is long gone, the CEAS still inhibits a strong inter-State spirit. Thus, it seems only forthright to qualify these norms as entailing "individual" rights of Member States vis-à-vis other Member States, as subjects under EU law.

A claim to state liability, finally, rests on the proof of a causal link between the breach of EU law and the financial burdens incurred. The Court has clearly indicated that Hungary's conduct has had the effects of transferring financial responsibility to other Member States. However, in a case of horizontal state liability, it would be for the other Member State to establish the causal link. Moreover, the latter would have to set out in detail the costs incurred for taking care of asylum seekers that otherwise Hungary would have been responsible for. In cases where the person in question cannot be returned to Hungary under Dublin regulation, due to its systemically defunct asylum system, it seems forthright to attribute these costs "directly" to Hungary.

The financial burdens for other Member States mostly seem to result from evasive movements in the migration flows. As a gentle reminder, Hungary has had the lowest number of asylum applications of any Member State in the EU ever since 2020. From a practical point of view, this seems to be thus the most

contentious issue. That being said, it is not inconceivable that, in light of the principle of effectiveness in a case where explicating the exact costs of the financial burden is factually so difficult and cumbersome as to render the claim to state liability effectively impossible, a deferential reliance on statistical estimations could take place. Recent reforms of the CEAS do indeed support this approach as they are aimed at putting concrete figures to the solidarity among Member States. The Pact on Migration and Asylum to this end sets out to establish a solidarity regime that relies on determining relocation quotas and a pool under which Member States can inter alia decide to show their solidarity by paying up for not participating in the relocation mechanism.

The fine print on how to prove the incurred costs as well as the procedural remit of such a claim to horizontal state liability would of course lie with Hungarian courts, which, in line with the classic doctrine of state liability and subject to the principles of effectiveness and equivalence, would be called upon to decide such a case.

One could be forgiven for thinking that this is absurd. Hungarian courts passing judgment on an inter-Member State claim of liability against Hungary? Yet, what could be more befitting for an autonomous legal order built on the rule of law – prohibiting Member States from settling scores through other legal means – than to entrust this mode of "private" EU law enforcement to the independent and impartial national courts on the ground? In that way at least nobody can claim that whatever liability is established is the product of a lofty foreign court.

Fewer carrots, more sticks

But even if such an action – for whatever reasons – were to fail, it would send a clear signal that not abiding by EU law is not just a concern for the Behemoth in Brussels but concerns the financial interests of other Member States. In concerted combination with other political and legal activities, this could leverage the potential costs of breaching EU law and substantially strengthen the incentives of abiding by the rules of the CEAS.

In any event, it is evident that the CEAS is in dire need of – financially – effective enforcement mechanisms. Bringing individual Member States into the fold could be a welcome addition to the Commission, which ever so often seems unwilling to take action in this politically sensitive domain, and private individuals, who for practical and legal reasons cannot live up to their acclaimed role as private enforcers of EU law.

In line with the principle of financial solidarity that underpins the CEAS and is at the forefront of reform endeavours, horizontal claims of state liability could be part of operationalising this notion. Instead of carrots, there would be more sticks. Beyond endless political squabbles and an ever more corrosive cycle of lawlessness, individual Member States could individually instigate financial incentives for other Member States to comply with the CEAS rules. This of course also underscores the necessity to draw a clearer line between the legal role of Member States as subjects under EU law in abiding by EU law and their political role in shaping EU law.

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