LOSING THROUGH WINNING: THE EUROPEAN COURT OF JUSTICE VIS-À-VIS THE RULE OF LAW BACKSLIDING IN HUNGARY

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Abstract

The persisting inability to enforce the rule of law in Hungary, even in the context of numerous infringement procedures at the European Court of Justice, is yet another example of how Hungary's non-compliant attitude threatens the Union's *acquis* as a whole. By examining the Court's recent judgments, this article aims to shed light on the dynamics behind the "rule of law" enforcement cases against Hungary, thereby allowing it to put the issue into a wider context, especially in terms of breaking down the Court's argumentation and determining in what ways it possibly remains static. The article concludes that although there is evidence of the Court's pro-active approach which goes as far as delivering landmark judgments, it is simply not enough to improve the situation on the ground. Indeed, where the presumption of compliance with the Court's judgments no longer holds, it essentially becomes losing through winning for the European Union.

Keywords

EU Law, EU Rule of Law, Rule of Law Backsliding, Hungary, Non-Compliance, European Court of Justice

I. Introduction

The European Commission has had repeatedly recourse to somewhat *legal finesse* in the past when it came to addressing the rule of law backsliding in Hungary or Poland (Kochenov, 2021; Nagy, 2017). Being unable to use the direct route to enforcement of EU values, i.e., the Article 7 of the Treaty on the European Union (TEU), and further lacking diagonal enforcement powers, which would enable it to apply the EU rule of law against Member States while they act in domestic matters, it brought a number of cases to the European Court of Justice (CJEU) seemingly dealing with unrelated EU law norms (Nagy, 2020b; Scheppele et al., 2021). Accordingly, while the infringement procedures initiated by the Commission over the last few years did not *technically* deal with the rule of law in the sense they would explicitly refer to it, they nonetheless tackled the question of "rule of law" enforcement, only using different terms. Namely, in the famous case *C-286/12 Commission v Hungary* concerning the discrimination of judges, where the Commission reacted to Hungary's legal measure of disposing of all judges, prosecutors and notaries over the age of 62 and replacing them with those loyal to the ruling party *Fidesz* – which generally put judicial independence in danger and thus involved a rule of law concern – the Commission presented the case as Hungary's failure to fulfil obligation under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, that is to say, as an age discrimination case. Importantly, the case was a legal success as the CJEU held that Hungary indeed failed to fulfil its obligations under the Directive by adopting a measure which gave different treatment to persons on the grounds of age (*C-286/12—Commission v Hungary*, 2012).

In the wake of this judgment supplemented by international pressure and even Hungary's own Constitutional Court's concerns, some of the judges were eventually re-hired. However, even at this early stage, Hungary sought to outsmart the CJEU, implying that there was in fact no issue with its legislation to begin with. It decided to offer a financial compensation to those judges who were willing to give up their posts which equalled 12 months of service, and which was therefore too appealing to turn down for judges who were expecting to retire soon either way. Moreover, the idea of compensating the victims through such means did not strike as a particularly absurd move since the

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entire case was framed as a matter of discrimination, which often leads to financial compensation in court. As a result, the CJEU fell victim of its own semantics. By adopting this measure, the Hungarian government was able to get rid of the previously serving judges and appoint the judges of its own choosing, all while making the decision to (not) resume the post as a voluntary and autonomous choice of each judge (Bárd & Sledzinska-Simon, 2019).

Unfortunately, this is not an isolated case of Hungary circumventing the Court's judgment, rather, it illustrates a characteristic feature of the fight against the rule of law backsliding in Hungary where even in the event that the country was actually forced to revoke an unlawful measure, it found a way around it to enforce its will at the end, which naturally raises concerns (Scheppele et al., 2021). To emphasize, in 2014, in the case *C-288/12 Commission v Hungary*, the CJEU found that the act of firing of the data protection ombudsman András Jóri before the end of his legally established term and outside the conditions established in the Hungarian national law constituted a violation of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Data Protection Directive), more precisely a breach of the "independence of the office" of the ombudsman (*Case C-288/12 Commission v Hungary*, 2014). Once again, the matter involved rather Hungary's continuing attacks on the rule of law by attempting to manipulate the filling of independent positions across the state administration and the judiciary than the premature termination of the office itself, even if in this case a similar course of action was previously taken at the Court level in the case of Germany and Austria, whose violations of the Data Protection Directive were however concerned with theoretical parliamentary oversight and therefore cannot be compared to the events in Hungary in terms of scale or gravity. Interestingly, Hungary argued that the only available remedy would require another breach of EU law since the only way to reinstate the former ombudsman would be to illegally fire the one appointed by *Fidesz*. At the end, the dismissal rules were amended, but the former ombudsman was only given compensation while the new ombudsman kept his job, and the case was closed in 2014 (Scheppele, 2014). In both cases, the common denominator was compensatory damages and not restitution, which would create the necessary effect of both putting Hungary's legislation back in line with the EU law and rectifying the current situation in Hungary. Either way, compliance with the Court's rulings remained only partial.

In a sense, the EU has therefore embarked on a strategy which has been aimed at fighting some particular symptoms of the rule of law backsliding, and the CJEU has become a promising weapon in the fight against rising illiberalism within the EU, albeit one with limited actual remedy on the ground (Blauberger & Kelemen, 2017; Neuwahl & Kovacs, 2021; Scheppele, 2014). The problem at hand remains two-fold: 1) while the *legal finesse* of the Commission, which involves framing rule of law issues as something else, is necessary in a situation where other legal mechanisms fail, it inevitably leads to covering the fact that violations of EU values are in fact violations of EU law, and thereby undermining the EU legal system as a whole (Scheppele et al., 2021); 2) even when the CJEU is legally successful with a particular infringement procedure, Hungary is somewhat still able to go around it, and thereby annulling the effects of such ruling. This has in turn significant implications on the enforcement of the EU law and the CJEU's judgments in the remaining Member States, let alone the Union's credibility and its future stance towards authoritarian regimes within its borders. The consequences are therefore not limited exclusively to the legal domain, but are also political and even societal, as they touch upon the essence of our everyday life, affecting basic democratic guarantees such as the right to be informed about the government's actions or being able to rely on the judicial system (Jakab & Kochenov, 2017).

Indeed, it is important to note at an early stage that the enforcement of rule of law and the EU values in general lies at the heart of the EU's effective and democratic functioning (Weatherill, 2016). The EU values bear significance both on their own – although they tend to be disregarded in contrast to the EU law, which is considered somehow "more law" – and in reference to the EU's *acquis*, notably in the face of recurring and widespread attacks from Member States determined to disrespect them. Similar course of action effectively undermines the principles of mutual trust and recognition, on

which the Member States rely heavily (Spaventa, 2015). While the rule of law backsliding has been one of the most important challenges that the EU faces at the present time, giving legal scholars sufficient room to discuss various angles of the topic ranging from available legal mechanism and their efficiency (Bárd & Sledzinska-Simon, 2019; Kochenov, 2021) and prospects of enforcement (Closa & Kochenov, 2016), through redefining the constitutional design of the EU and its Member States (Koncewicz, 2018, 2021), challenges surrounding the infringement procedures (Schmidt & Bogdanowicz, 2018) to the potential of the EU Charter (Nagy, 2020b), only little tangible progress has been achieved so far. As a matter of fact, the practice makes it clear that notwithstanding its limits, the CJEU might be one of the most effective tools when it comes to viable prospects of redressing the act of Hungary going rogue on purpose (Scheppele et al., 2021).

This article will contribute to the ongoing European debate concerning the rule of law backsliding by analysing 3 recent judgments of the CJEU, making it possible to grasp the dynamics behind the "rule of law" enforcement cases against Hungary through breaking down the specific reasoning adopted by the Court, which had to *go around* the concept of rule of law and frame the specific issues in question within the scope of other EU norms instead. Importantly, understanding the CJEU's logic and following its latest developments allows to situate the isolated cases of "rule of law" enforcement into a more comprehensive body of case law, which allows to identify possible basic patterns and direction of the legal arguments. In particular, demonstrating on what arguments the Court relies, in what ways it possibly remains static, and more generally, if the proactive approach to the rule of law enforcement brings about the desired effects when it comes to actual remedies, has an indisputable added value with implications for the future development of the rule of law enforcement in the EU. The methodological considerations relating to the selection of cases were dependent on the limited number of new cases – only the 3 recent judgments from 2020 were considered for a more detailed analysis. However, these cases constitute a rather representative sample in terms of the subject matter since they deal with 1) transparency of NGOs; 2) requirements imposed on higher education; and 3) the rights of refugees. Given the time-limited criterion and the relatively low number of available samples, it is evident that the article will not seek to draw generalized conclusions and does not offer an exhaustive empirical account of the infringement cases against Hungary, which was recently given by Anders and Priebus (Anders & Priebus, 2021). That is not the aim of the article. Instead, its aim is to examine the legal argumentation in detail, understanding the dynamics behind the Court's most recent decisions and their implications. Accordingly, in the chapters II-IV, the cases *C-78/18 - Commission v Hungary (Transparency of associations*), *C‑66/18 Commission v Hungary (Enseignement supérieur)* and *C-808/18 - Commission v Hungary (Accueil des demandeurs de protection internationale)* will be analysed successively, while Chapter V will engage in discussion and Chapter V will conclude the findings of the article.

II. Widening the Scope of the EU Charter as a Response to Unproportional Targeting of NGOs in Transparency of Associations

In *C-78/18 - Commission v Hungary (Transparency of associations*), the CJEU delivered its judgment in respect of the Hungarian Law No LXXVI of 2017 on 'Transparency Law', which imposes "obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and which provide for the possibility of applying penalties to organisations that do not comply with those obligations"[1]. In fact, the new Hungarian law laid down restrictions on the financing of civil organizations by persons residing outside of Hungary, forcing the NGOs to register with the national authorities as "organizations in receipt of support from abroad" in case they reach 7.2 million HUF of annual funding from foreign sources (approximately 20 000 EUR), to report annually on any changes in their funding and also to disclose their donors in case the foreign support reaches or exceeds HUF 500 000 (1400 EUR), whereby the exact amount of support must be publicized.[2] The

[1] Paragraph 1
[2] From Paragraph 2 onwards

government's reasoning was grounded in the assumption that foreign public interest groups could enforce their will and shape the political and legal interests in Hungary through funding, as was stressed in the Transparency Law's Preamble. Moreover, by virtue of the Transparency Law, the Hungarian government is entitled to provide a list of foreign-funded NGOs on its official website and the NGOs are legally bound to indicate that they are recipients of foreign funding in all their communications as well as on their websites – failure to do so might result in the imposition of fines and even forced dissolution of the organization in question (*C-78/18—Commission v Hungary (Transparency of associations)*, 2020).

According to the Commission, the Transparency Law was in breach of the EU Charter as well as the Treaty on the Functioning of the European Union (TFEU). It submitted in particular that the free movement of capital has been impeded and that both the civil organisations concerned by the Transparency Law and the persons abroad who supported them financially were treated in a discriminatory way, and moreover, their rights to respect for private and family life, protection of personal data, and freedom of association have been violated. Hungary made a number of arguments concerning the admissibility of the case in the first place, the fact that the criterion of burden of proof has not been satisfied by the Commission as to the Transparency Law having actual effects in practice on the free movement of capital, and the restrictions not being discriminatory as only the source of financial support was considered (not the nationality of the donors). In addition, it asserted that such measures were genuinely warranted for the prevention of "money laundering" and "increasing transparency with regard to financing which may conceal suspicious activities"[1].

Nonetheless, the CJEU recalled that the movement of capital includes inheritances and gifts as was already stipulated in its previous judgments *C-578/10 - van Putten and Others* and *C-485/14 - Commission v France*.[2] Arguably, since NGOs traditionally receive a significant portion of their funding through the means of donations, the Transparency Law essentially targeted their main funding channel, which created a disproportionate effect of the legislation on such organisations (Kirst, 2020). In this regard, the Court established that considering the *content* and *combined effect* of the specific constraints, namely 1) the act of registration as "an organization in receipt of funding from abroad"; 2) the publication of the list of donors on a public electronic platform; and 3) the threat of penalties which includes fines but also the possibility of dissolution of the NGO for failing to fulfil these requirements, the Transparency Law indeed restricted the free movement of capital. The Court considered that the Transparency Law's provisions applied *exclusively* and *in a targeted manner* to NGOs receiving funding from other Member States and third countries, which "singled them out" and created a "climate of distrust", which could result in discouraging foreign donors from funding them altogether.[3] Restricting the free movement of capital would have only been possible on the grounds of a *genuine, present,* and *serious threat* to public policy and security, or, if there was an *overriding reason* of public interest, and only because of the lack of more general harmonisation in this field.[4] Hungary made a claim based on both grounds. The CJEU, however, underlined that the Transparency Law did not rely on a genuine threat since the assumption that foreign funding can jeopardize Hungary's interests is not supported by evidence, and therefore arbitrary.[5] Moreover, the provision lacked proportionality, and therefore could neither be justified by grounds of public policy and security, nor an overriding reason of public interest, even though Hungary continued to bring up the public interest in anti-money laundering and increased transparency of the NGOs' finances.

Importantly, not only did the CJEU bring the free movement of capital to an obvious discussion about the rule of law backsliding, in fact, it went beyond the mere usage of the TFEU by affirming the applicability of the EU Charter, and thereby labelling the case as an "integrated Charter infringement". This category of infringement procedure is applicable when the four freedoms of the

[1] Paragraph 74
[2] Paragraph 48
[3] Paragraph 57-58
[4] Paragraph 69
[5] Paragraph 93

Single Market are infringed simultaneously with the Charter's rights. This cutting-edge approach of the Court is still under development, and its capacity to rule on the Charter provisions in case of integrated Charter infringements, instead of sticking exclusively to the four freedoms, remains disputed by some scholars (Groussot et al., 2019). The issue at hand is that the Charter's application is – at least in theory – strictly limited to situations where the Member States implement the Union law, but the Hungarian Transparency Law did not implement any, which would normally rule out the possibility of the Charter's application. The way the Court affirmed the Charter's applicability therefore substantiates the shift towards the possibility of Member States fulfilling the criterion of *implementing EU law* without implementing EU law. The argumentation is based on the idea that when Member States attempt to justify national measures which restrict a fundamental freedom of the Single Market by invoking EU law objectives, this justification must be considered as *implementing EU law* within the scope of the Article 51(1) of the Charter. The decision on the applicability of the Charter thus opened a path to ruling on the specific violations thereof, namely the respect for private and family life, the protection of personal data and the freedom of assembly and association. Ultimately, the Court concluded that by adopting the Transparency Law, Hungary has introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations, and thereby breached its obligations under Article 63 TFEU (free movement of capital) and then also Articles 7 (respect for private and family life), 8 (protection of personal data) and 12 (freedom of assembly and association) of the EU Charter, making effective use of the EU Charter as far as the rule of law backsliding is concerned (*C-78/18—Commission v Hungary (Transparency of associations)*, 2020).

By and large, even though the Transparency Law has been presented by Hungary as an attempt to render NGO funding more transparent, which appears to be in accordance with public interest, it has been repeatedly pointed out as yet another step to exclude independent NGOs from the EU tender funds by administrative means, or rather, to target opposition NGOs, especially those financed by the regime's critic George Soros (Kapronczay, 2017; Zalan, 2020). When testing the provisions of the Transparency Law against the general proportionality criteria, particularly in relation to public interest, they definitely seem to lack legal ground. First, targeting those NGOs which happen to benefit from foreign funding in the context of increasing pressure on the civil society representatives in Hungary, where foreign funds often represent the sole prospect of NGOs to remain operational, is striking. Second, the idea of forced dissolution of an NGO in the event that it does not indicate its reception of foreign funding in all its communications, is simply exaggerated. Yet, similar attempts to boycott independent associations in Hungary have taken place without significant hardship or resistance. After all, the process of silencing the civil society, especially through the means of targeting the activities of NGOs, is hardly something new in the country. On the contrary, there have been recurring allegations that NGOs only serve foreign interests, and that they essentially work against the interests of Hungary in exchange for millions of US dollars (Kapronczay, 2017). Undermining the credibility of foreign-funded NGOs and forcing them to operate in aggravated conditions which require them to undergo extensive red tape obligations thus definitely seems like an elaborated strategy leading to their portrayal as suspicious entities.

To conclude, the CJEU's judgment is not only decisive in that it upholds the rule of law without explicitly referring to it, but also through the manner of doing it – by ruling on the applicability of the EU Charter. Even though the judgment follows the line of the Court's previous case law (such as the already mentioned case relating to the discrimination of judges) and thus pursuing an anticipated course of action, the application of the Charter effectively widens the scope of its application and sends a clear message to the Member States that their laws can be – and will be – scrutinised against the rights laid out in it, which accounts for a significant legal development (Kirst, 2020). Notwithstanding the success of the judgment on paper, it is important to bear in mind that the part which matters most is Hungary's compliance with it, that is the actual effect in practice. On this account, while the Transparency Law has been reversed by this judgment, it should be underlined that it remains applicable to this day, its repeal being currently pending (Nagy, 2020a).

III. Groundbreaking application of the WTO Law in Enseignement supérieur

In *C-66/18 Commission v Hungary (Enseignement supérieur)*, the CJEU dealt with the requirement of foreign higher education institutions situated outside the European Economic Area (EEA) to conclude an international agreement as a prerequisite for providing education services, and the requirement on foreign higher education institutions to offer higher education in their country of origin, which derive from the Hungarian Law No CCIV of 2011 on national higher education as amended by the Hungarian parliament in 2017 (*Case C-66/18 Commission v Hungary (Enseignement supérieur)*, 2020). These requirements imposed an obligation on foreign non-EEA universities to operate on the basis of an obligatory intergovernmental agreement with Hungarian government, and further conditioned them to physically provide education in the country of registration even though their activities were limited to the country of provision of the educational services. Therefore, by virtue of the law, it was solely within the Hungarian government's discretion to decide whether a bilateral agreement would be signed with a particular university, allowing it to provide education in Hungary (or not), and there was a requirement on the part of the educational institution to have premises and to provide education in the country in which the institution has its seat. Moreover, should these requirements be not complied with, the foreign higher education institution would forfeit its licence and could not admit any new students.[1]

Due to the fact that the Law of Higher Education has been conveniently targeting the US-accredited Central European University (CEU), which has been in open conflict with the Hungarian government over the values of open society, protection of democracy, rule of law and freedom of expression, the legislation has been accordingly labelled as "Lex CEU"(Harms, 2017). In fact, there were additional conditions arising from the Lex CEU which were only applicable to institutions accredited in federal states, and which required a pre-existing general support treaty concluded with the Hungarian government (Bárd, 2020). Interestingly, the Commission requested the Court to declare that Hungary failed to fulfil its obligations stemming from Article XVII (national treatment) of the General Agreement on Trade in Services (GATS), which is the World Trade Organisation (WTO) law and therefore reportedly outside the scope of the Court's application, let alone directly applicable against the EU. In addition, the Commission referred to the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and Articles 13 (freedom of the arts and sciences), 14(3) (freedom to found educational establishments) and 16 (freedom to conduct a business) of the EU Charter. The case involved a rather rocky pre-litigation procedure which included an exchange of reasoned opinions and letters, and in which Hungary rejected all the allegations presented against it. It argued, inter alia, that the Commission initiated the infringement procedure solely in the interest of the CEU and therefore its motives were purely political and inconsistent with the Charter-protected right to good administration.[2] Later on, Hungary declared the procedure illegal because of the Commission's request to provide Hungary's observations on the matter within a month instead of the more commonly applied time period of 2 months. However, the Court held that such time limit was reasonable given the urgent nature of the infringement and reiterated that demanding a specific time limit for the country's observations has no effect on the admissibility of the case in question.[3]

Unsurprisingly, Hungary declared that the Court has no jurisdiction to hear the case and that the area of higher education does not fall within the EU competence. The Commission countered that by performing obligations under international agreements concluded by the EU (such as the GATS), the Member States are in fact implementing the EU law within the meaning of Article 51(1), which limits the application of the EU Charter to Member States only when they implement the EU law[4]. In contrast, Hungary claimed that a national measure adopted within the framework of GATS cannot be

[1] Paragraph 21-25
[2] Paragraph 43
[3] Paragraph 45-56
[4] Paragraph 208

considered as a part of implementing EU law, and that "neither the provisions of the [TFEU] concerning the freedom to provide services nor the provisions of Directive 2006/123 apply in the present case, and that, therefore, the measures at issue do not constitute a restriction that infringes the fundamental freedoms laid down by the [TFEU] or Directive 2006/123, they do not fall within the scope of EU law, and therefore the Charter is of no relevance."[1] The CJEU underlined that the EU signed the Agreement establishing the WTO in 1994, making the GATS a part of the EU law. It broadened its argument in para 213 by stating that the GATS forms part of the EU law and that when a Member State performs obligations under its scope, it must be considered as implementing EU law. Namely, as it outlined earlier in the judgment, it can rely on the WTO law in order to "ensure that the Union does not incur any international liability in a situation in which there is a risk of a dispute being brought before the WTO"[2]. The fact is that the EU can be held accountable for its Member States' actions before the WTO, which in turn creates the need to force the Member States to conduct their activities in line with the EU's international obligations. To elaborate, seeking compliance with the EU's obligations under GATS does not in itself incur that there is any direct application of the WTO law to the EU on one hand and its Member States on the other.

It is crucial to emphasize this point because even though the CJEU resorted to applying the WTO law in this case, it had to do so in a way that would not compromise its position in the international trade and especially the related trade disputes. Specifically, the CJEU repeatedly ruled out the WTO law as a legal basis for invalidation of the EU measures and actions for damages against the EU in the past. With regard to the political dimension of the WTO law, opening a path towards follow-up WTO-law-based claims would not only mean an overflow of incoming cases, but also a competitive disadvantage compared to traders from other countries not exposed to the direct effect of the WTO law. That is why the CJEU had to approach the case in a manner which would allow it to establish the EU competence without exposing itself, and the Member States, to such claims. Correspondingly, by adopting this line of argumentation, the Court was able to establish a violation of the GATS, but it did not overrule its previous case law (Nagy, 2021). Ultimately, the Court concluded that by requiring the foreign higher education institutions situated outside the EEA subject to the condition that Hungary and the government of the State in which the institution has its seat have to conclude an international treaty, Hungary failed to fulfil its obligations under Article XVII of the GATS, i.e., it violated the prohibition of discrimination based on national origin in respect of the international trade. Second, by setting the requirement on the side of the institutions to provide education in the State of registration, Hungary again violated Article XVII of the GATS. Lastly, Hungary breached the previously mentioned freedom of the arts and sciences, freedom to found educational establishments and freedom to conduct a business as laid out in the Article 13, 14(3) and 16 of the EU Charter.[3]

The CJEU's application of the WTO law as a mean to protect the fundamental freedoms in the EU is revolutionary as it marks the first historic use of the WTO law as part of the EU law, and particularly because such approach gives rise to an unlimited European enforcement power on the part of the Commission (Nagy, 2021). While approaching the case as a freedom of trade dispute, which strikes as somewhat absurd since it ultimately touches academic freedom and is directly linked to the expulsion of the CEU from Budapest, the Court created a new path for enforcement of academic freedom, and the EU values in general. The line of argumentation in this case only stresses the Court's determination not to let Hungary bend the EU values as it sees fit. After all, academic freedom is closely linked to the rule of law, and "CEU and Soros-funded NGOs represent everything the government fights against or is suspicious of, such as the rule of law, fundamental rights, multiculturalism, tolerance, accountable government, transparency, justice, equality, liberal democracy, and open society" (Bárd, 2020).

[1] Paragraph 210-211
[2] Paragraph 81
[3] Paragraph 244

However, even though the Lex CEU was rendered void by this judgment in October, which created hope for the possible return of the CEU in Budapest, Hungary's April amendment does not seem convincing as far as making amends is concerned. The amendment subjects the foreign non-EEA universities to be evaluated on the merits of *uniformity* with the Hungarian higher education institutions, requiring them to be "equivalent" in values and having the same admission requirements. Additionally, the respective governments are supposed to come to an agreement relating to the equivalency criterion, and the permission to provide education is only given once the Hungarian Education Office allows it. According to the CEU, the decision to grant the right to operate therefore remains a high-level political decision and the amendment conveniently plays out for the Chinese-Communist-Party's-funded Fudan University which is currently being built in Budapest, but does not level the playing field for the CEU (Vaski, 2021).

IV. Taking matters further than the European Court of Human Rights in *Accueil des demandeurs de protection internationale*

The case *C-808/18 - Commission v Hungary (Accueil des demandeurs de protection internationale)* concerned the Hungarian Law No CXL from 2015 which amended certain laws in the context of managing mass immigration. The Law gave rise to the creation of "transit zones" at the Serbian-Hungarian border, to which a limited number of persons was allowed, and in which asylum applications could be lodged exclusively. Moreover, the concept of crisis situation caused by mass immigration was introduced, allowing the government to apply derogatory rules should it be declared, and a later 2017 amendment further expanded the cases in which the crisis situation could be declared by broadening the provisions allowing derogation from the general provisions. As a consequence, the Law restricted access to the international protection procedure, it provided for unlawful detention of applicants for international protection in transit zones and for moving illegally staying third-country nationals to a border area, without observing the guarantees surrounding a return procedure (*C-808/18—Commission v Hungary (Accueil des demandeurs de protection internationale)*, 2020).

According to the Commission, Hungary failed to fulfil its obligations under 3 related EU Directives: The Return Directive, the Procedures Directive, and the Reception Directive. Namely, it requested the Court to look into violation of Article 3 (scope), 6 (access to the procedure), 24(3) (adequate support if applicants need special procedural guarantees), 43 (border procedures), 46(5) (right to remain in the territory until the time limit or pending outcome of remedy) (6) (a right to court or tribunal ruling on whether the applicant can stay on the territory in case of a previous decision which ends the right to remain on the territory) of the Procedures Directive; Article 2(h) (meaning of detention), 8 (detention), 9 (guarantees for detained applicants), 11 (detention of vulnerable persons and of applicants with special reception needs) of the Reception Directive; and Article 5 (Non-refoulement, best interests of the child, family life and state of health), 6(1) (return decision), 12(1) (form of procedural safeguards) and 13(1) (remedies) of the Return Directive, read in combination with Articles 6 (right to liberty and security), 18 (right to asylum) and 47 (right to an effective remedy and to a fair trial) of the EU Charter.

The first complaint related to the access to the international protection procedure. The Court emphasized that while there may be particular conditions or even limitations set by the Member State regarding the lodging of the application, the Article 6 of the Procedures Directive essentially secures the right of the applicant to make an application, including at the borders, as soon as he or she expresses his or her will of doing so, in an effective manner which allows the registration and examination of the application in adherence to the applicable time limits. By the "systematic" and "drastic" limitation of the incoming applicants to the reception centres, to which attests the existence of waiting lists, Hungary's measures gave rise to a situation where the waiting time for those wishing to make an application exceeded 11 months.[1] Hungary's argument that the queues of applicants gradually dissipated simply could not hold. Since there was no infrastructure in the transit zones

[1] Paragraph 117

allowing the long-term stay of applicants, it followed that most applicants had no other choice than to leave for Serbia, as it was virtually impossible to apply for international protection in Hungary. As a result, the CJEU found that restricting access to the asylum procedure exclusively to the two transit zones which were established at the border with Serbia, and the admittance rate at which fell to one person per day per transit zone in 2018, was clearly incompatible with the EU law.[1]

The second and third complaint – and a central issue that the CJEU had to establish in this case – was whether the conditions to which applicants have been subjected in the transit zones of Röszke and Tompa constituted detention. The Commission contended that the compulsory staying of applicants in these transit zones restricted their personal liberty in a manner which meets the threshold of detention. However, Hungary countered that the alleged "detention centres" are merely reception facilities which operate fully in line with the asylum procedure as laid out by the EU law, and do not amount to detention in the meaning of Article 2(h) of the Reception Directive.[2] The CJEU stated that detention is an autonomous EU-law concept which is characterized as "any coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter". In the present case, applicants would stay within a restricted zone surrounded by fence and barbed wire for an indefinite period of time, housed in small containers, with restricted freedom of movement and without contact outside the transition zone. Despite the fact that it is possible to detain an applicant to rule on his or her right of entry, the order to detain must be given in writing, listing the reasons as well as specifying the needs of the applicant. Importantly, in case of minors, detention should be last-resort solution only. Hungary was systematically issuing detention orders for every applicant older than 14. Therefore, even though the applicants could theoretically leave the transit zone to the direction of Serbia, as Hungary pointed out, the Court established that the mere placement in the transit zones in fact amounted to detention.[3]

In the course of its argumentation, Hungary followed its previously adopted line of argumentation by justifying its derogation from EU law through Article 72 TFEU, which excludes the exercise of the "responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". More specifically, Hungary argued that on condition that compliance with the EU rules on asylum, subsidiary and temporary protection would preclude it from managing an emergency situation relating to the large number of incoming applications as it did in case of the transit zones of Röszke and Tompa, derogation of the national rules is permitted.[4] However, according to the CJEU, it is not possible to rely on this exception on the basis of a general recourse to a risk or a threat to public order and national security, stressing that the only derogations from the obligations apply in *exceptional* and *clearly defined* cases. In particular, the Court stated that "it cannot be inferred that the [TFEU] contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law"[5]. The provision requires a strict interpretation of the terms and cannot be declared unilaterally without any oversight on the part of the EU, implying that the burden of proof rests on the Member State taking advantage of Article 72. In this case, Hungary failed to demonstrate the necessity of such derogation.

At the end, the CJEU ruled that Hungary failed to fulfil its obligations under the 3 Directives by 1) restricting the applications for international protection to the transit zones while applying a *consistent* and *generalised* administrative practice which substantially limited the number of applicants authorised to enter those transit zones daily; 2) by putting in place a system of *systematic detention* of applicants in the transit zones in disregard of the guarantees provided by EU law; 3) by allowing the removal of all third-country nationals staying illegally in its territory without observing the

[1] Paragraph 128
[2] Paragraph 148
[3] Paragraph 143, 166
[4] Paragraph 213
[5] Paragraph 214

procedures and safeguards; 4) by subjecting certain applicants to conditions contrary to EU law in the matter of their right to remain on the territory.

It is worth noting that the CJEU's judgment contradicts the case law of the European Court of Human Rights, namely *Ilias and Ahmed v. Hungary*, which did not consider the conditions in the transit zone of Röszke as *detention*, only as a *deprivation of liberty*, which relies on a lower threshold (Progin-Theuerkauf, 2021). Even though the two transit zones were closed at the time the judgment was given, it does not necessarily imply that the situation has improved in practice. In fact, Hungary announced its intention to further restrict the possibility to lodge the application for international protection to embassies only (European Council on Refugees and Exiles, 2020). Lastly, even though the reception of applicants for international protection might seem fairly distant from the issue of rule of law backsliding, it is interconnected because it deals with some underlying rule of law issues such as legal certainty (or the lack thereof), and especially since the issue of "refugees" is commonly exploited by the Hungarian administration as a principal rhetoric which shields its illiberal activities. On this account, it is well known that amendments of the refugee law labelled as "Stop Soros" take the matters further by making any NGO activity aimed at helping refugees illegal (European Commission, 2018).

V. Discussion

While none of the above cases explicitly referred to Article 2 TEU, the Commission attempted to link the violations concerned to a number of different human rights and freedoms such as the free movement of capital, respect for private and family life, protection of personal data, freedom of assembly and association, freedom of the arts and sciences, freedom to found educational establishments, freedom to conduct a business, right to liberty and security, right to asylum and right to an effective remedy and to a fair trial. With regard to the diverse subject matter of each case, it does not seem that there is any overlap suggesting that a particular provision is raised by the Court on a more regular basis when a "rule of law" backsliding infringement procedure is concerned. In that sense, the specific sphere of rights does not bear informative capability or legal value. At the same time, the CJEU did not employ the maximum level of *legal finesse* in the sense that mere technical aspects, that could be interpreted as flawed national transposition of EU law, would be brought into question. The scope of the "rule of law" cases is therefore not significantly reduced.

It seems that initiating an infringement procedure is a valid choice as a response to the recurring instances of rule of law backsliding since it proved as a relatively successful tool in contrast to other legal and political mechanisms which generally suffer from the "peer-review" logic which relies on active cooperation of the Member State concerned and therefore is simply inefficient in cases of non-compliant Member States who are far from eager to independently review their policies or act on the EU's recommendations (Scheppele et al., 2021). Against the backdrop of autocratic developments in Hungary, which target the very core of democratic ruling, it is clear that asking nicely will simply not do the trick. After all, Hungary has proved on numerous occasions that it is not willing to engage in a serious debate with the EU, alleging that the Commission is trying to punish it for "doing its job" as far as protection against migrants is concerned. Indeed, the anti-migrant and anti-Soros rhetoric is a recurring one, implying that the Hungarian government has gone from making an effort of partial compliance to dismissing the Court's judgments altogether (Anders & Priebus, 2021).

The danger of combating the rule of law backsliding with infringement procedures, though, lies in the downplaying of the severity of the situation in the Member State, or better yet, the fact that the instrument itself is too narrow, and therefore not necessarily reflecting the nature or scope of the violation in question, particularly when it comes to the systemic, structural problems that affect the independence of courts and institutions as is the case in Hungary (Pech & Kochenov, 2019). Furthermore, the labelling itself, which requires the Commission to come up with specific breaches of mostly secondary EU law in each infringement procedure instead of referring to the wider body of rule of law backsliding in the Treaties, remains problematic (Anders & Priebus, 2021). In an unconvincing attempt to do the Commission's and the CJEU's bidding, but essentially to satisfy some minimum requirements, for which basic legal changes which do not go to the core of the problem are

fairly sufficient, the phenomenon of "symbolic compliance", as referred to by some scholars, threatens to unfold (Batory, 2016).

There seems to be no unified approach of the Court which would give rise to a sufficiently established body of precedent that could be used as a reference in future cases, nonetheless, this is due to the different subject matter and factual background of each case, which prevents making such assumptions. Despite the limited number of samples, the detailed analysis allows to pinpoint to certain general tendencies of the CJEU and Hungary. For instance, Hungary seems to put forward the argument of measures necessary for public order and security. On the other hand, the Court focused on the question of widening of the scope of the Charter and the meaning of "when implementing EU law". Even though each of the cases went beyond the ordinary infringement procedures against EU Member States in that it brought innovative argumentation, as far as specific patterns are concerned, the argumentation was rather fragmented.

VI. Conclusion

Although there is evidence of the Court's pro-active approach which goes as far as delivering landmark judgments, more specifically in terms of 1) widening the scope of the EU Charter and its application in integrated Charter infringements (*C-78/18—Commission v Hungary (Transparency of associations)*, 2020); 2) applying the WTO law as a part of the EU law (*Case C-66/18 Commission v Hungary (Enseignement supérieur)*, 2020); and going against the settled case law of the European Court of Human Rights (*C-808/18—Commission v Hungary (Accueil des demandeurs de protection internationale)*, 2020), the CJEU relies heavily on the *legal finesse* which enables it to go around what matters most in these cases. The Court does seem to follow the route of widening the scope of the application of the EU Charter and what substantiates the meaning of Member States "implementing the EU law". Apart from that, it appears that there is no unified approach which would be characteristic for all the cases except for the will on the part of the CJEU to work in the shadows in order to deliver at least some results to the unstable situation on the ground.

The troubling part of the judgments is the question of actual remedy. So far, even when the infringements were a legal success, Hungary showed very little intention to rectify the situation, undeterred by the possibility of follow-up sanctions. As a consequence, it is clear that it will require more than a solid interplay between the Commission and the Court in order to tackle Hungary's backsliding tendencies. Systematic infringements are a reasonable countermeasure, but the EU has to reconsider how to make sure that the CJEU's judgments are duly respected, and the relevant changes implemented. Ultimately, even though Hungary lost cases at the CJEU, it is unclear whether the judgments can make an actual difference on the ground given Hungary's non-compliant attitude. Indeed, since the presumption of compliance with the Court's judgments no longer holds, and even winning judgments mean that Hungary will find a way to oppose it, it is all about losing through winning for the European Union (Scheppele et al., 2021).

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