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**Is the EU Toothless?**  
*An Assessment of the EU Rule of Law Enforcement Toolkit*

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Körtvélyesi – Gábor Mészáros*

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## Is the EU toothless?

### *An assessment of the EU Rule of Law enforcement toolkit*

***Petra Bárd – Nóra Chronowski – Zoltán Fleck – Ágnes Kovács – Zsolt Körtvélyesi – Gábor Mészáros<sup>1</sup>***

#### *Abstract*

*This paper lists and critically assesses European Rule of Law enforcement instruments. It argues that these could have provided dissuasive responses to severe and systemic Rule of Law violations in Hungary, had they been applied consequently, promptly, and in a coordinated manner. But they have not been used, or not effectively, or not in a timely manner. To prove this point, Hungarian cases of Rule of Law violations are listed and analysed, pointing out instances where European enforcement tools were applied; where they were applied, but could have been employed more efficiently; and where they could have been applied, had there been a political will to do so. Based on the assessment, authors consider infringement procedures and the rule of law conditionality mechanism to be the most effective tools of enforcement, and encourage the Commission to follow academic proposals and bundle cases to show and adequately respond to the systemic nature of autocratisation, where interconnected instances of Rule of Law violations mutually reinforce each other.*

*This paper was commissioned by the Netherlands Helsinki Committee. References to Paper I through Paper VII are to other reports in this series, published consecutively as working papers:*

*Paper I – The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary*

*Paper II – Tactics Against Criticism of Autocratization. The Hungarian Government and the EU's Prolonged Toleration*

*Paper III – Inventing Constitutional Identity in Hungary*

*Paper IV – The Constitutional Court*

*Paper V – Is the EU toothless? An assessment of the Rule of Law enforcement toolkit*

*Paper VI – The CJEU and the ECtHR – High Hopes or Wishful Thinking?*

*Paper VII – The Changes Undermining the Functioning of a Constitutional Democracy*

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<sup>1</sup> Authors are grateful for the insightful comments by Professor Daniel R. Kelemen. As always, responsibility for any errors remains our own.

The problem of the Rule of Law is a very grave one in several parts of the EU, despite the fact that the Union, under the current treaty configurations, is already a Rule of Law actor, relying on a set of policy and legal instruments, assessing Member States' compliance with values in Article 2 TEU. (For details see Paper I, and Paper VI) What is more, the EU already possesses of important tools to counter Rule of Law problems.<sup>2</sup> The Copenhagen dilemma exists on the one hand because these mechanisms have a scattered and patchwork nature and on the other – and this is the graver problem – because those powers entitled to use the tools they have available are unwilling to do so. In other words, **“the EU’s toolbox of measures to support and correct for Rule of Law rot is already sufficiently comprehensive and sophisticated in nature to, at the very least, contain Rule of Law backsliding if the full set of current instruments is used promptly, forcefully and in a coordinated manner.”**<sup>3</sup> (emphasis in original)

In the following the focus will be exclusively on Rule of Law *enforcement* tools that could potentially be effective against backsliding. Monitoring instruments, such as Article 7(1) TEU, the Commission’s EU Justice Scoreboard, the Commission’s Rule of Law Framework, the Commission’s Annual Rule of Law Report, the Council’s dialogues on the Rule of Law, the European Semester, the Democracy, Rule of Law and Fundamental Rights Monitoring Group (DRFMG) of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) will not be discussed. (For an in-depth analysis of these monitoring tools please see Paper I.)

In this paper, tools of enforcement will be critically assessed. Constructive criticism of the toolbox includes illustrations from Hungary about how some of the instruments were applied, misapplied or disapplied, and how their efficiency could be enhanced with or without Treaty changes. The illustrations cover both closed cases and procedures tested by the institutions, and also outstanding Rule of Law issues which could have served as the basis for enforcement procedures in the past or which should be tackled by such processes in the future. Individual cases explained in this paper may trigger various types of procedures. We mention them in relation to the procedure that is most likely to be invoked. In Table 1 we show the most promising procedures the various Rule of Law problems might trigger, including the sanctioning prong of Article 7 TEU, and infringement procedures. As to the latter we encourage the Commission to follow academic proposals and bundle cases in the form of systemic infringement procedures. Some issues however may trigger traditional single-issue infringement or other types of procedures, too.

Beyond these promising tools, we will cover a broader set of procedures that might attach consequences to Rule of Law decline. Beyond the instruments visible in the Table, we address preliminary references, which were originally not designed as tools of enforcement, but the CJEU can and in fact does attach consequences to Rule of Law violations in preliminary rulings. The Cooperation and Verification Mechanism will only be briefly mentioned, since it is not applicable to Hungary. Its discussion will be followed by measures displaying the power of the purse, the Common Provisions Regulations and the more recent Conditionality Regulation that will attach financial consequences to the violations of some elements of the Rule of Law. Finally, the paper also highlights promising legislative proposals to enhance the efficiency of Rule of Law enforcement.

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<sup>2</sup> On Article 7 TEU see, most importantly, Besselink, “The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives” in Jakab and Kochenov (Eds.), *The Enforcement of EU Law and Values* (OUP, 2017), pp. 128-144; Hillion, “Overseeing the Rule of Law in the EU: Legal Mandate and Means”, 1 SIEPS EPA (2016), available at [https://www.sieps.se/en/publications/2016/overseeing-the-rule-of-law-in-the-european-union-legal-mandate-and-means-20161epa/Sieps\\_2016\\_1\\_epa?](https://www.sieps.se/en/publications/2016/overseeing-the-rule-of-law-in-the-european-union-legal-mandate-and-means-20161epa/Sieps_2016_1_epa?), (all websites last visited 15 March 2022).

<sup>3</sup> Pech and Kochenov, *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid* (RECONNECT, 2019), available at <https://reconnect-europe.eu/wp-content/uploads/2019/06/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf>, pp. 1-2.

**Table 1: Rule of Law violations in Hungary and EU enforcement tools to be invoked**

	Article 7(2)-(3) TEU	Systemic infringement procedures	Individual infringement procedures	Conditionality Regulation
Capture of the Hungarian Constitutional Court	Red	Red	White	Red
Capture of the ordinary judiciary	Red	Red	Red	Red
Limiting the independence of the prosecution services	Red	Red	White	Red
Assets declarations	Red	Red	White	White
Violations of media freedom and pluralism	Red	Red	Red	White
Shrinking the space for NGOs	Red	Red	Green	White
Attacks on academic freedom	Red	Red	Green	White
Asylum law	Red	Red	Green	White
Corruption	Red	Red	Red	Red

*Red cell: the tool should be used; green cell: the tool has already been used at least in relation to some of the sub-issues mentioned in the first column, blank cells: not applicable.*

*Source: Authors*

## Existing tools of Rule of Law enforcement

### Article 7(2)-(3) TEU

One of the “hard laws” with a treaty basis is **Article 7 TEU**. **Article 7 consists of a preventive arm (Article 7(1) determining a clear risk of a breach), and a corrective arm ((Article 7(2) determining a serious and persistent breach). Only the latter prong can be interpreted as a tool of enforcement, Article 7(1) is not more than a platform for dialogue and early warning.** (See above.)

The scope of Article 7’s application is broad and has the clear advantage that, unlike other tools, it is not limited to Member States’ actions when implementing EU law, but also covers breaches in areas where they act autonomously. **It also provides for more or less clear sanctions in Article 7(3): if there is a serious and persistent breach by a Member State of the values referred to in Article 2, this Member State might be sanctioned and even be suspended from voting at the Council level.** However, Article

7(2)-(3) has never been activated in practice due to political obstacles, i.e. the fact that any Member State may veto the determination of a breach. As stated above in relation to Article 7(1) TEU, Article 354 TFEU provides that the Member State subjected to the Article 7 TEU procedure is excluded from voting. But another problem may arise with regard to multiple Member States simultaneously subjected to various Article 7 TEU procedures. They might cooperate by shielding each other, and making use of their veto rights in a procedure against another Member State. Against this background, **in order to guarantee the *effet utile* of Article 7, it has been suggested that Article 7 TEU should not allow the participation of a Member State already subjected to Article 7(1) procedure. Alternatively, it has been recommended to start Article 7(2) TEU procedures against several Member States in one bundle, so that both or all of them are excluded from the voting.** A Treaty amendment could of course ease the requirements – albeit that is highly unlikely to happen, as long as the EU harbours autocratic Member States. Also, as explained above, Article 7(1) TEU should not be seen as a mandatory preliminary procedure before Article 7(2) TEU could be triggered, but instead institutions should move directly to the latter provision when a Member State’s executive directly usurps its power. This is the only reading a textual or teleological interpretation of the Treaty text might dictate.

Where a determination under Article 7(2) TEU has been made about the existence of a serious and persistent breach of values, the Council, acting by a qualified majority, may decide to suspend certain rights of the problematic Member States, that derive from the Treaties. These may include, but are certainly not limited to the suspension of the voting rights of the representative of the given government in the Council. The voting threshold for the adoption of such sanctions is extremely high. Whereas the affected Member State is excluded from the voting, in all other respect qualified majority has to be defined in line with Article 354(2) TFEU and Article 238(3)(b) of TFEU. In other words, **the population threshold seems to be unaffected, i.e. the votes – that now exclude the votes from one Member State – still have to represent 65% of the population of the EU.** As Kochenov noted, given that no express reference is made to excluding the population of the Member State concerned in Article 354 TFEU, “a strong argument can be made to include the population while excluding the Member State, while the contrary reading (exclusion of both the Member State and its population from the count) is more consistent with the *raison d’être* of the special procedure in question.”<sup>4</sup> Sooner or later the issue will need to be decided by the CJEU.

All the case studies presented in the present paper under different headings could be candidates for an Article 7(2)-(3) procedure. In the following subchapter, we will exclusively discuss violations of the Rule of Law that do not fit into other clusters, i.e. those that cannot be subject to infringement procedures (unless our suggestion to file systemic infringement procedures are taken up), cannot be challenged in the framework of preliminary references, and where neither the Common Provisions, nor the Conditionality Regulations are applicable. At the heart of the analysis is the Hungarian Constitutional Court (CC), which after various steps of court capture and court packing, is not in the position anymore to exercise meaningful constitutional scrutiny. Ordinary court capture will later be assessed in light of these developments, too.

### The Constitutional Court

Structure, composition, competences or even the existence of a Member State’s constitutional court are – at least at first sight – not EU law questions, therefore the related symptoms cannot be discussed either under Article 258 TFEU, the Conditionality Regulation, or any other EU procedure.

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<sup>4</sup> Kochenov, “Article 7: A Commentary on a Much Talked-About ‘Dead’ Provision” in von Bogdandy, Bogdanowicz, Canor, Grabenwarter, Taborowski and Schmidt (Eds.), *Defending Checks and Balances in EU Member States*, (Springer, 2021), pp. 127-154.

However, the changes related to the constitutional and institutional capacity of the CC will help to understand and evaluate Rule of Law backsliding, thus they belong to the evaluation of the wider Rule of Law landscape in Hungary, and contribute to the assessment whether there is an existence of a clear risk of a serious breach of Article 2 TEU values. Moreover, the evolving influence and interrelations of the Constitutional Court on the judicial branch can be relevant features while evaluating the independence of the ordinary judiciary in Hungary.

In Paper IV we explain in detail how the CC was captured by amending procedural rules related to the mandate and structure of the CC and by slightly changing the rules of competence that **shifted the emphasis from judging the legislative to reviewing the practice of the ordinary courts**. In the real constitutional complaint procedures when the final judgments of ordinary courts are reviewed, the Constitutional Court can even control whether the judges considered sufficiently the explanatory memorandum of a legislative act, or assess whether the judges' interpretation conforms with the Fundamental Law.

During the past decade, the composition of the Constitutional Court has changed to a great extent. The acting justices take a modest approach to controlling the legislator, and sometimes postpone or bypass decisions in sensitive questions (e.g. in the cases of the Central European University, or the refugee quota discussed *infra* under the candidate topics for infringement procedures).

The protection of the Rule of Law principle is less “spectacular” in the argumentation of the CC compared to the 1990s. This can be attributed partly to the repositioning of constitutional justice and the abolition of the *actio popularis* right of petition, which has led to a reduction in the number of abstract norm-control procedures; and the fact that in constitutional complaint proceedings, the CC protects the Rule of Law only to a limited extent, considering the lack of sufficient preparation time and the prohibition of retroactive effect. But the constitutional environment of the illiberal state also has an overwhelming influence on the Rule of Law interpretation and disrupts the development of the Rule of Law case law and initiates the introduction of new concepts (such as achievements of the historical constitution and constitutional identity protection, see Paper III).

The latest amendments related to the competence and status of the CC took place in 2019. The Constitutional Court concluded in its 2018 ruling,<sup>5</sup> that public authorities might initiate constitutional complaints if they allege that their fundamental rights have been violated. This novelty also influenced the legislation, since in December 2019 the Hungarian Parliament by Act CXXVII of 2019 amended the Act on the CC<sup>6</sup> – beyond several other acts as it was a legislative package to substitute the administrative court reform that had been repealed upon European pressure (see *infra*). The new regulation opens the possibility for public authorities to submit complaints, not only for the protection of their fundamental rights, but also their own constitutional competences. This idea invigorated the discussion on the legal institution of constitutional complaint in Hungary. The government and the supporters of the amendment explicate, that constitutional complaint shall be a safeguard of the rights of all legal entities, therefore, public authorities should also be included. According to the opposing views, constitutional complaint targets inherently the protection of individuals against the state, therefore, public authorities shall be excluded from this opportunity.

The same act also entitled the **members of the CC to be appointed as a judge of the Supreme Court without any application procedure**. As it was already explained in Paper IV, the CC judges are elected

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<sup>5</sup> Hungarian Constitutional Court, 23/2018. (XII. 28.) AB decision - annulling the judgement No. Kfv.I.35.676/2017/10 of the Curia (supervisory fine).

<sup>6</sup> Act CLI of 2011 on the Constitutional Court (in force from 1 January 2012).

by the Parliament and are under the control of the ruling majority from the nomination to the election, while ordinary judges of the courts of law are appointed upon application controlled by judicial expert bodies. A provision of the act tailor-made for one specific person amended the eligibility criteria for the President of the Supreme Court as well. For the counting of the five years of judicial experience, also the years spent in the CC as a CC judge or senior adviser must be considered.

Taking into consideration the above-mentioned developments the EU Rule of Law requirements related to judicial independence may be applicable to the Constitutional Court even though it is structurally not part of the judiciary, because (i) the CC reviews the constitutionality of the final judgments of the ordinary courts, and (ii) the CC judges can be appointed to the Supreme Court after their term at the CC expires.

### Infringement procedures

**Articles 258 and 260 TFEU provide for Commission-initiated infringement procedures.** These are currently underused in the enforcement of the Rule of Law. As Petra Bárd and Anna Sledzinska-Simon argue, for Article 258 infringement procedures to be truly effective, **the European Commission should frame Rule of Law problems as such**, and should not reframe them as human rights or equality problems as it happened earlier.<sup>7</sup> Second, **the European Commission should not waste time and postpone its legal actions during the first phase of the process, while a Member State openly violates the Rule of Law.** Third, also due to the importance of the time element, **interim measures should be used** to put an immediate halt to Rule of Law infringements that can culminate in serious and irreversible harm. Fourth, **the CJEU shall automatically prioritize and accelerate infringement cases with a Rule of Law element.** Fifth, as suggested by Kim Lane Scheppele, **the Commission could bundle cases, and point to the systemic nature of various problems.**<sup>8</sup> Fifth, there should be a **follow-up** as to whether the Luxembourg judgments were implemented or not.

In line with Article 260, if the CJEU finds a violation of Article 2 TEU, the Commission should closely scrutinise and carefully assess whether the Member State in question took the necessary measures to comply with the judgment, and if not, it should bring the case before the Court, specifying the amount of the lump sum or penalty payment to be paid by the Member State.

Member States under EU law could stand up for Article 2 TEU values and against Rule of Law backsliding in other countries via symbolic means, and hard measures as well. As to the former, Member States could intervene into Rule of Law infringement proceedings on the side of the Commission. When it comes to hard laws, Member States that are friends of the Rule of Law could make use of **Article 259 TFEU**, which gives the Member States the opportunity to take action even in cases when the Commission does not start or does not take over from a Member State the infringement process.<sup>9</sup> The contours of such a first attempt are already visible.

On 1 December 2020, the Dutch Parliament's Second Chamber adopted by a 70 % majority a motion to launch an Article 259 TEU procedure against Poland. The Parliament "calls on the government to

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<sup>7</sup> Bárd and Sledzinska-Simon, "On the principle of irremovability of judges beyond age discrimination: Commission v. Poland", 57 CML Rev. (2020), 1555-1584.

<sup>8</sup> Scheppele, "Enforcing the Basic Principles of EU Law through Systemic Infringement Actions" in Clossa, Kochenov, (Eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016), pp. 105-132.

<sup>9</sup> Kochenov, "Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool", 7 Hague J. Rule Law 2 (2015), 153-174.

investigate and to make necessary arrangements to bring Poland before the Court of Justice for failure to fulfil an obligation under the Treaties (Article 259 TFEU), preferably in cooperation with like-minded Member States, and to inform the Second Chamber of the Parliament by 1 February 2021 at the latest.”<sup>10</sup> The Dutch Foreign Minister promised to search for allies in stepping up against Rule of Law backsliding in Poland.

Starting such a Rule of Law infringement procedure should be seen as a last resort, a cry for help addressed to the European Commission. According to Article 259 TFEU, “before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.” Should thus a Member State initiate an infringement procedure, the Commission should immediately take up its task, take over the case from the Member State(s) starting an Article 259 TFEU procedure and enforce EU law.<sup>11</sup>

A variety of issues in Hungary would qualify for infringements procedures with a Rule of Law element. These include judicial capture, undue executive influence over the prosecution services, attacks on media freedom and pluralism, shrinking the space for civil society organisations, attacks against academia, and blatant disregard of EU asylum law.

### Judicial capture

Since 2010, the governing majority has adopted a wide range of measures to curb judicial independence and weaken judicial oversight over the political branches of power. The tools the Fidesz-KDNP government has deployed to contain the judiciary cover radical steps as well as softer, less visible methods. The measures employed are targeting the external and internal independence of the judiciary as well. Judicial capture and court packing in Hungary has many elements, of which we will discuss the early forced retirement of judges, the problems with court administration, the difficulties with challenging ordinary court decisions before the CC, the highly controversial proposed system of administrative courts, the system of limited precedent and uniformity complaints, the issue of case allocation, the omnibus law of 2020 concerning the judiciary, the removal of the former President of the Supreme Court by *ad hominem* legislation, and the appointment of the current President of the Supreme Court by another *ad hominem* legislation.

Interference with judicial independence is a blatant violation of the Rule of Law, and thus violates Article 2 TEU on the founding values the EU, and Article 4(3) TEU on the principle of sincere cooperation. The triple European footing of the common Rule of Law standards regarding judicial independence specifically stems from Articles 6 and 13 ECHR; Article 47 of the EU Charter of Fundamental Rights; and Article 19(1) TEU. These make violations of judicial independence in a Member State a particularly strong case for intervention by the European Commission. Thus far the Court of Justice placed the emphasis on the concept of effective judicial remedies enshrined in Article 19(1)(2) TEU.<sup>12</sup>

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<sup>10</sup> As cited and translated by Morijn, “A Momentous Day for the Rule of Law: The ECJ Hearing about the Disciplinary Regime for the Polish Judiciary”, *VerfBlog*, 2 Dec. 2020, available at <<https://verfassungsblog.de/a-momentous-day-for-the-rule-of-law/>>.

<sup>11</sup> As formulated more forcefully by John Morijn, the Commission “should, in short, up its game and stop being a part-time, partial and delayed guardian of the Treaties instead of a full-time, comprehensive and proactive one.” Morijn, *ibid*.

<sup>12</sup> Bárd and Sledzinska-Simon, “On the principle of irremovability of judges beyond age discrimination: Commission v. Poland”, 57 CML Rev. (2020), 1555-1584.



### *Early retirement of judges*

In 2011, the government decided to radically lower the mandatory retirement age of the judges from 70 to 62 years. The new law was implemented without any meaningful transitional period and resulted in forcing almost 10% of the judiciary to retire within one year. A large number of court executives and justices of the Supreme Court were forced into early retirement which provided the possibility for significantly remaking the composition of the judiciary and appointing new court leaders by the newly established central court administration. The law was later found unconstitutional by the Constitutional Court,<sup>13</sup> and the European Commission launched an infringement procedure against Hungary and referred the case before the CJEU which found Hungary in breach of EU law as the impugned measure constituted age discrimination at the workplace, thereby violating Council Directive 2000/78/EC.<sup>14</sup> 158 judges also turned to the ECtHR on the ground that their forced early retirement adversely affected their professional career and private life. However, the ECtHR found these applications inadmissible on all grounds, *inter alia*, by referring to Act XX of 2013 which provided different remedial measures (reinstatement, stand-by post or compensation) for those judges who were affected by the early retirement.<sup>15</sup> From the perspective of judicial independence stemming from Article 19(1) TEU, forcing judges into early retirement without any compelling and legitimate ground constituted a political intervention into the functioning of the courts and violated the principle of the irremovability of judges. Later case-law of the CJEU established in a series of rulings the importance of judicial independence for the European project, underpinned by Article 2 TEU on the founding values the EU, Article 4(3) TEU on the principle of sincere cooperation, and importantly Article 19(1) on the obligation to provide national remedies for effective legal protection in the fields covered by EU law. In the Case C-64/16 *Associação Sindical dos Juizes Portugueses (ASJP)* the Court of Justice held that every Member State must ensure that national courts meet the requirements of effective judicial protection, which is only possible if judicial independence is maintained.<sup>16</sup> In a case similar to the Hungarian one, on the forced early retirement of judges in Poland, the CJEU held that national rules must be designed in such a way that judges are protected from temptations to give in to external intervention or pressure, whether direct or indirect. Therefore, practically “a ‘court’ is always to be understood as meaning an ‘independent court’” in the EU legal order.<sup>17</sup> In this case the CJEU recognized that the principle of irremovability of judges as an important aspect of independence is not absolute, but it also stated that exceptions to the principle must be justified by legitimate and compelling objectives, must be proportionate to these objectives, and ensure the appearance of judicial independence in the eyes of individuals, which were not met in the Polish case.<sup>18</sup> Had the CJEU applied this test earlier, the Hungarian case would have failed on that ground, too.

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<sup>13</sup> Hungarian Constitutional Court, 33/2012. (VII. 17.) AB decision.

<sup>14</sup> Case C-286/12, *Commission v Hungary*, EU:C:2012:687.

<sup>15</sup> ECtHR, *J.B. and others v. Hungary*, Appl. Nos. 45434/12, 45438/12 and 375/13, judgment of 27 November 2018 [Section IV]. For a critical analysis of the ECtHR’s deferential approach, see Uitz, “The perils of defending the rule of law through dialogue” *European Constitutional Law Review* 15.1 (2019), 1-16.

<sup>16</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117, para 37-38.

<sup>17</sup> Lenaerts, “The Court of Justice and national courts: A Dialogue based on mutual trust and judicial independence”, speech delivered at the Supreme Administrative Court in Poland, Warsaw, 19 March 2018.

<sup>18</sup> Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531, para 79. See also Case C-192/18, *Commission v Poland (Indépendance des juridictions de droit commun)*, EU:C:2019:924. For an analysis see: Bárd and Sledzinska-Simon, “On the principle of irremovability of judges beyond age discrimination: *Commission v. Poland*”, 57 CML Rev. (2020), 1555-1584.

### *Court administration*

In 2012, a new model of court administration was introduced which established a highly centralized system with a strong, single-person leadership, replacing the previous system of judicial self-governance. The ruling majority justified the reform by referring to the deficiencies of the “judicial council model” that existed between 1997 and 2011: lack of transparency and accountability, low level of efficiency, and strong corporatism.<sup>19</sup> The new, centralized model provided broad powers to the President of the National Office for the Judiciary (NOJ), while the self-governing body, the National Judicial Council (NJC) – consisting of 15 judges out of which 14 are elected by their peers and the President of the Supreme Court is an *ex officio* member of it –, was given only weak supervisory powers over the activity of the President of the NOJ. The President of the NOJ is elected for 9 years by the Parliament which establishes a clear link between the political branches and the judiciary and provides the possibility for political control over the judiciary through court administration. Furthermore, it was Tünde Handó, the wife of a prominent Fidesz politician and Member of the European Parliament, who was first elected to this post. As a result, the current model does not constitute genuine judicial self-governance, even if the NJC is exclusively composed of judges elected by their peers (except for the President of the Supreme Court). Major competences in court administration are allocated to the President of the NOJ, who is elected by the legislative branch, and the current legal framework does not entrust the NJC with strong powers for counterbalancing the President of the NOJ. Developments in recent years have proved the institutional weakness of the NJC *vis-à-vis* the President of the NOJ, and also the lack of effective tools available to the NJC to hold the President of NOJ accountable.<sup>20</sup>

Tensions in court administration came to fore in 2018 when a newly elected NJC took office which started to closely scrutinize the practice of the President of the NOJ. The NJC criticized Tünde Handó several times for irregularities and for abusing her power, especially in appointing court executives (court presidents and other senior court officials). Court executives, primarily court presidents in Hungary have broad administrative powers within the judiciary and can exert significant control over judicial careers. Court presidents play an important role in judicial appointments and promotions, they can determine the rules for case allocation and the working conditions of individual judges, initiate disciplinary proceedings against judges and decide on salary bonuses as well. In Hungary, the President of the NOJ can appoint court presidents and other senior court officials to higher courts, but in case the candidate does not receive the support of the plenary session of the judges or the judicial collegium, the NJC must give its consent to the appointment. From 2012, Handó declared a large number of application procedures unsuccessful and failed to provide adequate reasons for her decisions. She annulled calls without reasonable grounds even if the candidate received the overwhelming support of the judges in the relevant court. During the Handó era, it became widespread that leadership positions were not filled through ordinary appointment procedure but by temporarily mandating judges with leadership tasks. After annulling the appointment procedure, Handó gave mandate regularly to those judges who were rejected by their peers or those who did not participate in the application procedure, or did not even work in the court where the vacant leadership position must have

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<sup>19</sup> Fleck, “Judicial independence in Hungary” in Seibert-Fohr (Ed.) *Judicial Independence in Transition* (Springer, 2012), pp. 796-801.

<sup>20</sup> The President of the NOJ cannot be subject to any ethical and disciplinary procedure. Acting within its supervisory power, the NJC can notify the President of the NOJ of irregularities in central court administration, and as a last resort, can initiate the removal of the President of the NOJ to the Parliament. The latter tools, however, have so far proved ineffective. These problems concerning the accountability of the head of central court administration have been highlighted in the request for a preliminary ruling made by a Hungarian judge in case C-564/19. See the request for a preliminary ruling from the Pesti Központi Kerületi Bíróság (Hungary) lodged on 24 July 2019 — Criminal proceedings against IS, Case C-564/19. *Case C-564/19, IS (Illégalité de l’ordonnance de renvoi)*, EU:C:2021:949.

been filled in.<sup>21</sup> This practice was capable of circumventing the NJC and mandating (then later appointing) court leaders loyal to the President of the NOJ.

In 2018, when several members of the newly elected NJC suddenly resigned,<sup>22</sup> Handó declared the NJC's operation unlawful,<sup>23</sup> and rejected any kind of further cooperation with the self-governing body.<sup>24</sup> The NJC initiated the removal of Handó to the Parliament in 2019 which was rejected by the MPs of the governing party without meaningful debate. Handó was later appointed to the Constitutional Court by the governing majority, and a new President of the NOJ, György Barna Senyei took office.

These developments in central court administration raise doubts about the independence of the President of the NOJ from the political branches which also calls into question the independence of selecting and appointing judges and court executives in the Hungarian judiciary.

In a recently published decision, the Győr Regional Court of Appeal found in favour of a judge who brought a lawsuit against the President of the NOJ. The respective judge applied for higher judicial offices two consecutive times, and he was ranked first among the candidates by the local judicial council, but the President of the NOJ annulled both procedures. The challenged decisions did not contain any detailed and individualized reasons for the annulment, only cited the abstract wording of the relevant law stating that “*due to administrative concern there was no need to fill the vacancies*”<sup>25</sup>. However, when the calls were annulled, there was at least one other vacancy in the relevant court. The appeal court in retrial held that the decisions of the NOJ President were unlawful as she failed to provide adequate and sufficient reasons for her decisions, and ordered the President of the NOJ to decide on the calls on the merit.<sup>26</sup> The appeal court emphasized that effective judicial protection is a fundamental principle of EU law stemming from Articles 2 and 19(1) of the TEU and Article 47 of the Charter of Fundamental Rights, and judges must be provided the right to access to court and seek legal remedy against decisions on judicial appointment. The Hungarian court cited three judgments of the CJEU (C-619/18., C-64/16., and joined cases of C-585/18, C-624/18 and C-625/18) in order to argue that the Hungarian law must be interpreted in the light of these principles. According to the latest news, President of the NOJ, György Barna Senyei appeals the judgment.<sup>27</sup>

### *Challenging ordinary court decisions before the Constitutional Court*

The 2011 Fundamental Law significantly changed the competences of the Constitutional Court. While access to the CC by initiating an abstract review of legislation was significantly restricted by abolishing “*actio popularis*”, the so-called “full constitutional complaint” was introduced in turn which authorized the CC to review the constitutionality of judicial decisions. As the CC has been packed with judges loyal

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<sup>21</sup> For more details, see Kovacs, “Új Modell a Bírósági Igazgatásban: Bírák Központi Nyomás Alatt”, 3-4 Buksz (2019), 239-258.

<sup>22</sup> These judges decided to leave the NJC just a few months after they had been elected to the self-governing body and referred to “family reasons or other existing judicial and executive duties”.

Available at <[https://index.hu/belfold/2018/04/19/oten\\_kiszallnak\\_az\\_orzagos\\_biroi\\_tanacsbol/](https://index.hu/belfold/2018/04/19/oten_kiszallnak_az_orzagos_biroi_tanacsbol/)>.

<sup>23</sup> See the statement of the NOJ on the website of the judiciary, ‘*The operation of the NJC in not lawful*’, [birosag.hu](http://birosag.hu), 3 May, 2018, available at <<https://birosag.hu/hirek/kategoria/birosagokrol/nem-torvenyes-az-obt-mukodese>>.

<sup>24</sup> Hungarian Helsinki Committee, *Attacking the Last Line of Defence Judicial Independence in Hungary in Jeopardy* (HHC, 2018), available at <<https://helsinki.hu/wp-content/uploads/Attacking-the-Last-Line-of-Defense-June2018.pdf>>, pp. 8-10.

<sup>25</sup> Section 20(1) bd, Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

<sup>26</sup> Győr Regional Court of Appeal, decision no. Mf.V.30.054/2020/13/I.

<sup>27</sup> Bíró, “Jogerős bírósági ítéletet támadott meg a bírósági hivatal elnöke”, [telex.hu](http://telex.hu), 23 March 2021, available at <<https://telex.hu/belfold/2021/03/23/jogeros-birosagi-iteletet-tamadott-meg-a-birosagi-hivatal-elnoke>>.

to the government resulting in an obedient court which fails to directly confront the governing majority, this new competence poses a risk to the independence of the ordinary judiciary. Today, a politically captured CC can control the administration of justice and shape the jurisprudence of ordinary courts. (For more details, see Paper IV.) Moreover, from 2020, public authorities can also file full constitutional complaints with the CC on the ground that their rights determined by the Fundamental Law have been violated. This authorization has further expanded the power of the packed CC over the ordinary judiciary by directing politically sensitive administrative cases before the CC.

### *The new system of administrative courts*

From 2016, the government worked on setting up a separate system of administrative courts. The government plan, however, drew a lot of criticism from the very beginning as the Minister of Justice failed to provide convincing reasons for changing the existing structure of administrative justice and making the unified court system into a fragmented one in which politically sensitive cases such as cases on public procurement, competition law, taxes, construction, asylum, the right to assembly or electoral disputes are dealt with a separate court system. In 2016, even the NOJ expressed its criticism about the planned reform arguing that there was no need for establishing a separate administrative judiciary. The Parliament nevertheless adopted the law on administrative courts in 2018,<sup>28</sup> which envisaged a separate top court, the Supreme Administrative Court for administrative lawsuits, a ministerial model for court administration, a separate judicial council as a self-governing body for the new system of administrative justice, entrusted with weak powers to counterbalance the broad administrative and managerial powers of the Minister of Justice. The Minister of Justice would have played an important role in selecting and appointing judges to the administrative courts, determining the number of judicial positions in administrative courts, in appointing the presidents and deputy presidents of administrative courts, or initiating disciplinary procedures. The reform was criticized by Hungarian NGOs, the Venice Commission<sup>29</sup> and the UN Special Rapporteur.<sup>30</sup> In May 2019, the government unexpectedly announced to suspend the reform of setting up a separate administrative court system. In the autumn of 2019, the government officially withdrew the reform, and the relevant provisions of the Fundamental Law were changed accordingly. As the reform had been kept on the government agenda since 2016, administrative judges had to adjudicate under uncertainties concerning their tenure which was capable of undermining the independence of individual judges. The dropped reform of 2018 would have entrusted significant discretionary powers to the Minister of Justice in the administration of the separate court system; and providing broad powers to the executive over the judiciary without adequate safeguards could have been problematic also on the basis of EU law due to the growing jurisprudence of the CJEU on judicial independence.<sup>31</sup>

Despite abandoning the idea of the 2018 administrative court reform, the government did not retreat from the plan to overhaul the system of administrative justice in order to subject administrative lawsuits to political control, and therefore adopted Act CXXVII of 2019 which implemented some elements of the dropped 2018 reform. The 2019 omnibus bill made fundamental changes to the organizational structure of

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<sup>28</sup> Act CXXX of 2018 on Administrative Courts.

<sup>29</sup> Available at <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e)>.

<sup>30</sup> Mandate of the Special Rapporteur on the independence of judges and lawyers, 21 Dec. 2018. Available at <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24283>>.

<sup>31</sup> For a detailed overview of the failed 2018 reform on the separate administrative court system and the relevance of EU law in light of the development of the CJEU jurisprudence on judicial independence see: Várnay and Varju, “Whither Administrative Justice in Hungary? European Requirements and the Setting Up of a Separate Administrative Judiciary” 25(3) European Public Law (2019), pp. 283–304.

administrative justice, but did not set up a separate court system with a Supreme Administrative Court. Instead it transferred significant powers to the Supreme Court,<sup>32</sup> which was gradually captured by the government. The newly established competences provided a pretext for appointing a large number of new judges to the Supreme Court; changing the composition of the court can be seen as a tool for taking control over the top court of Hungary.

#### *The system of limited precedent and the uniformity complaint*

The 2019 omnibus bill referenced in the previous subchapter did not only concern the system of administrative justice, but introduced general measures that significantly strengthened the role of the Supreme Court within the ordinary justice system. These measures, together with the capture of the top court by appointing new justices to it, among them the new President who is a close ally of the government (see below), were very likely part of the government plan to take control over ordinary courts by controlling the Supreme Court, the most important veto player of the system. The respective act introduced a so-called “limited precedent system”, obliging judges to follow the published decisions of the Supreme Court, and to give justification for those judgments in which they deviate from the legal interpretation of the Supreme Court. Furthermore, the 2019 Act established the “uniformity complaint procedure” which can be initiated by the parties if the judicial panel of the Supreme Court deviates from the legal interpretation set out in a published decision of the Supreme Court. The President of the Supreme Court was given broad powers to determine the composition of “uniformity panels” which can annul the judgments of the Supreme Court and determine the mandatory interpretation of questions of law. Omnibus bills adopted in recent years therefore strengthened the role of the Supreme Court within the ordinary judiciary and restricted judicial discretion in legal interpretation,<sup>33</sup> which raises concerns over the independence of the judiciary, especially if the President of the Supreme Court is elected in a highly politicized process, disregarding the opinion of the judiciary, and if other leadership positions are filled with newly appointed politically reliable justices.

#### *No automated case allocation*

Hungary still lacks a randomized or automatized case allocation system. The rules for case allocation are primarily determined by court presidents, and the opinions of the judicial council and the collegium are not binding. In 2019, the Parliament eliminated an important safeguard requiring a fixed, one-year term case allocation scheme for each court. The current statutory framework for case allocation provides ample grounds for undue human intervention and room for manoeuvre for court executives in charge of distributing cases among judges. While the highly controversial discretionary power of the President of the NOJ to transfer cases from one court to another was found unconstitutional by the CC<sup>34</sup> and in breach of the European Convention on Human Rights (ECHR) by the Strasbourg court,<sup>35</sup> and it was abolished in 2013, cases can still be transferred to other judges and judicial panels on several grounds without meaningful safeguards. Furthermore, judicial secondment is also a widely used practice in Hungary which raises similar constitutional concerns in light of the right to a lawful judge and the principle of judicial

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<sup>32</sup> For instance, as a result of the Act CXXVII of 2019, the Supreme Court was given almost exclusive jurisdiction over freedom of assembly cases. See Section 206(2)d of the Act CXXVII of 2019.

<sup>33</sup> For details on the problem of the impugned law see the analysis of the Amnesty International Hungary. Available at <<https://www.amnesty.hu/wp-content/uploads/2020/10/ANALYSIS.pdf>>.

<sup>34</sup> Hungarian Constitutional Court, 36/2013. (XII.5.) AB decision.

<sup>35</sup> ECtHR, *Miracle Europe Kft v. Hungary*, Appl. No. 57774/13, judgment of 12 January 2016.

independence and impartiality.<sup>36</sup> The system of case allocation in the Supreme Court was recently criticized by judges<sup>37</sup> and human rights NGOs as well.<sup>38</sup>

### *Overwriting judicial decisions by the executive*

Outright political attacks started with the so-called “Nullification Act” adopted in 2011 (Act XVI of 2011) when final judgments on convictions were declared *ex lege* null in relation to riots in autumn 2006, triggered by the speech of PM Ferenc Gyurcsány, the head of a left-liberal government at the time. With the Nullification Act, the legislative branch overruled judicial decisions and interfered with the operation of the judicial branch without providing any discretion for the courts to review the disputed convictions.

More recently, Hungarian courts have been exposed to harsh criticism by high-ranking government officials for rendering judgments that are detrimental to the interests of the government.<sup>39</sup> These statements pose serious risk to the external independence of the judiciary, namely to the independent functioning of the court from any undue external pressure. In 2018, after the Supreme Court invalidated more than 4000 postal ballots casted in the parliamentary elections, the Prime Minister claimed that the Supreme Court seriously interfered with the elections and took away a seat from Fidesz, accusing the top court of not being intellectually up to the task. In early 2020, PM Viktor Orbán publicly denounced the judiciary for making decisions that offended the people’s “sense of justice” in relation to a compensation case due to school segregation concerning Roma pupils (“*Gyöngyöspata case*”) and cases on prisoners’ compensation.<sup>40</sup> The harsh criticism by the PM was expressed when the Roma segregation case was still pending before the Supreme Court, formulating clear expectations towards the top court in an individual case. Also, the PM called on the Minister of Justice not to execute the judgments in prison compensation cases. These attacks were accompanied by legislative steps aiming at overruling the respective judicial decisions. First, the government proposed a law that suspended for months the payment of compensation awarded for inmates for inhuman prison conditions.<sup>41</sup> Second, as a response to the judgment of the Supreme Court, which ultimately upheld lower courts’ decisions on pecuniary compensation granted for the victims of school segregation, the Parliament adopted the so-called “*lex Gyöngyöspata*”, the amendment of the act on national public education,<sup>42</sup> which excluded awarding damages in compensation for similar future claims on

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<sup>36</sup> See also Bencze, Kovács and Zödi, “The evaluation and development of the quality of justice in Hungary” in Contini (Ed.) *Handle with Care. Assessing and designing methods for evaluation and development of the quality of justice* (IRSIG-CNR, 2017), pp. 159-161.

<sup>37</sup> Vadász and Kovács, “A game hacked by the dealer”, *VerfBlog*, 10 November 2020, available at <<https://verfassungsblog.de/a-game-hacked-by-the-dealer>>.

<sup>38</sup> Hungarian Helsinki Committee, *Contributions of Hungarian NGOs to the European Commission’s Rule of Law Report* (HHC, 2021), available at <[https://helsinki.hu/wp-content/uploads/2021/03/HUN\\_NGO\\_contribution\\_EC\\_RoL\\_Report\\_2021.pdf](https://helsinki.hu/wp-content/uploads/2021/03/HUN_NGO_contribution_EC_RoL_Report_2021.pdf)>, pp. 6-7.

<sup>39</sup> For an overview of these attacks, see Hungarian Helsinki Committee. *Unfettered Freedom to Interfere – Ruling party politicians exerting undue influence on the judiciary in Hungary between 2010–2020* (HHC, 2020), available at <[https://helsinki.hu/wp-content/uploads/HHC\\_Hun\\_Gov\\_undue\\_influence\\_judiciary\\_29072020.pdf](https://helsinki.hu/wp-content/uploads/HHC_Hun_Gov_undue_influence_judiciary_29072020.pdf)>.

<sup>40</sup> These statements were made by the Hungarian PM during an international press conference in early January, 2020. Available at <<https://www.youtube.com/watch?v=1X00OvC2HZo&t=6186s>>.

<sup>41</sup> See Act IV of 2020 on the urgent measures to be taken to stop abusive practices in respect of compensation claims as a result of prison overcrowding.

<sup>42</sup> See Section 18 of Act LXXXVII of 2020. See also Györy, “Fighting Prison Overcrowding with Penal Populism – First Victim: the Rule of Law: New Hungarian Law “Suspends” the Execution of Final Court Rulings”, *VerfBlog*, 12 March 2020, available at <<https://verfassungsblog.de/fighting-prison-overcrowding-with-penal-populism-first-victim-the-rule-of-law/>>.

segregation.<sup>43</sup> These laws are clear instances of the violation of the separation of powers, as the political branches interfered with the judiciary in order to overwrite the consequences of individual judicial decisions.

Prominent Fidesz-MPs have also called into question the importance of judicial independence and checks and balances in public statements,<sup>44</sup> while government-friendly media outlets have launched several attacks against individual judges who expressed their concerns about the independence of the judiciary.<sup>45</sup> These developments prove that the judiciary is exposed to “external interventions or pressure” that are capable of impairing “the independent judgment of its members”.<sup>46</sup>

### *Omnibus laws concerning the judiciary*

In recent years, the government has made significant changes to the justice system through long omnibus laws, without meaningful consultation with the judiciary. In November 2020, when *Bill T/13648 on the amendment of certain justice-related acts* was due for submission to the Parliament, the NJC turned to the Ministry of Justice in a letter requesting the possibility for giving its opinion on draft laws concerning the judicial organization, as the current legal framework provides consultative powers in the legislative process only for the President of the NOJ.<sup>47</sup>

### *Removing the President of the Supreme Court by ad hominem legislation: Baka v. Hungary*

The status of Supreme Court Presidents deserves greater attention, since tailor made laws were designed to prematurely terminate the office of a President disliked by the government, and the same technique of *ad hominem* laws was used in 2020 to appoint the new President who is said to be loyal to Fidesz. (On the latter saga, see the next subchapter.)

András Baka was the Hungarian judge at the European Court of Human Rights (ECtHR) from 1991 to 2008, then he was appointed to the Budapest-Capital Regional Court of Appeal as a judge. In 2009, he was elected to President of the Supreme Court by the National Assembly for a six-year long term, which was to expire on 22 June 2015. According to the constitutional regulation of that time, the President of the Supreme Court had a dual role: beyond the judicial task he was the President of the National Council of Justice, which was a self-governing body responsible for administration of justice.

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<sup>43</sup> See also Hungarian Helsinki Committee, *Hungary: Illiberal Highlights of 2020* (HHC, 2020), available at <[https://helsinki.hu/wp-content/uploads/HHC\\_Illiberal\\_Highlights\\_of\\_2020.pdf](https://helsinki.hu/wp-content/uploads/HHC_Illiberal_Highlights_of_2020.pdf)>, p. 7.

<sup>44</sup> Németh, “Speaker of the Parliament: Forget checks and balances, they are dumb”, *index.hu*, 25 Oct. 2019, available at <[https://index.hu/english/2019/10/25/laszlo\\_kover\\_checks\\_balances\\_dumb\\_forget\\_it\\_rule\\_of\\_law\\_hungary\\_fidesz](https://index.hu/english/2019/10/25/laszlo_kover_checks_balances_dumb_forget_it_rule_of_law_hungary_fidesz)>; Hungarian Spectrum, “Soon Enough, Hungarian Judicial Independence Will Exist Only in History”, *Hungarian Spectrum*, 24 Apr. 2019, available at <https://hungarianspectrum.org/2019/04/24/soon-enough-hungarian-judicial-independence-will-exist-only-in-history-books/>.

<sup>45</sup> Hungarian Helsinki Committee, *Contributions of Hungarian NGOs to the European Commission’s Rule of Law Report* (HHC, 2021), available at <[https://helsinki.hu/wp-content/uploads/2021/03/HUN\\_NGO\\_contribution\\_EC\\_RoL\\_Report\\_2021.pdf](https://helsinki.hu/wp-content/uploads/2021/03/HUN_NGO_contribution_EC_RoL_Report_2021.pdf)>, p. 13.

<sup>46</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117.

<sup>47</sup> See the minutes of the 4 November 2020 meeting of the NJC. Available at <<https://orszagosbiroitanacs.hu/2020-11-04/>>.

During the 2010-11 constitution making process the governing majority commenced an extensive “judicial reform” and András Baka as President of the Supreme Court and judicial administration formulated concerns and critics on the plans and steps of the government. One of the “reforms” was that the Supreme Court will be called Kúria again, which was its historical name before WW2. This appeared in the new Fundamental Law as it was adopted on 25 April 2011. In the meantime, the new acts on the judiciary introduced a new eligibility criterion for the candidates of the President of the Kúria: at least 5 years of judicial service in the Hungarian judiciary was required, and serving as member of an international court did not satisfy that condition. The Constitution of the Republic of Hungary – the ’89 Constitution – was also amended, prescribing that the president of the Kúria shall be elected until 31 December 2011. Thus András Baka – in the lack of 5-years-service in the Hungarian judiciary – formally was not eligible anymore and the Transitional Provisions of the Fundamental Law terminated his mandate as President of the Supreme Court as of 1 January 2012, 3 and a half years before its originally foreseen date of expiry.<sup>48</sup> The mandate of the Supreme Court Vice President – who was appointed by the President of the Republic, upon the recommendation of the President of the Supreme Court in 2009 – was also terminated at the same time upon the regulation of the new act on judiciary [Act CLXI of 2011, § 185(1)]. The official reasoning referred to the structural changes of the judicial organisation and administration.

Since the mandate of the President of the Supreme Court was terminated by the Transitional Provisions of the Fundamental Law,<sup>49</sup> only the Vice President could lodge a constitutional appeal, because his term was terminated pursuant to the Act on the organisation and administration of courts. The Constitutional Court found, with a narrow 8 to 7 majority, that the transformation of the organisation of courts and the significant modification of the scope of responsibilities of the Kúria, its President and Vice-President, provided sufficient constitutional justification for the shortening of their mandates, and did not require a review of the relevant Strasbourg jurisprudence.<sup>50</sup> According to those Constitutional Court judges who attached a dissenting opinion, infringement of the Rule of Law principle and violation of the right to remedies of the petitioner should have been established.

The former President of the Supreme Court, András Baka had no remedy at national level, therefore he turned directly to the ECtHR. The premature termination, via *ad hominem* legislative measures of the applicant’s term of office was found to have violated András Baka’s right of access to a court as guaranteed by Article 6(1) ECHR because of the absence of judicial review. The Court found that these measures had been prompted by the views and criticisms expressed by the applicant on issues of public interest (planned major reform of the judicial system) and had violated Article 10 ECHR as they had not pursued any legitimate aim linked to the judicial reform at issue, nor had the measures been necessary in a democratic society. As to the latter aspect the ECtHR considered that they had not been the object of any strict scrutiny and could hardly be reconciled with judicial independence and the irremovability of judges. The ECtHR

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<sup>48</sup> Point 14(2) of the Closing and miscellaneous provisions of the FL: The mandate of the President of the Supreme Court and of the President and members of the National Council of Justice shall terminate upon the entry into force of the Fundamental Law.

<sup>49</sup> The Transitional Provisions of the Fundamental Law (TPFL) was adopted by the National Assembly in December 2011. Its aim was to support the coming into force of the Fundamental Law, however, it contained many rules which obviously did not have a transitional character. Later, in March 2021 the Ombudsman filed a petition to the CC and challenged the constitutionality of TPFL. The CC in its Decision 45/2012. (XII. 29.) annulled approximately half of the articles of the TPFL on formal grounds. As a response, the governing majority adopted the Fourth Amendment of the FL (April 2013), which incorporated into the Constitution most of the abolished articles. About the TPFL-story, see more in Paper IV.

<sup>50</sup> Hungarian Constitutional Court, 3076/2013. (III. 27.) AB decision.



also found that the challenged measures had a “chilling effect”, discouraging not only the applicant, but also “other judges and court presidents [...] from participating in public debate on [...] issues concerning the independence of the judiciary” (para. 173).

Later, the former Vice President of the Supreme Court, Lajos Erményi, whose complaint was dismissed by the Constitutional Court also filed an application to the ECtHR.<sup>51</sup> He claimed that beyond the right to a fair trial and the right to property, the termination of his mandate also infringed his right to private life. In the Erményi case, the ECtHR found, referring to its rulings in the Baka case, a violation of Article 8 ECHR<sup>52</sup> as the *ad hominem* legislation similar to that at issue in the Baka case, but remaining at a legislative rank, had also not pursued any legitimate aim linked to the so-called judicial reform.

Although this case was not an EU law conflict,<sup>53</sup> it is worth recalling this case well-discussed by legal scholarship,<sup>54</sup> since it has important consequences for the independence of the judiciary, which also affects the EU legal system in the multi-level constitutional landscape. The case itself was formulated as a European

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<sup>51</sup> ECtHR, *Erményi v. Hungary*, Appl. No. 22254/14, judgment of 22 November 2016. The case originated in an application against Hungary by Lajos Erményi, former SC Vice-President lodged with the Court under Article 34 of the Convention on 20 June 2012.

The application had initially been brought, by the applicant and several other Hungarian judges, in respect of both the reduction of their mandatory retirement age and the applicant’s dismissal from his position of Vice-President of the Supreme Court. On 19 March 2014 the ECtHR disjoined from the initial application the applicant’s complaint concerning the termination of his mandate as Vice-President and registered it as a separate application (no. 22254/14). The applicant died on 6 January 2015. On 6 February 2015 his heirs applied to pursue the application before the Court in his stead.

The applicant complained that he had been dismissed from his position of Vice-President, three years and ten months before the statutory date of his term’s expiry, by means of an *ad hominem* legislative measure. In the initial application of 20 June 2012 he invoked Articles 6, 13 and 14 of the Convention, as well as Article 1 of Protocol No. 1, and contended, in particular, that his dismissal had ruined his career and reputation as well as his social and professional relationships and had also resulted in his unjustified deprivation of the peaceful enjoyment of the benefits that would have been due to him during his term of office. In a memorial summarising his arguments following the disjoinder, on 19 March 2014, the applicant also invoked Article 8 of the Convention and explicitly argued that the termination of his mandate had violated his right to respect for private life, including the development of relationships of a professional nature.

<sup>52</sup> ECtHR, *Erményi v. Hungary*, Appl. No. 22254/14, judgment of 22 November 2016, paras 30-31: “The notion of ‘private life’ within the meaning of Article 8 of the Convention encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature. Article 8 thus protects the right to personal development and the right to establish and develop relationships with other human beings and the outside world and does not exclude in principle activities of a professional or business nature because it is in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world [...]. In the present case, it was not in dispute between the parties that the termination of the applicant’s mandate as Vice-President constituted an interference with his right to respect for his private life. The Court finds no reason to hold otherwise.”

<sup>53</sup> It is worthwhile to note however, that the premature termination of the mandate of the Data Protection Commissioner violated the EU law, and there are similarities in the circumstances of the two cases; see Case C-288/12, *European Commission v Hungary*, EU:C:2014:237.

<sup>54</sup> See e.g. Vincze, “Dismissal of the President of the Hungarian Supreme Court: ECtHR Judgment Baka v. Hungary” 21 *European Public Law* (2015) 445–456.; Vincze, “Judicial independence and its guarantees beyond the nation state – some recent Hungarian experience” 56 *Journal of the Indian Law Institute* (2014a) 202–215.; Uitz, “Expelling dissent: On account of the ECtHR judgment in Baka v Hungary” *VerfBlog*, 3 June 2014, available at <<https://verfassungsblog.de/expelling-dissent-account-ecthr-judgment-baka-v-hungary-2/>>; Kosář and Šipulová, “The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law” 10 *Hague J Rule Law* (2018), 83–110, available at <<https://doi.org/10.1007/s40803-017-0065-y>>.

human rights law conflict and was based on the premature termination of the mandate of the President of Hungarian Supreme Court in 2012. But the case has relevance for the EU project as well, where judicial independence and the irremovability of judges also occupies a central role. (On this last aspect see the first subchapter of the part on judicial capture.)

*Appointing the Supreme Court President by ad hominem legislation: the case of András Zs. Varga*

In October 2020, the Parliament elected András Zs. Varga, a former Deputy Prosecutor General and justice of the Constitutional Court as the new President of the Supreme Court (*Kúria*) for 9 years. Varga was nominated by the President of the Republic and was supported only by the governing parties having a two-third majority in the legislature. The NJC, representing the judiciary, overwhelmingly rejected his nomination in a non-binding 13:1 vote on the ground that he lacked any professional experience as a judge and a court executive in the ordinary court system, and his candidacy was possible only due to two legislative changes adopted in 2019 which raised concerns about his independence from the political branches and the appearance of impartiality in the eyes of the public.<sup>55</sup> In order to be eligible for the post of the President of the Supreme Court, the government amended two laws in 2019 to pave the way for Varga to the top court: (1) the requirement of five-year judicial experience was extended to experience gained as a justice or a senior adviser in the Constitutional Court or international tribunal,<sup>56</sup> and (2) justices of the Constitutional Court, upon their request, can now be appointed to judges in the ordinary judiciary without participating in any ordinary application procedure.<sup>57</sup> These moves were also criticized by the Executive Board of the European Network of Councils for the Judiciary (ENCJ)<sup>58</sup> in relation the Varga's election. *Ad hominem* laws that are tailored to certain individuals are in clear breach of the Rule of Law as it was also stressed by the ECtHR in the above-mentioned infamous *Baka* case.<sup>59</sup>

The Commission's 2020 Annual Rule of Law Report has emphasized the concerns about the above changes as well: as justices of the Constitutional Court, elected by the Parliament, can assume a judicial position in the ordinary court system without any call for application, the legislative branch can exert unjustified influence over judicial appointments and over the composition of the judiciary, in particular that of the Supreme Court.<sup>60</sup> This rule, therefore, poses risk to the external independence of the judiciary, all the more in the light of the selection procedure of Constitutional Court justices, which has been dominated by the governing majority since 2010, lacking any consensual element among the political parties.

As the election of András Zs. Varga was determined by purely political considerations, and the President has very broad managerial powers within the Supreme Court, there is a clear risk that his term of office will undermine the institutional independence of the entire judiciary, and jeopardize the independence of individual judges in the top court since their judicial career is highly dependent on him.

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<sup>55</sup> Decision no. 120/2020 of 9 October 2020 of the National Judicial Council on the preliminary opinion on the candidate for the office of President of the *Kúria* (Hungarian Supreme Court), available at <<https://orszagosbiroitanacs.hu/english>>.

<sup>56</sup> Act XXIV of 2019 on further guarantees ensuring the independence of administrative courts.

<sup>57</sup> Act CXXXVII of 2019 modifying certain laws related to the creation of one-instance municipality procedures.

<sup>58</sup> The ENCJ's letter to the European Commission about rule of law concerns in Hungary. Available at <<https://www.encj.eu/node/577>>.

<sup>59</sup> ECtHR, *Baka v. Hungary*, Appl. No. 20261/12, judgment of 27 May 2014.

<sup>60</sup> European Commission, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, Brussels, 30. 9. 2020. available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0316&from=EN>>, pp. 5-6.

## Prosecution services

Even though Article 29(1) of the Fundamental Law declares that the Prosecutor General and the prosecution services are independent, in recent years several concerns have been raised about the functional independence and the professional integrity of the prosecution service, at domestic and international levels. The prosecution service is a highly centralized institution<sup>61</sup> led by the Prosecutor General (PG), having broad powers<sup>62</sup> to control the operation of the prosecution service. The incumbent PG, Péter Polt has been extensively criticized for exercising his powers in a partisan manner, in the interest of the government which makes the strong hierarchy and the wide powers of the PG more problematic in relation to the independence and autonomy of the prosecution service. He maintains friendly ties with PM Orbán and was formerly not only a Fidesz party member but also a Fidesz candidate in parliamentary elections,<sup>63</sup> none of which strengthens the perception of impartiality. When his 9-year mandate expired in 2019, the Parliament re-elected Péter Polt as PG for another 9 years by the votes of the governing majority, despite the opposition parties' strong rejection of his nomination. According to the current legal framework, Polt can remain in office after the expiry of his mandate if the Parliament will not be able to elect his successor by a two-third majority.

Human rights NGOs pointed out that the vaguely formulated rules of accountability do not provide clear avenues for removing the PG, which can undermine the role of the prosecution service as a genuine institutional check on the political branches of the government.<sup>64</sup>

While the prosecution office investigated certain corruption cases of government politicians, it has so far failed to take actions with respect to those closest to the government.<sup>65</sup> Cherry-picking among cases that are brought before courts raises serious Rule of Law concerns: this practice indicates that the prosecution service is not subject to the law, and law enforcement takes place in an ad hoc and discriminatory manner, violating the principle of equality, fairness and legal certainty. As Joseph Raz puts it with regard to the Rule of Law: “*The prosecution should not be allowed, for example, to decide not to prosecute for commission of certain crimes, or for crimes committed by certain classes of offenders.*”<sup>66</sup>

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<sup>61</sup> See also European Commission for Democracy through Law (Venice Commission), Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career of Hungary, CDL-AD(2012)008, 19 June 2012, available at <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)008-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)008-e)>, para 87; and European Commission, 2020 Rule of Law Report – Country Chapter on the rule of law situation in Hungary, p. 7.

<sup>62</sup> According to Transparency International Hungary, these powers are “uncontrolled and unlimited”. See: Transparency International Hungary, *Corruption, Economic. Performance and the Rule of Law in Hungary. The results of the 2019 Corruption Perceptions Index* (TI Hungary, 2020), at 15.

<sup>63</sup> available at <<https://valtor.valasztas.hu/valtort/jsp/oevkjelolt.jsp?EA=7&MAZ=01&OEVK=24>>.

<sup>64</sup> See Hungarian Helsinki Committee et al., *Contributions of Hungarian NGOs to the European Commission's Rule of Law Report* (HHC, 2021), available at <[https://helsinki.hu/wp-content/uploads/2021/03/HUN\\_NGO\\_contribution\\_EC\\_RoL\\_Report\\_2021.pdf](https://helsinki.hu/wp-content/uploads/2021/03/HUN_NGO_contribution_EC_RoL_Report_2021.pdf)>, pp. 10-11.

<sup>65</sup> For details, see Transparency International Hungary, *Corruption, Economic. Performance and the Rule of Law in Hungary. The results of the 2019 Corruption Perceptions Index* (TI Hungary, 2020), available at <<https://transparency.hu/wp-content/uploads/2020/02/Korrupci%C3%B3-gazdas%C3%A1gi-teljes%C3%ADtm%C3%A9ny-%C3%A9s-jog%C3%A1llamis%C3%A1g-Magyarorsz%C3%A1gon-CPI-2019-EN-1.pdf>>, pp. 15-16.; Karsai, *The European Public Prosecutor's Office and Hungary: Challenge or Missed Opportunity?* (TI Hungary, 2021), available at <[https://transparency.hu/wp-content/uploads/2021/02/europai\\_ugyeszseg\\_eng\\_VEGSO.pdf](https://transparency.hu/wp-content/uploads/2021/02/europai_ugyeszseg_eng_VEGSO.pdf)>, p. 5.

<sup>66</sup> Raz, *The Authority of Law: Essays on Law and Morality* (OUP, 2009) at 218.

In 2020, the prosecution office rejected the pressed charges against the Hungarian Minister of Foreign Affairs and Trade who was photographed on the deck of a luxury yacht owned by a Hungarian oligarch whose construction firm have won several public procurements in the past years.<sup>67</sup> The PG argued that the reported act, according to the information available, did not constitute a criminal offence.<sup>68</sup>

The 2020 report of GRECO (*Second Interim Compliance Report*) stressed that Hungary has only partially implemented most of its recommendations in relation to prosecutors.<sup>69</sup> GRECO highlighted that the immunity prosecutors enjoy is still too broad and should be limited only to “functional immunity”. The rules of immunity have also been criticized by the Venice Commission already in 2012.<sup>70</sup> The 2020 GRECO report also stated that there have been significant improvements in the disciplinary regime and in the rules for taking away cases from subordinate prosecutors, but the current framework still lacks adequate safeguards against arbitrariness, and undermines transparency and accountability. Disciplinary proceedings are still dealt within the hierarchy of the organization where the superior of the prosecutor concerned “decides on the merits of the case, rather than an impartial body”.<sup>71</sup> No strict criteria have been established in law for removing a case from a subordinate prosecutor which provides the possibility for arbitrary decisions by the superiors. GRECO also expressed its concerns about the rules allowing the automatic prolongation of the term of office of the PG, if the Parliament lacks the supermajority to elect a new PG.

Hungary has so far refused to join the European Public Prosecutor's Office (EPPO) despite of the 680 thousand signatures collected to push the government for Hungary's participation in the EPPO.<sup>72</sup> The government continues to reject the accession with reference to the argument that joining the EPPO would violate national sovereignty.<sup>73</sup>

### Media freedom and pluralism, journalistic freedom

Albeit there are no powers explicitly conferred upon the European Union to regulate media pluralism, in the penumbra of non-explicit competences there emerges a legal basis. Put together, these could lead to the triggering of an infringement, but even more a systemic infringement or some other Rule of Law enforcement procedure. Little wonder that the Commission in its Annual Rule of Law Reports also scrutinises media freedom (See Paper I).

Under its negative competences, the EU can attach consequences to disrespect for EU values enshrined in Article 2 TEU, including “freedom, democracy, the rule of law and respect for human rights”, which are closely intertwined with media freedom and pluralism. The media will transmit information that is the basis

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<sup>67</sup> Németh, “Szijjártó Péter külügyminiszter Szijj László adriai luxusjachtján bekkeli ki a fehérorosz válságot”, *átlátszó.hu*, 18 Aug. 2020, available at <<https://atlatzo.hu/2020/08/18/szijjarto-peter-kulugyminiszter-szijj-laszlo-adriai-luxus-jachtjan-bekkeliki-a-feherorosz-val sagot/>>.

<sup>68</sup> Available at <<http://ugyeszseg.hu/wp-content/uploads/sajto6/2020/09/k-12223-valasz.pdf>>.

<sup>69</sup> See: Group of States against Corruption, *Fourth Evaluation Round – Corruption prevention in respect of members of parliament, judges and prosecutors. Second Interim Compliance Report – Hungary*, (GRECO, 10, 2020), available at <<https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a062e9>>.

<sup>70</sup> Venice Commission, 2012, para 21.

<sup>71</sup> GRECO, 2020, para 52.

<sup>72</sup> Reuters Staff, “Hundreds of thousands sign petition demanding Hungary join new EU prosecution body”, *REUTERS*, 5 June 2019, available at <<https://www.reuters.com/article/us-eu-hungary-prosecution-petition-idUSKCN1T61W0>>.

<sup>73</sup> Karsai, *Az Európai Ügyészseg és Magyarország: Kihívás vagy elszalasztott lehetőség?* (TI Hungary, 2021), available at <<https://transparency.hu/wp-content/uploads/2021/02/europai-ugyeszseg-hun-VEGSO.pdf>>, p. 7

of flourishing public debates and deliberative democracy.<sup>74</sup> As the High-Level Group on Media Freedom and Pluralism formulated: “There can be no genuine democracy at the EU level if media freedom and pluralism are not guaranteed throughout the European political space.”<sup>75</sup> But media freedom is also closely related to both the active aspect of freedom of speech, and its passive side, i.e. the right to receive information. But in the Charter of Fundamental Rights of the European Union it also received protection on its own right. Article 11(2) states that the “freedom and pluralism of the media shall be respected”. Albeit the Charter is limited in scope,<sup>76</sup> case-law rendered its provisions applicable to cases beyond implementation of EU law to cases when a Member State acts within the scope of EU law.<sup>77</sup> Certain rights can also be deducted from the concept of Union citizenship as enshrined in Article 9 TEU and Article 20 TFEU.<sup>78</sup> Harming these rights, especially distortions of passive voting rights at the European Parliamentary elections will have effects beyond the borders of the given Member State.<sup>79</sup> Restricting media pluralism necessarily hinders the very idea of European integration, including the free movement of media services and of persons. Violations of media and journalistic freedom, censorship, or SLAPPs (strategic litigation against public participation) all hinder the free movement of journalists. Article 114 TFEU allowing for the adoption of legislation for the achievement of the internal market could therefore also be invoked. Finally, media pluralism is not only protected from political, but also from commercial influence – even though the two often overlap.<sup>80</sup> EU competition law as laid down in Articles 101-118 TFEU, and due to the intricate relationship between competition law and culture, Article 167(4) TFEU, are also relevant. Depending on the media outlet in question, secondary pieces of EU law, such as the proposed Digital Services Act,<sup>81</sup> or the revised Audiovisual Media Services Directive<sup>82</sup> might also be invoked.

Political influence, monopolisation, lack of pluralism, diminished market diversity, openly discriminative and ideological use of state resources, local newspapers became clear political channels after the 2006 local elections.

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<sup>74</sup> Viķe-Freiberga, Däubler-Gmelin, Hammersley and Poiares Pessoa Maduro, *A free and pluralistic media to sustain European democracy. The Report of the High Level Group on Media Freedom and Pluralism* (European Commission, 2013), available at [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/hlg/hlg\\_final\\_report.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf), (last retrieved on 15 June 2016).

<sup>75</sup> Viķe-Freiberga, Däubler-Gmelin, Hammersley and Poiares Pessoa Maduro, *A free and pluralistic media to sustain European democracy. The Report of the High Level Group on Media Freedom and Pluralism* (European Commission, 2013), available at [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/hlg/hlg\\_final\\_report.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf), p. 3.

<sup>76</sup> Cf. Article 51(1).

<sup>77</sup> Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105.

<sup>78</sup> Article 3 (2) TEU.

<sup>79</sup> Bárd, Carrera, Guild and Kochenov, *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights* (Center for European Policy Studies, 2016), p. 95., Viķe-Freiberga, Däubler-Gmelin, Hammersley, Poiares Pessoa Maduro, *A free and pluralistic media to sustain European democracy. The Report of the High Level Group on Media Freedom and Pluralism* (European Commission, 2013), available at [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/hlg/hlg\\_final\\_report.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf), p. 20.

<sup>80</sup> Bárd and Bayer, *A comparative analysis of media freedom and pluralism in the EU Member States* (European Union, 2016), available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL\\_STU\(2016\)571376\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU(2016)571376_EN.pdf), p. 45.

<sup>81</sup> COM(2020)825 final, “Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC”.

<sup>82</sup> O.J. 2010, L 95, “Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services” (Audiovisual Media Services Directive).

State organs such as the National Media and Infocommunications Authority and the Competition Office use the legal tools arbitrarily, the bias is always detrimental for the remaining of the independent media players. The most well-known case is that of Klubrádió, which lost its frequency. The government-controlled Media Authority refused its license extension and even a court decision did not repeal the obviously biased decision.<sup>83</sup> Similar to other fields in the issues of media freedom and informational rights there are no independent organs to balance the executive overpower.

Public media became openly political, workers are selected along ideological and loyalty lines. Consequently they regard their role as providing support for the government, as agents of state-ideology. Pro-governmental media exerts military, frightening tone against NGO's and independent resistant individuals. A recent Kúria decision on the "unacceptable sentences" of Árpád Tóta W., eminent journalist shows the radically shrinking space of critical voices. Two civic plaintiffs sued HVG weekly for an article in which the author sarcastically described Hungarians as filthy migrants, referring to the criminal activities of the present FIDESZ-party affiliates.<sup>84</sup>

The legal, judicial assistance in limiting the freedom of expression in a situation where media pluralism has been radically cut by political and legal decisions gives a dark general picture on the chances of critical voices in Hungary.

#### *Media concentration via KESMA*

KESMA, a newly established conglomerate controlled by the government received 476 TV channels, radio stations, online and print newspapers for free on November 2018.<sup>85</sup> These outlets were mostly owned by political allies of the governing party even before, but this move made the monopoly of the governing political force absurdly extensive, and completed the monopolisation of the Hungarian media also from the perspective of media ownership. This newly established foundation was legally classified by a Decree of the Prime Minister (229/2018 (XII.5.)) as being of "national strategic importance", which means that no review of the Competition Office is needed to perform the action of media concentration. On paper the National Media and Infocommunications Authority has the duty to investigate cases of undue media concentration, but this state organ remained silent. All the members of the body of this institution were delegated by the ruling party. The Constitutional Court in June 2020 declared that the legal basis of KESMA

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<sup>83</sup> Hungary Today, "Government Refutes Accusations of Klubrádió Losing License Due to Political Decision", *Hungary Today*, 11 Feb. 2021, available at <<https://hungarytoday.hu/government-refutes-accusations-of-klubradio-losing-license-due-to-political-decision>>; Beswick, "Klubrádió: Frequency of Hungarian independent radio to be taken over by group close to Orbán", *euronews*, 11 April 2021, available at <<https://www.euronews.com/2021/04/11/klubradio-frequency-of-hungarian-independent-radio-to-be-taken-over-by-group-close-to-orba>>; COE, Safety of Journalists Platform, available at <[https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_pos=4&p\\_p\\_col\\_count=9&sojdashboard\\_WAR\\_coesojportlet\\_alertPK=90585573](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-2&p_p_col_pos=4&p_p_col_count=9&sojdashboard_WAR_coesojportlet_alertPK=90585573)>.

<sup>84</sup> Bárd, "The Tóta W./HVG controversy: The Hungarian Supreme Court's judgment limiting freedom of expression", *RECONNECT blog*, 6 April 2021, available at <<https://reconnect-europe.eu/blog/the-tota-w-hvg-controversy-the-hungarian-supreme-courts-judgment-limiting-freedom-of-expression/>>.

<sup>85</sup> Brogi, Nenadic, de Azevedo Cunha and Parcu, *Assessing certain recent developments in the Hungarian media market through the prism of the Media Pluralism Monitor* (CMPF, 2019), available at <[https://cmpf.eu.eu/wp-content/uploads/2019/07/Report\\_KESMA\\_Hungary\\_A2.pdf](https://cmpf.eu.eu/wp-content/uploads/2019/07/Report_KESMA_Hungary_A2.pdf)>.

is not unconstitutional.<sup>86</sup> On the lack of independence of the CC, see the section *supra*, discussing potential Article 7 TEU procedures.

### *State subsidy in the advertising market*

State funds are allocated unevenly, they reward pro-governmental actors enormously. Public money is used for subsuming media ventures into the pro-governmental political empire. State sources are also spent for buying commercial channels, internet newspapers or publishers (TV2, Origo.hu, Mediaworks) For now, pro-governmental media have no competitors on the market.<sup>87</sup>

### *Limitation of journalistic freedom, censorship*

During the Coronavirus pandemic the Parliament passed a modification of the Penal Code<sup>88</sup> severely punishing spreading “fake news” related to an emergency situation. More specifically, an amendment to Article 337 makes it a crime for anyone before grand public claiming or spreading a falsehood or distorted truth in relation to an emergency in a manner that is capable of alarming or agitating a large group of people at the site of the emergency. Punishment is up to three years of imprisonment. Should the same behaviour in an extraordinary situation jeopardise or prevent the efficiency of protection, the sanction is one to five years of imprisonment. Another amendment to the Criminal Code, Article 322/A orders to punish those who obstruct government measures to fight an epidemic with imprisonment of up to three years. These provisions have been criticised for being open to abuse, especially in light of the fact that judicial independence is heavily compromised, and the prosecutor’s office also suffers from several shortcomings.<sup>89</sup> Even if these provisions have not been overused so far, their sheer existence and the arrests that happened so far may have a chilling effect.<sup>90</sup>

In parallel, independent media outlets and news channels were attacked by high governmental officials saying that “opposition channels do not defend the Hungarians and they are virus collaborators”. In January 2021 a new law was passed regulating the use of drones after some media published pictures on the assets of Lőrinc Mészáros, eminent business figure close to PM Orbán.<sup>91</sup> This regulation made public interest investigations hard. Creating and publication footage without the permission of the owner is punishable with up to one year imprisonment.

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<sup>86</sup> Hungarian Constitutional Court, 16/2020 (VII. 8.) AB decision. It is not the task of the Constitutional Court to rate the content of what the government considers to be in the public interest from a national strategic point of view - said the decision. Available at <<https://hclu.hu/en/articles/orbans-media-empire-unlawfully-given-green-light>>.

<sup>87</sup> Polyák, Media in Hungary: Three Pillars of an Illiberal Democracy in: Połońska and Beckett (Eds.), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (Palgrave, 2019), pp. 279-303.

<sup>88</sup> Act C of 2012 on the Criminal Code of Hungary.

<sup>89</sup> Bárd and Carrera, “Showing true illiberal colours – Rule of law vs Orbán's pandemic politics”, CEPS POLICY INSIGHTS 2020-10/April, pp. 1-17, at 5-6.; IPI, “Hungary: Press freedom threatened as Orbán handed new powers”, 30 March 2020, available at <<https://ipi.media/hungary-press-freedom-threatened-as-orban-handed-new-powers/>>.

<sup>90</sup> Bárd, Bayer, Chun Luk and Vosyliute, *Ad-hoc request. SLAPP in the EU context, Academic Network on European Citizenship Rights* (European Commission, 2020), available at <[https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp\\_en.pdf](https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf)>, p. 20.

<sup>91</sup> Act CLXXIX of 2020 on amending certain laws relating to the operation of unmanned aircrafts. Some weeks before independent MP Hadházy published some pictures on the estate belongs to Lőrinc Mészáros showing some military vehicle.

KGYK, “Mészáros Lőrinc birtokán fotózott, most a rendőrséghez fordult Hadházy Ákos”, *index.hu*, 30 Oct. 2020, available at <[https://index.hu/belfold/2020/10/30/hadhazy\\_akos\\_meszaros\\_lorinc/](https://index.hu/belfold/2020/10/30/hadhazy_akos_meszaros_lorinc/)>.

In 2019 the Speaker of the Hungarian Parliament re-regulated the rules concerning the activities of journalists in the House. Recording and interviewing are banned, media activity is limited to a small, roped “press area” and a designated press-room. Some independent media were denied access to the news conference of the government, accreditations were withheld from independent journalists. The Prime Minister openly denies answering any questions from the press not in the hands of the government or its allies.

The biases of this kind resulted in a wholesale transformation of the radio market and the the rest of the media, and has killed the media pluralism.

### *Freedom of information, public information requests*

State organs notoriously exclude access to documents referring to official or business secrets. The foundations of the Hungarian National Bank started their activities with 1 billion EUR and they denied to be a public found and that the money generated by the National Bank was public money. With a term that has since become a popular locution: by the transfer from the National Bank to its foundation “the money has lost its public quality”.<sup>92</sup>

A clear breach of the general obligation of public bodies to disclose public information is the abolition of the taking of minutes in cabinet meetings since 2010. Because the Act CLI of 2011 abolished the right of the Data Protection Commissioner of turning to the Constitutional Court, the constitutional review of this Act became impossible.

An amendment of the Act CXII of 2011 on the right to informational self-determination (Article 27.) gave the possibility of denying access to information which is “expected to underlie a future possible decision”. “Decision-preparation” became the usual pretext for bypassing the duty of serving public information.

From 2015 on, non-identified (anonymous) information requests can be denied freely. Another critical modification is the fee of the data-serving process, which is to be determined by the controller of the data.

### *Shrinking the space for NGOs*

A vivid civil society is vital for a flourishing democracy. Shrinking the space for NGOs might violate various Charter rights, depending on the exact means used or abused to silence civil society organisations. In the case of *Commission v Hungary (Transparency of associations)*<sup>93</sup> for example, the Hungarian authorities “introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations” when the Parliament adopted a new legislation in 2017 “on the Transparency of

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<sup>92</sup> Hungarian Spectrum, “Developments in the Hungarian National Bank Corruption Case”, *Hungarian Spectrum*, 2 May 2016, available at <<https://hungarianspectrum.org/2016/05/02/developments-in-the-hungarian-national-bank-corruption-case/>>.

BBJ, “Bloomberg reports on spending by MNB foundations”, *bbj.hu*, 23 May 2016, available at <<https://bbj.hu/economy/environment/initiatives/bloomberg-reports-on-spending-by-mnb-foundations>>.

Brückner, “Legendásan balhész pénzköltési módszereket tesz most megismerhetlenné az állam”, *telex.hu*, 11 Nov. 2020, available at <<https://telex.hu/belfold/2020/11/11/alaptorveny-elvesztheti-kozpenzjelleget>>.

<sup>93</sup> Case C-78/18, *Commission v Hungary (transparency of associations)*, EU:C:2020:476; Bárd, Grogan and Pech, “Defending the Open Society against its Enemies: The Court of Justice’s ruling in C-78/18 *Commission v Hungary (transparency of associations)*”, *VerfBlog*, 22 June 2020, available at <<https://verfassungsblog.de/defending-the-open-society-against-its-enemies/>>.



Organisations which receive Support from Abroad” referred to as Lex NGO in the literature. In doing so, the Hungarian authorities have violated Article 63 TFEU on the free movement of capital, Article 7 on the right to respect for private and family life, Article 8 right to the protection of personal data and Article 12 right to freedom of association.

The Hungarian government with the two-thirds majority in the National Assembly had started to fight against its real and fictitious enemies right after the elections in 2010.<sup>94</sup> NGOs, independent institutions emerged as threats of the newly created system that could formulate government criticism and thereby jeopardise its maintenance.

The attack against NGOs, mainly with human rights protection profiles started in 2013 and these institutions soon became one of the most relevant and symbolic enemies of the Orbán regime. A widespread political campaign started through the government-friendly media sources which claimed that George Soros was spending half a billion forints on strengthening the Hungarian opposition through NGO’s.

Beside comprehensive and aggressive media attacks (stigmatization, harassment, compromising statements), against the independent journalists, media and civil organizations, financial, administrative and legal tools are also used for silencing and keeping in fear all the critical voices.<sup>95</sup>

In 2013 state organs unlawfully scrutinized NGO’s which were supported by the Norway Fund (NCTA). After the investigations, no official process continued, the only aim remained the intimidation and diminishing their public prestige.<sup>96</sup>

In 2017 Parliament passed an act modelled on the Russian and Israeli anti-civil regulation. By prescribing the duty of publicly displaying the fact of “supporting from abroad” independent NGOs were stigmatized. This was the law that ultimately ended up in front of the CJEU and its adoption and application led to Hungary losing an infringement procedure.<sup>97</sup>

### Attacks on academia

Academic freedom is enshrined in general terms in Article 13 of the Charter of Fundamental Rights. But again, the specificities of the tools used to oppress academics and violate academic freedom may determine

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<sup>94</sup> See: Drinóczi and Mészáros, “Hungary: An Abusive Neo-militant Democracy” in Rak and Roman (Eds.), *European Neo-militant Democracies*, (Routledge, forthcoming).

<sup>95</sup> Hungarian Helsinki Committee, Akta: Civil szervezetek elleni kormányzati támadások, available at <<https://helsinki.hu/akta/civil-szervezetek/>> and Hungarian Helsinki Committee, “A kormány a segítőköt börtönnel fenyegetve ünnepli a menekültek világnapját, *helsinki.hu*, 20 June 2018, available at <<https://helsinki.hu/a-kormany-a-segitok-bebortonzesevel-unnepli-a-menekultek-vilagnapjat/>>.

<sup>96</sup> Hungary receives approximately 300 million EUR since 2004 from the so-called Norwegian Grants as a result of an agreement that Norway, Iceland, and Lichtenstein signed in, the “Agreement on the European Economic Area,” which allowed these three non-EU states to join the common market of the European Union. The larger part of this sum that was spent under the supervision of the Hungarian government, while a smaller part (the so-called Norwegian Civic Fund) was handled by the NGO Ökotárs Alapítvány. This was the organisation whose offices were raided. Hungarian Spectrum, “The Latest Scandal: The Orbán Government And The Norway Fund, *Hungarian Spectrum*, 2 June 2014, available at <<https://hungarianspectrum.wordpress.com/2014/06/02/the-latest-scandal-the-orban-government-and-the-norway-fund/>>.

<sup>97</sup> Case C-78/18, *Commission v Hungary (transparency of associations)*, EU:C:2020:476; Bárd, Grogan and Pech, “Defending the Open Society against its Enemies: The Court of Justice’s ruling in C-78/18 Commission v Hungary (transparency of associations)”, *VerfBlog*, 22 June 2020, available at <<https://verfassungsblog.de/defending-the-open-society-against-its-enemies/>>.

what other laws could be invoked. Lex CEU, which was a tailor-made law to chase the Central European University out of the country, was for example also in violation of the GATS (General Agreement on Trade in Services of the WTO), Article 49(1) TEU, The Services Directive 2006/123, and two further provisions of the Charter, i.e. Article 14(3) on the freedom to found educational establishments and Article 16 on the freedom to conduct a business.<sup>98</sup>

Simultaneously with the intimidation of civil society organisations, individual academics are censored,<sup>99</sup> and the institutional autonomy of higher education is attacked. The latter began with the campaign against the “Central European University” (CEU) consequently called by government members “Soros university” and the acceptance of the so-called Lex CEU.<sup>100</sup>

Soon after the CEU the Hungarian government was attacking another major academic institution, the Hungarian Academy of Sciences and jeopardizing the autonomy of the 200-year-old institution.<sup>101</sup> The total war against academic freedom and institutional autonomy is still on the way.

The National Scientific Research Fund that was established under the socialist regime and has enjoyed legitimacy and independence, saw direct political influence on its decisions last year. The elimination of legal guarantees of independent decision-making took place in 2014, but the 2020 move of the Ministry of Innovation and Technology to overrule the decision of the expert jury triggered the resignation of László Acsády, the president of the life sciences college, in protest.<sup>102</sup>

It was only logical that the consistent attacks on autonomous institutions reach academic bodies. This should raise flags resembling responses to the curtailment of judicial independence: just like there is an assumption of judicial independence behind the recognition of Hungarian judgments and courts, EU funding in academia rests on the assumption that researchers follow academic standards even when their

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<sup>98</sup> Case C-66/18, *Commission v Hungary (Higher Education)*, EU:C:2020:792; Bárd, “A Strong Judgment in a Moot Case: Lex CEU before the CJEU”, *RECONNECT blog*, 12 Nov. 2020, available at <<https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/>>.

<sup>99</sup> Körtvélyesi, “Fear and (Self-)Censorship in Academia”, *VerfBlog*, 16 Sept. 2020, available at <<https://verfassungsblog.de/fear-and-self-censorship-in-academia/>>.

<sup>100</sup> On this issue see Bárd, “The Open Society and Its Enemies: An attack against CEU, academic freedom and the rule of law” 14 CEPS Policy Insights, 2017, available at <<https://www.ceps.eu/ceps-publications/open-society-and-its-enemies-attack-against-ceu-academic-freedom-and-rule-law/>>; Uitz, “Academic Freedom in an Illiberal Democracy: From Rule of Law through Rule by Law to Rule by Men in Hungary”, *VerfBlog*, 13 Oct. 2017, available at <<https://verfassungsblog.de/academic-freedom-in-an-illiberal-democracy-from-rule-of-law-through-rule-by-law-to-rule-by-men-in-hungary/>>; Uitz, “What Being Left Behind by the Rule of Law Feels Like, Part I”, *VerfBlog*, 29 Oct. 2018, available at <[https://verfassungsblog.de/what-being-left-behind-by-the-rule-of-law-feels-like-part-ii/](https://verfassungsblog.de/what-being-left-behind-by-the-rule-of-law-feels-like-part-i/#:~:text=Disappointed%2C%20frustrated%20%E2%80%93%20but%20most%20of,%E2%80%9Cthick%20or%20thin%E2%80%9D%20padding.>”; Uitz, “What Being Left Behind by the Rule of Law Feels Like, Part II”, <i>VerfBlog</i>, 31 Oct. 2018, available at <<a href=)>; Halmai, “The Hungarian Constitutional Court betrays Academic Freedom and Freedom of Association”, *VerfBlog*, 8 June 2018, available at <<https://verfassungsblog.de/the-hungarian-constitutional-court-betrays-academic-freedom-and-freedom-of-association/>>; Bárd, “The rule of law and academic freedom or the lack of it in Hungary” *European Political Science* (2018), pp. 1–10.

<sup>101</sup> Ziegler, “It’s Not Just About CEU: Understanding the Systematic Limitation of Academic Freedom in Hungary”, *VerfBlog*, 26 March 2019, available at <<https://verfassungsblog.de/its-not-just-about-ceu-understanding-the-systemic-limitation-of-academic-freedom-in-hungary/>>.

<sup>102</sup> Sprik, “Még a Kádár-rendszerben sem történt ilyen: Palkovicsék belenyúltak az OTKA pénzosztásába”, *24.hu*, 31 Aug. 2020, available at <<https://24.hu/belfold/2020/08/31/kadar-rendszer-palkovics-belenyultak-otka-penzosztas/>>.

findings conflict with the government line. In many cases, this ceased to be the case, with loyalists leading these bodies and a series of measures and scandals instigating (self-)censorship.

With the ninth amendment of the Fundamental Law adopted towards the end of 2020, the ideological fight hitched with the motivation to hide EU funds from the radar screen, in order to prevent European institutions from suspending them by applying the Conditionality Mechanism adopted in December 2020. Funds can only be suspended if they are spent by state authorities. Should however a Member State make the money disappear before it flows into unapproved uses, then it is impossible to trace to its illegal ends. The Fundamental Law after the amendment in December 2020 now contains that “Public money is the revenue, expenditure and monetary claims of the state”. It is “Short. Elegant. And alarming.”<sup>103</sup> This new provision can be better understood in accordance with the public foundations: once EU funds enter these foundations – which are according to the Civil Code and other relevant laws, private entities established for public purposes – they would cease being public and therefore the state audit office would stop tracking them.

Soon after the mentioned amendment of the Fundamental Law the transformation of universities – which had started before the amendment was passed with the Corvinus University in 2019 – from a state-funded to a private-funded model, accelerated. In January 2021 some universities (including the scientific universities with medical faculties like University of Debrecen, University of Szeged, University of Pécs and the SOTE in Budapest) were approached by the Ministry of Innovation and Technology to decide on the transformation until the end of the month: whether they want to become a private university controlled by a public foundation. However, this was not a real choice. As Tímea Drinóczi well described: “The transformation had already been decided even before the universities ‘requested’ it; an ultimatum was given”.<sup>104</sup> Although all Senates of the universities approached decided as the government wanted, nevertheless the legal basis, the basic structures and the members of the body of trustees are still unknown for the institutions.

In these public foundations there is a great freedom for the founders to construct the structure of the body for its own benefits, however one may find few general rules for the audits. The most important body is the supervisory board which is established in the instrument of constitution by the founders. Its main task is to supervise the management in order to protect the interests of the legal person. The main problem with this construction is that the foundations are basically private law institutions, however it is evident that they are founded by the state and serve public interests. Because of the private law nature of the foundations, the regulation is based on the premise to protect the founders’ interest. Therefore, the so-called audit’s main function is to control the potential mismanagement of the body of trustees. In this model the state as a founder establishes the public foundations by accepting their charter document, which latter is regulating the basic structure of the institution with the body of trustees (this is a board with the politically appointed and Fidesz friendly members) and the supervisory body whose task is to “control” the management of the previous. This latter may have some tools to report the founder the malfunctions of the board, if the actions of the board aggrieve the interests of the founder, but the audit depends on the founder (i.e. the state or more exactly the government). It is also important to note that the founder can designate the board of trustees to exercise the founder’s rights, or to transfer such rights to the trust. In this case the founder shall delegate a trust property administrator for the purpose of monitoring the exercise of such rights and the management of assets by the trust in accordance with the objectives set out in the statutes, independent of

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<sup>103</sup> Halmai, Mészáros and Scheppele, “So It Goes – Part II“, *VerfBlog*, 20 November 2020, available at <<https://verfassungsblog.de/so-it-goes-part-ii/>>.

<sup>104</sup> Drinóczi, “Loyalty, Opportunism and Fear – The forced privatisation of Hungarian universities”, *VerfBlog*, 5 Feb. 2021, available at <<https://verfassungsblog.de/loyalty-opportunism-and-fear/>>.

the trust's oversight body. Therefore, the story comes full circle: Fidesz delegates will be solely responsible for the management of the public foundations, the only body which can spend the EU funds. The state will have only one option to control the public foundation's spendings: the public prosecutor has a right to check the legality of the functioning of a foundation. If he/she has concerns, it is possible to initiate various processes before the relevant court. However, this system is led by Orbán's friend, Péter Polt.<sup>105</sup>

Funding to academic institutions was kept to a low level,<sup>106</sup> but funds were promised and often distributed to those who pledged loyalty. One of the lavishly financed institutions, the National University of Public Service was established by the regime (from the merger of earlier institutions including the police and the military academy), it is directly controlled by the government. It is favoured not only financially<sup>107</sup> but also by creating monopolies by law<sup>108</sup> to secure enough students.<sup>109</sup> The institution was also exempted from general accreditation requirements.<sup>110</sup> The institution launched an emblematic research project, seeking to measure "good governance" in Hungary. It provides conclusions like the fact that the fall in decisions where the Constitutional Court finds incompatibility with the Fundamental Law "shows an improvement in legal security"<sup>111</sup> (against the mainstream view in academic circles which would hold that this is a result of the domestication of the institution). The research is financed by European Union funds.<sup>112</sup>

Alternative institutions, sometimes established explicitly to counter dominant narratives, are lavishly funded: the Veritas Institute (for presenting "true history"), Ferenc Mádl Institute (for comparative law studies), Institute for Hungarian Studies (researching "Hungarianness"), Research Institute for National Strategy (for reuniting the nation divided by state borders), Mathias Corvinus Collegium and its Migration Research Institute (co-founded by Századvég Foundation), to name a few. Governments are of course free to establish research institutes. A crucial question is whether they live up to their stated academic credentials or act more like GONGOs that invade the NGO sphere. The minister of justice announced plans to create

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<sup>105</sup> The lack of independence of the public prosecutor system in Hungary seems evident after 2010. Péter Polt is often criticised for not investigating corruption-related cases in which the government political elite or even the prime minister's family is involved as happened in the so-called "Elios-case". See: Euractiv, "Hungarian police drops Orban-linked corruption probe" *Euractiv*, 8 Nov. 2018, available at <<https://www.euractiv.com/section/justice-home-affairs/news/hungarian-police-drops-orban-linked-corruption-probe/>>; Kazai and Kovács, "The Last Days of the Independent Supreme Court of Hungary?", *VerfBog*, 13 Oct. 2020, available at <<https://verfassungsblog.de/the-last-days-of-the-independent-supreme-court-of-hungary/>>.

<sup>106</sup> Polónyi, "A hazai felsőoktatás elmúlt 10 évének néhány gazdasági jellemzője" in Kovács and Temesi (Eds.) *A magyar felsőoktatás egy évtizede 2008 – 2017* (Budapest Corvinus Egyetem, Nemzetközi Felsőoktatási Kutatások Központja, 2018), p. 96, Figure 10.

<sup>107</sup> According to a 2017 per-student calculation, the institution receives four times the average public funding. CSD, "Még több pénzt kap Orbán Viktor kedvenc egyeteme", *index.hu*, 23 Sept. 2017, available at <[https://index.hu/belfold/2017/09/23/meg\\_tobb\\_penzet\\_kap\\_orban\\_viktor\\_kedvenc\\_egyeteme/](https://index.hu/belfold/2017/09/23/meg_tobb_penzet_kap_orban_viktor_kedvenc_egyeteme/)>.

<sup>108</sup> eduline, "Jövő ősszel indul a nagy tiltakozást kiváltó szak a közszolgálatin", *eduline.hu*, 14 Nov. 2016, available at <[http://eduline.hu/felsooktatas/Jovo\\_osszel\\_indul\\_a\\_nagy\\_tiltakozast\\_kivalt\\_EICD2C](http://eduline.hu/felsooktatas/Jovo_osszel_indul_a_nagy_tiltakozast_kivalt_EICD2C)>.

<sup>109</sup> Some of these monopolies were inherited by the university when it merged the formation of police and military forces. The creation of "state sciences", however, was widely seen as a threat to law schools, available at <[http://old.mta.hu/data/cikk/13/65/20/cikk\\_136520/9\\_osztaly\\_allasfoglalas\\_20150617.pdf](http://old.mta.hu/data/cikk/13/65/20/cikk_136520/9_osztaly_allasfoglalas_20150617.pdf)>.

<sup>110</sup> Unyatyinszki, "A közszolgálati egyetem privilégiumai I.", *Atlátszó Oktatás*, 9 June 2015, available at <<https://oktatas.atlatszo.hu/2015/06/09/a-kozszojalati-egyetem-privilegiumai-i/>>.

<sup>111</sup> Available at <[https://joallamjelentes.uni-nke.hu/2019\\_pages\\_PDF/Jo\\_Allam\\_Jelentes\\_2019\\_Elso\\_Valtozat.pdf](https://joallamjelentes.uni-nke.hu/2019_pages_PDF/Jo_Allam_Jelentes_2019_Elso_Valtozat.pdf)>, p. 25.

<sup>112</sup> CSD, "Jó állam? Mi lenne, ha rossz lenne?", *index.hu*, 25 Oct. 2017, available at <[https://index.hu/gazdasag/2017/10/25/jo\\_allam\\_jelentes\\_2017/](https://index.hu/gazdasag/2017/10/25/jo_allam_jelentes_2017/)>.

a V4 comparative law institute with the goal of representing the specific regional view in important topics of public law and European integration.<sup>113</sup>

### Asylum law: Undermining mutual trust, blatant violations and perverse incentives

The following overview presents how the governing majority and the government of Hungary adopted measures that have undermined human rights and the Rule of Law in the field of asylum law, what reactions this triggered from the EU and how the leadership of Hungary responded to these. Asylum law is probably the clearest case where challenges to the measures of the post-2010 Hungarian regime have solid footing in EU law.<sup>114</sup> Accordingly, common procedural guarantees like infringement procedures and preliminary rulings are available to address Member State deviations. Article 78 TFEU creates a clear basis for “a common policy on asylum”, with detailed rules in secondary law, including Directives 2008/115/EC, 2013/32/EU and 2013/33/EU. The Charter of Fundamental Rights also recognizes the right to asylum (Article 18) and underlying protections (e.g. the right to life, Article 2 and the prohibition of torture, Article 4) as well as procedural safeguards that the Hungarian rules infringed upon (e.g. effective remedy, Article 47). The related case-law has been in large part developed as a response to Hungarian developments (see Table 2).

The case law shows that there has been constant engagement with violations of asylum law by Hungary through individual infringement procedures and preliminary rulings, but it also shows, together with the most recent move to further restrict access to asylum, the systemic nature of the violations that would call for systemic responses from EU institutions, including a systemic infringement procedure. The nature of the violations is undermining human rights and Rule of Law and guarantees as recognized under EU norms, falling under the scope covered by Article 2 TEU and, as a consequence, Article 7(2) and (3) TEU.

The case of asylum law allows us to see what EU reactions could achieve in case of well-defined European competencies: the overview illustrates the practice of faking compliance where blatant violations of EU law are combined with a rhetoric of compliance. It is hard to avoid the conclusion that EU law has so far proved to provide inadequate responses to bad faith actions even where legal competence is clearly established. The asylum case-law also underlines the importance of follow-up of judgments, and the imposition of lump sum penalties for not complying with CJEU decisions.

At the centre of policy changes since the beginning of the refugee crisis are the legislative changes that make it impossible to submit an asylum request upon entering the territory of Hungary.<sup>115</sup>

- A key rule in this respect is a 2015 amendment that allowed the government to designate Serbia a safe third country and reject applications from asylum seekers arriving through that country.

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<sup>113</sup> Inotai, Ciobanu and Sirotnikova, “Jury’s Out on V4 Comparative Law Institute”, *Balkan Insight*, 26 Nov. 2020, available at <<https://balkaninsight.com/2020/11/26/jurys-out-on-v4-comparative-law-institute/>>.

<sup>114</sup> The relevant Hungarian law is subject to European *acquis* including the Schengen norms after Hungary entered the Schengen zone in 2007. EU law encompasses a wide area of immigration and asylum law, incorporating also the obligations under international law, most importantly the Geneva Conventions including the expansion of the geographical scope ratified in 1989. Asylum law is an area with a wide international attention from bodies like the UNHCR and the UN Working Group on Arbitrary Detention; Council of Europe bodies including the ECtHR, the Venice Commission, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; or the OSCE ODIHR.

<sup>115</sup> The overview is necessarily selective and does not consider all aspects of the post-2015 changes in asylum law.

- The other foundational element of the post-2015 regime was the creation of the transit zones in 2015. The operation of these zones raised a good number of compliance issues, as we will see, the clear goal was again to cut the number (ultimately: eliminate the possibility) of asylum requests filed at the Southern border of Hungary.
- As part of the effort to direct all potential applicants to transit zones or to avoid Hungary altogether, a fence was built along the Southern border, irregular entry was criminalized, and a policy of pushbacks was established.
- The policy of deterrence was completed by reports of violence and the lack of food for those held in the transit zones in many cases.
- It should be noted that in many cases information is not available due to lack of oversight, independent experts have been denied entering facilities in a number of cases,<sup>116</sup> including a UN delegation.<sup>117</sup>

Just to provide some vivid illustrations of the problem, the fate of three Afghan families who were detained in the transit zones from January 2019, that UNHCR followed closely, could be mentioned. In May, two families were escorted back to the Serbian side of the border. UNHCR staff did not have access to the part of the transit zone where the families were held. The families complained that the adult member did not receive food for five days. The third family's removal was blocked by an injunction of the ECtHR.<sup>118</sup>

As Council of Europe Commissioner for Human Rights Dunja Mijatović put it, “[I]t is extremely difficult to access the refugee determination procedure in Hungary”, “applicants cannot access an effective remedy” and face “excessive use of violence by the police during forcible removals”; the Hungarian practice is “in violation of European and international asylum law”.<sup>119</sup>

The creation of closed transit zones while not providing food, only allowing in one person per day, and automatically rejecting all applicants arriving through Serbia rendered asylum protection meaningless in most cases. The establishment and maintenance of the transit zone was not a step towards better compliance with asylum law requirements but hollowing out the same, leading to an effective denial of asylum to the vast majority of (potential) applicants. Letting a family in could block entry for several days.

European forums had to step in at various points to try to remedy violations and, ultimately, by 2020, every element of the regime proved to be in violation of EU law.

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<sup>116</sup> Hungarian Helsinki Committee, *Country Report: Hungary - 2016 Update - Aida Asylum Information Database* (HHC, 2017), available at [https://www.asylumineurope.org/sites/default/files/report-download/aida\\_hu\\_2016update.pdf](https://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2016update.pdf), p. 11.

<sup>117</sup> UN human rights experts suspend Hungary visit after access denied, Press Release, UNIS/MA/237, 15 Nov. 2018, available at <http://www.unis.unvienna.org/unis/en/pressrels/2018/unisma237.html>.

<sup>118</sup> UNHCR, “Hungary’s Coerced Removal of Afghan Families Deeply Shocking,” UNHCR Press Release, 8 May 2019, available at <https://www.unhcr.org/news/press/2019/5/5cd3167a4/hungarys-coerced-removal-afghan-families-deeply-shocking.html>.

<sup>119</sup> Dunja Mijatović, “Commissioner for Human Rights of the Council of Europe - Report Following Her Visit to Hungary from 4 to 8 February 2019”, Strasbourg: Council of Europe, May 21, 2019, available at <https://rm.coe.int/report-on-the-visit-to-hungary-from-4-to-8-february-2019-by-dunja-mija/1680942f0d> > p. 4.

**Table 2: EU law violations in Hungarian asylum law**

EU law	Subject	Hungarian law	Document
Art. 46(3) of Directive 2013/32/EU + CFR Art. 47	effective remedy where international protection is warranted	not allowing courts to change authority decisions, only to annul decisions (against EU law, can be disapplied and new applications allowed)	<p>Judgment of the Court (First Chamber) of 19 March 2020 (request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság — Hungary) — PG v Bevándorlási és Menekültügyi Hivatal, Case C-406/18;</p> <p>Judgment of the Court (First Chamber) of 19 March 2020 (request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság — Hungary) — LH v Bevándorlási és Menekültügyi Hivatal, C 564/18;</p> <p>Judgment of the Court (Grand Chamber) of 29 July 2019 (Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal), Case C-556/17;</p> <p>Judgment of the Court (Grand Chamber) of 14 May 2020 (FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Cases C 924/19 PPU and C 925/19 PPU.</p>
Art. 13 of Directive 2008/115/EC + CFR Art. 47	effective judicial protection	rules excluding an appeal to courts (against EU law)	Judgment of the Court (Grand Chamber) of 14 May 2020 (FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Cases C 924/19 PPU and C 925/19 PPU.
Art. 33(2) of Directive 2013/32/EU	exhaustive list of grounds of inadmissibility	new ground: applicant arriving through a country where no persecution or risk of serious harm (against EU law)	<p>Judgment of the Court (First Chamber) of 19 March 2020 (request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság — Hungary) — LH v Bevándorlási és Menekültügyi Hivatal, C 564/18;</p> <p>Judgment of the Court (Grand Chamber) of 14 May 2020 (FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Cases C 924/19 PPU and C 925/19 PPU.</p> <p>See also Opinion of Advocate General Rantos delivered on 25 February 2021, C-821/19, Commission v Hungary, ECLI:EU:C:2021:143.</p>
CFR Art. 18	access to asylum	asylum application possible only in person at third country embassies of Hungary (against EU law)	European Commission, October infringements package: key decisions, 30 October 2020, <a href="https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_168">https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_168</a> ; reasoned opinion on 18/02/2021
Directive 2008/115, Directive 2013/33/EU, Art. 43 of Directive 2013/32	detention-related guarantees	keeping people in transit zones (CJEU: detention under EU law), over four weeks (against EU law)	Judgment of the Court (Grand Chamber) of 14 May 2020 (FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Cases C 924/19 PPU and C 925/19 PPU.

Arts. 8 and 9 of Directive 2013/33	detention-related guarantees	among others, no reasoned decision or appeal (against EU law)	Judgment of the Court (Grand Chamber) of 14 May 2020 (FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Cases C 924/19 PPU and C 925/19 PPU.
Art. 15 of Directive 2008/115	detention-related guarantees	among others, no reasoned decision or appeal (against EU law)	Judgment of the Court (Grand Chamber) of 14 May 2020 (FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Cases C 924/19 PPU and C 925/19 PPU.
Art. 16 of Directive 2008/115/EC, CFR Art. 4	conditions of detention	not providing food (against EU law)	European Commission, Hungary: Commission takes next step in the infringement procedure for non-provision of food in transit zones, Press Release, Brussels, 10 October 2019, <a href="https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5994">https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5994</a> ; reasoned opinion on 10/10/2019.
CFR Art. 47	effective judicial remedy against detention	no judicial remedy (direct application of relevant EU law provisions)	Judgment of the Court (Grand Chamber) of 14 May 2020 (FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Cases C 924/19 PPU and C 925/19 PPU.
Art. 26 of Directive 2013/33/EU and CFR Art. 47	right to financial allowance or housing and corresponding judicial remedy	no provision for this right and judicial enforcement (direct application of relevant EU law provisions)	Judgment of the Court (Grand Chamber) of 14 May 2020 (FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Cases C 924/19 PPU and C 925/19 PPU.
Arts. 5, 6(1), 12(1) and 13(1) of Directive 2008/115/EC  Arts. 6, 24(3), 43 and 46(5) of Directive 2013/32/EU	access to asylum	asylum applications can only be submitted in transit zones with limited access	Judgment of the Court (Grand Chamber) of 17 December 2020 (Commission v Hungary), Case C 808/18, ECLI:EU:C:2020:1029.  Followed up for non-implementation: European Commission, “Asylum: Commission calls on HUNGARY to implement the Court of Justice ruling in the area of procedures for granting international protection and return”, June infringements package: key decisions, 9 June 2021, <a href="https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743">https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743</a> .
Arts. 8, 9 and 11 of Directive 2013/33/EU			
Arts. 24(3) and 43 of Directive 2013/32/EU and Arts. 8, 9 and 11 of Directive 2013/33/EU	procedural guarantees for detention	detention in transit zones	Judgment of the Court (Grand Chamber) of 17 December 2020 (Commission v Hungary), Case C 808/18, ECLI:EU:C:2020:1029.  Followed up for non-implementation: European Commission, “Asylum: Commission calls on HUNGARY to implement the Court of Justice ruling in the area of procedures for granting international protection and return”, June infringements package: key decisions, 9 June 2021, <a href="https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743">https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743</a> .
Arts. 5, 6(1), 12(1) and 13(1) of Directive 2008/115/EC	procedural guarantees for removal	pushbacks (removal from Hungarian territory without	Judgment of the Court (Grand Chamber) of 17 December 2020 (Commission v Hungary), Case C 808/18, ECLI:EU:C:2020:1029.  Followed up for non-implementation: European Commission, “Asylum: Commission calls on HUNGARY to implement the Court of Justice



		procedural safeguards)	ruling in the area of procedures for granting international protection and return”, June infringements package: key decisions, 9 June 2021, <a href="https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743">https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743</a> .
Art. 46(5) of Directive 2013/32/EU	right to remain during remedy	non-suspension of removal upon appeal	Judgment of the Court (Grand Chamber) of 17 December 2020 (Commission v Hungary), Case C 808/18, ECLI:EU:C:2020:1029.  Followed up for non-implementation: European Commission, “Asylum: Commission calls on HUNGARY to implement the Court of Justice ruling in the area of procedures for granting international protection and return”, June infringements package: key decisions, 9 June 2021, <a href="https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743">https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743</a> .
Arts. 8(2), 12(1)(c), 22(1) of Directive 2013/32/EU and 10(4) of Directive 2013/33/EU	organizations providing advice and counselling should have effective access to and possibility to communicate with applicants	criminalizing a broad scope of activities as “aiding illegal migration”	Opinion of Advocate General Rantos delivered on 25 February 2021, C-821/19, Commission v Hungary, ECLI:EU:C:2021:143.
Art. 5 of Council Decision (EU) 2015/1523	relocation decision	non-implementation	Judgment of the Court (Third Chamber) of 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic, ECLI:EU:C:2020:257.

Source: Authors

### *Safe third country rule and transit zones*

The central piece of Hungarian asylum legislation is a 2015 amendment to the Asylum Act, allowing the government to designate safe third countries by decree. Under the earlier rule, courts made a substantive assessment, which resulted in sustained conclusions that Serbia could not be considered a safe third country.<sup>120</sup> Under the new rule, Serbia should be considered a safe third country by law, without the ability to prove the opposite before agencies and courts. A new rule resulted in automatic rejection of applications in case of arrival from a country where the applicant is not in danger. As virtually all asylum seekers have been arriving to Hungary through Serbia, this in itself made sure that no applicant arriving through the Balkan route gets a chance to qualify as worthy of protection.

A CJEU Grand Chamber judgment in May 2020 found all major elements of the Hungarian asylum legislation to be in violation of EU law,<sup>121</sup> including the rule allowing the automatic rejection of applications by asylum seekers arriving from countries where they do not face danger (most commonly, Serbia) is in violation of EU law.<sup>122</sup> In a different case, pending before the Court, it was the Commission that brought

<sup>120</sup> 2/2012 (XII.10) KMK. vélemény a biztonságos harmadik ország megítélésének egyes kérdéseiről, available at <<https://kuria-birosag.hu/hu/kollve/22012-xii10-kmk-velemeny-biztonsagos-harmadik-oroszag-megitelesenek-egyeb-kerdeseirol>>.

<sup>121</sup> Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, EU:C:2020:367.

<sup>122</sup> Case C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal*, EU:C:2020:218.

an action against Hungary requesting the CJEU to rule again on the third country exclusionary rule.<sup>123</sup> The assessment that this added ground of rejection is in violation of EU law is seconded in the opinion of Advocate General Rantos.<sup>124</sup>

The other foundational element of the post-2015 regime was the creation of the transit zones (amending Act CXL of 2015). The operation of these zones raised a good number of compliance issues, as we will see, the clear goal was again to cut the number of asylum requests filed at the Southern border of Hungary. In September 2015, two “transit zones” were created at the border, where entrance was limited, but once applicants entered, they were held in a closed environment that they could not leave. (From the point of view of Hungary, they could leave towards Serbia, where they came from, but that there was no legal possibility for that under Serbian law.) The number of people allowed to enter the zone was cut down to one per day (two for the two transit zones) by January 2018.

The central flaw of the transit zone model was that the terrain through which asylum seekers enter the transit zone (‘pre-transit zone’) is also Hungarian territory where all legal obligations of Hungary continue to apply, but where Hungary decided not to undertake its obligations. Some obligations failed to be discharged even within the transit zones. Despite continued calls from European bodies, most importantly, the European Court of Human Rights,<sup>125</sup> denying food remained a recurring practice. Once it was established that food needs to be provided to those held in the transit zones, a prominent government politician countered that the country does not have an obligation to provide food for tourists visiting the country, implying that the same standard should apply in the two cases.<sup>126</sup>

In 2020, the CJEU held in 2020 that being held in transit zones amounts to detention<sup>127</sup> that should be necessary, proportionate and subject to requirements of legal remedies.<sup>128</sup> The Court found the current practice to keep asylum seekers in the transit zone to be in violation of EU law and stated that its length should be limited to four weeks and the decision should be individualized with reasons stated.

Instead of remedying the situation in line with European standards, the government decided to close the transit zones altogether.<sup>129</sup> Prime Minister Orbán argued that this is to let “European bureaucrats” have their

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<sup>123</sup> The ECtHR also found violations of European standards. It found returns without individual assessment, based on declaring Serbia a safe third country, in violation of established standards, Art. 3 of ECHR in this case.

<sup>124</sup> Opinion of Advocate General Rantos, Case C-821/19, *Commission v Hungary*, EU:C:2021:143.

<sup>125</sup> The ECtHR was granting interim measures for the same violation in numerous cases, but the government regularly reverted the practice. Most recently, ECtHR, *R. R. and Others v. Hungary*, Appl. No. 36037/17, judgment of 2 March 2021, para 57.

<sup>126</sup> Magyar, “Gyerekzsivaj a magyarországi tranzitónánál - helyszíni riport Röszkéről,” *euronews*, 27 Nov. 2019, available at <<https://hu.euronews.com/2019/11/27/gyerekzsivaj-a-magyarorszag-t tranzitzonanal-helyszini-riport-roszkerol>>.

<sup>127</sup> This is often contrasted to the ECtHR holding in *Ilias and Ahmed v. Hungary* that it is not detention due to the fact that the applicants could leave the transit zones in the direction of Serbia. The Strasbourg court nevertheless found a violation on other grounds. ECtHR, *Ilias and Ahmed v. Hungary* [GC], Appl. No. 47287/15, judgment of 21 November 2019. More recently, the Strasbourg court found that being held in the transit zone did amount to illegal detention. ECtHR, *R. R. and Others v. Hungary*, Appl. No. 36037/17, judgment of 2 March 2021, para 87–92. The ECtHR also halted in some cases transfers to the transit zones: halted by the ECtHR, available at <<https://www.helsinki.hu/a-strasbourg-birosag-leallitotta-nyolc-gyerek-es-egy-terhes-no-atszallitas-at-a-tranzitzonaba>>.

<sup>128</sup> Joined Cases, C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, EU:C:2020:367.

<sup>129</sup> See the motivation of legislative amendment on page 221 here: <<https://www.parlament.hu/irom41/10748/10748.pdf>>.

way.<sup>130</sup> The move brought a considerable improvement in the case of those already in the zone (they were transferred to accommodation from where the asylum seekers are able to go out and come back and benefit from more meaningful procedural guarantees), but made it even harder for others to seek asylum in Hungary. New applications can only be filed at embassies (outside Hungary) and asylum seekers have to wait for the end of the procedures there. This means that other countries (like Serbia) will be responsible for the applicants. While humanitarian visas and applications at embassies are accepted practice, not allowing asylum seekers to request protection at the border, within Hungary goes against international commitments and EU norms and is likely to trigger a new round of compliance procedures (which can take years while the practice can stand). The UNHCR argues that the law, adopted in response to the CJEU ruling, violates existing standards, most importantly the access to territory and non-refoulement.<sup>131</sup>

### *Pushbacks*

As part of the effort to direct all potential applicants to transit zones or to avoid Hungary, a fence was built along the Southern border, irregular entry was criminalized, and a policy of pushbacks was established.<sup>132</sup> The latter first allowed the pushbacks in the case of irregular entering within 8 km from the Croatian and Serbian borders (amendment of July 2016), which was later expanded to the entire territory(!) of Hungary (amendment of March 2017).

NGO reports show that the complete lack of documentation and remedies resulted in many cases in violence by state authorities taking place in what appears to be a legal vacuum. FRA reported that

*“local vigilante groups participated in pushback incidents against asylum seekers along the Serbian-Hungarian border during the summer of 2016. NGOs registered multiple cases of violence in which asylum seekers and refugees who tried to enter Hungary – including children and women – were beaten, threatened and exposed to humiliating practices by these paramilitary groups before being pushed back to Serbia.”<sup>133</sup>*

In an infringement case decided at the end of 2020, the CJEU found the policy of pushbacks in violation of EU law.<sup>134</sup> The Court agreed with the Commission on most points, including the undue limitations on access to asylum (only limited-access transit zones), the inadequate legal guarantees in assessing asylum applications, the automatic detention of applicants and the pushback provisions. According to NGO reporting, the practice of pushbacks has continued since.<sup>135</sup> The Commission has been following up on the

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<sup>130</sup> Nagy, “A – pyrrhic? – victory concerning detention in transit zones and procedural rights: FMS & FMZ and the legislation adopted by Hungary in its wake”, *EU Immigration and Asylum Law and Policy*, 15 June 2020, available at <<http://eumigrationlawblog.eu/a-pyrrhic-victory-concerning-detention-in-transit-zones-and-procedural-rights-fms-fmz-and-the-legislation-adopted-by-hungary-in-its-wake/>>.

<sup>131</sup> UNHCR Position, available at <<https://www.refworld.org/docid/5ef5c0614.html%22%20/h>>.

<sup>132</sup> For a detailed overview with concrete accounts, see Border Violence Monitoring Network, *Black Book of Pushbacks*, Volume I, available at <<https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:3f809f15-bada-4d3f-adab-f14d9489275a>>, pp. 310–404.

<sup>133</sup> Fundamental Rights Agency, *Current Migration Situation in the EU: Hate Crime* (European Union Agency for Fundamental Rights, 2016), available at <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-november-monthly-focus-hate-crime\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-november-monthly-focus-hate-crime_en.pdf)>, pp. 7-8.

<sup>134</sup> Case C-808/18, *Commission v Hungary*, EU:C:2020:1029.

<sup>135</sup> Letter to Mr. Fabrice Leggeri, Executive Director of Frontex, 7 Jan. 2021, available at <[https://www.helsinki.hu/wp-content/uploads/HHC\\_Frontex\\_07012021.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Frontex_07012021.pdf)>.

non-implementation of the judgment.<sup>136</sup> The experiences with bad faith non-compliance underline the importance of relying on more speedy remedies like interim measures should be a more common part of EU action.

Asylum law also illustrates how broader Rule of Law issues translate into violations of specific areas of EU law. Domestic courts could invalidate but could not alter the decisions of the asylum authority, leading to endless back-and-forth in case the authority was unwilling to grant asylum. The CJEU stepped in ultimately to rectify the inability of courts to directly overrule and change the decisions of the asylum authority.<sup>137</sup>

#### *Related legislation against civil society actors*

As part of the migration-related campaign, NGOs receiving funding from abroad, including organizations working on asylum cases, became subject to requirements akin to the Russian “foreign agents’ law” and were obliged to report that they are “foreign funded” entities or face penalties. The law was found incompatible with EU law as discriminatory and violating rights under the Charter of Fundamental Rights and the free movement of capital.<sup>138</sup> At the time of writing (March 2021), the government failed to act upon the CJEU judgment.

A separate measure criminalized assistance to “illegal migration”, which threatens advocates and activists who help asylum seekers whose applications are rejected under the stringent national rules. According to the published opinion of Advocate General Rantos (and the Commission), this also constitutes a breach of EU law.<sup>139</sup>

#### *The broader context*

Looking at asylum law is also important for the wider context of Rule of Law backsliding: migration has become the defining framework for government policies and rhetoric for the past years, e.g. legitimizing criticism of the EU, the illegitimacy of the opposition, NGOs, academics and independent media.<sup>140</sup> This salience might in part explain the failure to make Hungary compliant with European standards in this field.

Relying on a securitizing framing of migration, successfully portrayed as an existential threat to Hungary, allowed the governing party to turn around the trend of losing public support. Where the voters failed to give popular mandate, the domestication of independent bodies allowed the government to have its way. While referendum initiatives associated with the opposition have been rejected, often with dubious arguments, both by the National Electoral Committee and the Constitutional Court, these same bodies green lighted the referendum on the European asylum quota. The question to be answered by voters<sup>141</sup> was

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<sup>136</sup> European Commission, ‘Asylum: Commission calls on HUNGARY to implement the Court of Justice ruling in the area of procedures for granting international protection and return’, June infringements package: key decisions, 9 June 2021, available at <[https://ec.europa.eu/commission/presscorner/detail/EN/INF\\_21\\_2743](https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743)>.

<sup>137</sup> Case C-556/17, *Alekszj Torubarov v Bevándorlási és Menekültügyi Hivatal*, EU:C:2019:626; Case C-406/18, *PG v Bevándorlási és Menekültügyi Hivatal*, EU:C:2020:216.

<sup>138</sup> Case C-78/18, *Commission v Hungary*, EU:C:2020:476.

<sup>139</sup> Opinion of Advocate General Rantos, Case C-821/19, *Commission v Hungary*, EU:C:2021:143.

<sup>140</sup> Majtényi, Kopper, and Susánszky, “Constitutional Othering, Ambiguity and Subjective Risks of Mobilization in Hungary: Examples from the Migration Crisis,” 26:2 *Democratization*, 173–189.

<sup>141</sup> “Do you want the European Union to be able to mandate the resettlement of non-Hungarian citizens to Hungary without the approval of the National Assembly?”

unconstitutional on at least three grounds.<sup>142</sup> The initiative failed to pass as a result of the low turnout. The government also tried to pass an amendment to the Fundamental Law further entrenching the curtailment of asylum. As the governing party at the time lost its parliamentary supermajority required to pass amendments to the Fundamental Law at an interim election, this would have required some opposition votes. After they failed to secure these votes and the amendment failed in the Parliament, the Constitutional Court, at the initiative of the ombudsperson, effectively read the proposed amendment into the Fundamental Law.<sup>143</sup> (For more on this, see Paper IV.) The case serves as an illustration for how the denial of human rights and the Rule of Law in one field (asylum) gets entangled with violations of democratic and Rule of Law requirements.

The topic also allowed continued reliance on the emergency context from well before the pandemic (see Paper VII). Immigration-related emergency was declared repeatedly,<sup>144</sup> expanding it to the entire territory of the country,<sup>145</sup> without complying with the requirements of the underlying legislative act.<sup>146</sup>

Hungary relied on these domestic developments to reject the asylum quota regime on the EU level. Right after the 2018 elections, the amendment to the Fundamental Law passed and it is now an obligation of all state organs to defend the “national identity” of the country (Article R-4). This was meant as EU-compatible arguments for the full rejection of the quota system and related obligations. The national identity of Member States is, after all, recognized under Article 4-2 of the Treaty on European Union, even if that is hardly a good argument for overriding Rule of Law and human rights commitments (see Paper I).

Hungary also tried to argue that it in fact did more than its fair share of asylum duties by protecting the common EU border. The argument was meant to shield Hungary from all obligations of asylum transfers. The Commission responded by making clear that no à la carte solidarity is possible, members should comply with EU law requirements in their entirety.<sup>147</sup>

A seemingly contradicting argument appeared in 2018. Responding to a question about Hungary’s obligation to take over “about 1300 migrants” under the EU quota, a Hungarian deputy state secretary argued, in an interview with a Maltese journal, that Hungary took about 1300 refugees.<sup>148</sup>

The rhetoric of compliance and domestic entrenchment did little to shield Hungarian asylum law from European scrutiny. The Commission brought action against Hungary, Poland and the Czech Republic for failing to fulfil their obligations under the relocation decision. The CJEU agreed with the Commission and

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<sup>142</sup> Szente, “The Controversial Anti-Migrant Referendum in Hungary Is Invalid,” *Constitution-Making and Constitutional Change*, 11 Oct. 2016, available at <<https://constitutional-change.com/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/>>.

<sup>143</sup> Hungarian Constitutional Court, 22/2016. (XII. 5.) AB decision.

<sup>144</sup> E.g. Govt. decrees 270/2015. (IX. 18.), 41/2016. (III. 9.) (expanding the territorial scope as well), 272/2016. (IX. 5.), 36/2017. (III. 6.), 247/2017. (VIII. 31.), 21/2018. (II. 16.), 159/2018. (IX. 3.).

<sup>145</sup> Already in the second instance of declaring the emergency, see Art. 2 of Govt. decree no 41/2016. (III. 9.).

<sup>146</sup> Magyar Helsinki Bizottság, “Álsághelyzet ez, nem válsághelyzet: saját törvényét is megsérti a kormány,” *Magyar Helsinki Bizottság*, 5 Sept. 2019, available at <<https://www.helsinki.hu/alsaghelyzet-ez-nem-valsaghelyzet-sajat-torvenyet-is-megserti-a-kormany/>>. Tóth, “...A hazájukat elhagyni kényszerülők emberi jogainak és alapvető szabadságainak védelmére” 19(4) *Fundamentum* (2015), pp 61–66; Magyar Helsinki Bizottság, “A Menekülők Kisöporve, a Válsághelyzet Mégis Megmaradt”, *Helsinki Figyelő*, 27 Nov. 2015, available at <[http://helsinkifigyelo.blog.hu/2015/11/27/a\\_menekuloket\\_kisoportek\\_a\\_szuksegallapot\\_megis\\_megmaradt](http://helsinkifigyelo.blog.hu/2015/11/27/a_menekuloket_kisoportek_a_szuksegallapot_megis_megmaradt)>.

<sup>147</sup> Jean-Claude Juncker, “Letter to Prime Minister Viktor Orbán,” 5 Sept. 2017, available at <<https://images.politico.eu/wp-content/uploads/2017/09/JunckerOrbansignedletter.pdf>>.

<sup>148</sup> Micallef, “Hungarian Junior Minister - ‘We Do Not Want to Be the EU’s Black Sheep,’” *Times of Malta*, 10 Jan. 2018, available at <<https://timesofmalta.com/articles/view/hungarian-junior-minister-we-do-not-want-to-be-the-eus-black-sheep.667572>>.

declared the three countries to be in violation of EU law concerning relocations.<sup>149</sup> In the pending Article 7 procedure, serious violations of asylum law are among the issues listed in the proposal of the European Parliament to the Council.<sup>150</sup>

### *Evaluating the effectiveness of European responses in the asylum field*

In response to the finding of EU violations, Hungary moved to further restrict access to asylum, instead of bringing its policies in line with European and international commitments. The border control agency of the EU, FRONTEX decided to leave Hungary as a response to violations.<sup>151</sup>

EU measures to enforce compliance with basic asylum requirements proved to be ineffective, showing a broader trend of inadequate responses against bad faith Member State behaviour.

### **Preliminary rulings**

**Preliminary references and rulings as provided for in Article 267 TFEU are not specifically designed to target EU law violations, but may also attach consequences to Rule of Law backsliding.** They play an increasing role in Rule of Law cases. Preliminary ruling procedures are there to interpret EU law, but on the way, they may prevent consequences of Rule of Law backsliding or fundamental rights violations from spreading. Whereas the CJEU lays down important principles in the form of preliminary rulings, they are not the sharpest tools of Rule of Law enforcement. Rather, they tend to give decentralised answers to an EU-wide problem that goes beyond the lack of judicial independence and judicial cooperation. **The weak side of the procedure from a Rule of Law perspective is that it usually leaves the final assessment to national authorities that may not be in a position to adequately weigh the gravity of systemic Rule of Law problems.** This is so especially in cases when the very problem to be addressed is judicial independence.<sup>152</sup>

### **Judicial independence, disciplinary proceedings**

In *A.K.*<sup>153</sup> the Chamber of Labour and Social Security of the Polish Supreme Court questioned the independence of the Disciplinary Chamber of the Polish Supreme Court and that of the National Council of the Judiciary. The CJEU left it to the referring court to answer its own questions, but it provided important elements of interpretation. Relying on the CJEU's judgment, the referring court held the challenged judicial

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<sup>149</sup> Joined Cases C-715/17, C-718/17 and C-719/17, *European Commission v Republic of Poland and Others*, EU:C:2020:257.

<sup>150</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), available at <[https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html)>.

<sup>151</sup> Barigazzi, "EU border agency suspends operations in Hungary", *Politico*, 27 Jan. 2021, available at <<https://www.politico.eu/article/eu-border-agency-frontex-suspends-operations-in-hungary-migration/>>.

<sup>152</sup> Case C-216/18, *PPU - Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586.

<sup>153</sup> Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982.

bodies not to be independent in light of EU law, Article 6 ECHR and Article 45(1) of the Polish Constitution.<sup>154</sup>

In both *Atanas Ognyanovon*<sup>155</sup> and *RH*<sup>156</sup> the CJEU reacted forcefully against national measures that might prevent national courts from making use of their rights, and sometimes obligation to refer preliminary references to the CJEU.

Disciplinary proceedings started against a judge just because he or she submitted a preliminary reference to the CJEU, are deemed as having a chilling effect and likely to discourage domestic courts from exercising their rights under the Treaties. *Miasto Łowicz and Prokurator Generalny* were such important cases, even if in these controversies the CJ declined to go into the merits and declared the reference to be inadmissible.<sup>157</sup> *Miasto Łowicz and Prokurator Generalny* were discussed jointly by the CJEU. In both cases the state was a party, and the judges feared to be subjected to disciplinary proceedings if they were to decide against the state party. So they asked the CJEU to assess Polish law in light of EU norms including previous CJEU case-law on judicial independence. The CJEU declared the requests inadmissible, for the lack of necessity. According to the judgment, the questions referred to the CJEU are of a general nature, and do not concern an interpretation of EU law which would be needed for the resolution of the original disputes.

But in an important obiter dictum the CJEU stated that “[p]rovisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot [...] be permitted [since] the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference [...] is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions” in relation to preliminary references.<sup>158</sup>

In Case C-564/19 *IS* the legal issue is similar to the one in *Miasto Łowicz*<sup>159</sup> *IS* resulted from criminal proceeding suspended by a Hungarian judge of the Pest Central District Court in a case where a Swedish national was charged with criminal offences. The judge first asked whether the accused was denied the use of his first language, Swedish during the proceedings, in accordance with Directive 2010/64/EU, considering that there is no register of independent interpreters and translators in Hungary, as required by the Directive. Second, the judge asked whether the practice of the then President of the National Judicial Office of sidestepping the rules for applying for court leadership positions, disregarding the opinion of the judges, and filling positions through temporary mandates, was in line with the Rule of Law and judicial independence as guaranteed by the Treaties. Third, the court asked whether the facts that judges’ salaries have not changed in the last 15 years; that they earn less than prosecutors of equivalent rank; and that court presidents have the discretionary power to give bonuses, was in line with judicial independence.<sup>160</sup>

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<sup>154</sup> See Supreme Court of Poland, judgment of 5 December 2019, case III Po 7/18, Resolution of 8 January 2020, case I NOZP 3/19.

<sup>155</sup> *ibid.*, para 25.

<sup>156</sup> Case C-8/19, PPU - *RH*, EU:C:2019:110.

<sup>157</sup> Joined Cases C-558/18 and C-563/18, *Miasto Łowicz (Régime disciplinaire concernant les magistrats)*, EU:C:2020:234.

<sup>158</sup> Joined Cases C-558/18 and C-563/18, *Miasto Łowicz (Régime disciplinaire concernant les magistrats)*, EU:C:2020:234, para 57-58.

<sup>159</sup> Case C-564/19, *IS (Illégalité de l’ordonnance de renvoi)*, EU:C:2021:949.

<sup>160</sup> For detailed analyses see Szabó, “A Hungarian Judge Seeks Protection from the CJEU – Part I”, *VerfBlog*, 28 July 2019, available at <<https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/>>; Vadász,

The Prosecutor General exercised his right to initiate a review of the order for the preliminary reference in front of the Hungarian Supreme Court (in Hungarian: Kúria),<sup>161</sup> i.e. the initial three questions discussed above.<sup>162</sup> The Prosecutor General argued that the questions are irrelevant, since the quality of translation did not come up in the case at hand, while the second and third questions are not about the interpretation of EU law, furthermore they are too remote from the case, and do not influence its outcome.

The Kúria in its judgement agreed with the Prosecutor General without reservations,<sup>163</sup> and determined that the challenged decision was illegal.<sup>164</sup> The Acting President of the Metropolitan Court, expressly because the reference for a preliminary ruling had been rendered illegal by the Kúria, initiated a disciplinary proceeding against the judge referring the case to the CJEU.<sup>165</sup>

Two more questions were added to the request in light of the above circumstances, Judge Vasvári asking whether the declaration of illegality of the original preliminary reference and the disciplinary proceeding were in line with EU law, and whether he would have to withdraw the reference, or simply disregard whatever the CJEU has to say on the matter in light of the Kúria's declaration of illegality.

On 23 November 2021 the Grand Chamber of the CJEU delivered its judgment.<sup>166</sup> The CJEU made some important statements with regard to the first question on criminal procedural law, but let us focus on the judicial independence related questions now.

With regard to the Kúria decision, the CJEU reiterated that domestic courts have a wide discretion to make use of the preliminary reference mechanism. This does not mean that an appeal against a preliminary reference would per se be contrary to EU law.<sup>167</sup> However, the Kúria's reasoning that the questions were not relevant and necessary for the resolution of the dispute in the original criminal proceedings, came very close to the determination of inadmissibility, which is an issue to be decided by the CJEU exclusively. But the CJEU went further. For the future, the declaration might have a chilling effect, which again restricts the effective judicial protection of the rights which individuals enjoy as per EU law. As a consequence, the referring judge must disregard the illegality decision by the Kúria, without waiting for any authority to withdraw or invalidate that decision.

With regard to the disciplinary proceeding against Judge Vasvári, the Court reiterated its earlier case-law, according to which launching disciplinary proceedings against a national judge for making a reference for a preliminary ruling contradicts EU law. Most importantly, the disciplinary procedure does not need to come to an end to produce chilling effects: "(T)he mere prospect of being the subject of disciplinary

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"A Hungarian Judge Seeks Protection from the CJEU – Part II", *VerfBlog*, 7 Aug. 2019, available at <<https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-ii/>>.

<sup>161</sup> Articles 666-669, Act XC of 2017 on Criminal Procedures.

<sup>162</sup> Press release in original language is available at <[http://ugveszseg.hu/legfobb-ugyeszi-jogorvoslati-inditvany-a-keruleti-birosag-vegzevel-szemben/](http://ugveszseg.hu/legfobb-ugyeszi-jogorvoslati-inditvany-a-keruleti-birosag-vegzevel-szemben/http://ugveszseg.hu/legfobb-ugyeszi-jogorvoslati-inditvany-a-keruleti-birosag-vegzevel-szemben/)>.

<sup>163</sup> Judgment No. Bt.838/2019. Press release in original language is available at <[https://kuria-birosag.hu/hu/sajto/buntetoeljaras-menetenek-megakaszitasa-jogszeru-es-alapos-erdemi-dontes-meghozatalanak?fbclid=IwAR1DEofrVZp2vgufIZ-AB\\_l2p9AKcUW\\_h2cHGRHeShkmv6tO1OmMWafIBM](https://kuria-birosag.hu/hu/sajto/buntetoeljaras-menetenek-megakaszitasa-jogszeru-es-alapos-erdemi-dontes-meghozatalanak?fbclid=IwAR1DEofrVZp2vgufIZ-AB_l2p9AKcUW_h2cHGRHeShkmv6tO1OmMWafIBM)>.

<sup>164</sup> Article 669(3), Act XC of 2017 on Criminal Procedures.

<sup>165</sup> File number: 2019.II.IV.K.15/2. In the meantime, the disciplinary procedure was withdrawn with reference to the "interest of the judicial organization".

<sup>166</sup> Case C-564/19, *IS (Illégalité de l'ordonnance de renvoi)*, EU:C:2021:949.

<sup>167</sup> See the request for a preliminary ruling from the Szegedi Ítéltábla (Hungary). Case C-210/06, *CARTESIO Oktató és Szolgáltató bt.*, EU:C:2008:723.



proceedings” is undermining the effective use of Article 267 TFEU. (para. 90) Therefore, the CJEU held that EU law precludes disciplinary proceedings from being brought against a judge on the ground that he filed a request for a preliminary ruling to the CJEU.

The referring court’s original questions in relation to the overall health status of the Hungarian judiciary were declared inadmissible by the CJEU, on the ground that there was not a strong enough connecting factor between the case pending before it and the interpretation of EU law it asked for.<sup>168</sup>

### Mutual trust, mutual recognition

There is a second set of cases where preliminary rulings play a vital role for the Rule of Law, or where the CJEU was invited by national courts at least tries to prevent the spreading of consequences from Rule of Law backsliding to other Member States. In the past years we have witnessed several cases where the CJEU clarified the consequences of the failure to protect the values enshrined in Article 2 TEU in the issuing state, in the mutual recognition domain. These cases are initiated by the executing courts, that are worried to become complicit in the proliferation of human rights abuses in case they recognise judgments with a substandard human rights regime or systemic Rule of Law problems, such as judicial capture that may lead to violations of the right to a fair trial. Both issues are relevant for Hungary, therefore they will be discussed in conjunction.

As formulated in European Arrest Warrant cases, namely in *Aranyosi and Căldăraru*<sup>169</sup> with regard to prison conditions as a possible reason to halt surrenders, and later reaffirmed in *LM*<sup>170</sup> and *Openbaar Ministerie*<sup>171</sup> with regard to deficiencies in the justice system, general suspension of mutual recognition is allowed exclusively when a Member State has been sanctioned in the form of an Article 7 TEU procedure. But as described above, this is rather just a theoretical possibility. Article 7(2)-(3) has never been started in EU history. Alternatively, mutual recognition can be suspended in individual cases, where a two-prong-test is satisfied: first, the executing judicial authority must assess whether the issuing state suffers from general deficiencies. Second, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the person concerned by a European Arrest Warrant, will be exposed, to a real risk of a human rights violation.<sup>172</sup> The latter part of the test is difficult to satisfy: proving individual concern is extremely burdensome for suspects and convicted persons.<sup>173</sup> As a result, there have been hardly any cases where instruments based on mutual trust have been halted by national courts. Not even the original case in *LM*.<sup>174</sup>

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<sup>168</sup> For a thorough assessment of the cases see Bárd, “In courts we trust, or should we? Preliminary rulings and judicial independence”, *European Law Journal*, 2022, forthcoming.

<sup>169</sup> Joined Cases C-404/15 and C-659/15, PPU - *Aranyosi and Căldăraru*, EU:C:2016:198, para 81.

<sup>170</sup> Case C-216/18, PPU - *LM Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, para 70.

<sup>171</sup> Case C-354/20, PPU - *Openbaar Ministerie (Indépendance de l'autorité judiciaire 'émission) L and P*, EU:C:2020:1033, para 52.

<sup>172</sup> See van Ballegooij and Bárd, “Mutual recognition and individual rights, Did the court get it right?”, 7(4) *New Journal of European Criminal Law* (2016) pp. 439-464; Bárd and van Ballegooij, “Judicial independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v. LM*”, 9(3) *New Journal of European Criminal Law* (2018), pp. 353–365.

<sup>173</sup> *ibid.*

<sup>174</sup> *Minister for Justice v Celmer (No 5)* [2018] IEHC 639, 19 November 2018.

As a consequence, national courts are opposing the above rulings, and thus jeopardize the principle of primacy for the sake of delivering judgments conscious of human rights.<sup>175</sup>

The *LM*-test's compatibility with the ECHR is also doubtful. One may wonder whether such a strict insistence on mutual recognition to the detriment of Article 2 TEU values was in harmony with Strasbourg case-law, especially the presumption of equivalent protection formulated in the *Bosphorus* case, which is rebuttable in case of a manifest deficiency can be detected, and where the ECtHR discussed the limits of mutual recognition from the viewpoint of the ECHR.<sup>176</sup>

## The CVM

The **Cooperation and Verification Mechanism (CVM)** for Bulgaria and Romania was created for accelerating and enabling the two Member States' accession. The CVM has its legal basis in Articles 37 and 38 of the Act of Accession of Bulgaria and Romania, and enables the Commission to adopt measures to monitor and ensure implementation of commitments undertaken during the accession negotiations and to rectify identified shortcomings.<sup>177</sup> The CVM suffers from various weak points, including lack of equality of the Member States, lack of effectiveness and enforceability. For the future of the Rule of Law in Hungary, the CVM is only relevant as far as it contributes to the progressive case-law of the CJEU on judicial independence.<sup>178</sup> For the future it could be incorporated into other Rule of Law monitoring tools, such as for example the Commission's Annual Rule of Law Report.<sup>179</sup>

## The Common Provisions Regulation

Several studies show at the power of the purse vis-à-vis rulers that engage in Rule of Law backsliding. As it has been shown by Israel Butler,<sup>180</sup> and Daniel Kelemen and Kim Lane Scheppele<sup>181</sup> – even without the Commission's recent “generalised deficiencies” proposal – in line with Article 142(1)(A) of the Regulation

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<sup>175</sup> District Court of Appeals of Karlsruhe, Ausl 301 AR 15/19 of 17 Feb. 2020. For a summary of national implementation of the judicial tests see Bárd and van Ballegoij, “The effect of CJEU case law concerning the rule of law and mutual trust on national systems” in Mitsilegas, di Martino and Mancano (Eds.), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (Hart, 2019), at 455; Bárd and Morijn, “Domestic courts pushing for a workable test to protect the rule of law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM rulings (Part II)”, *VerfBlog*, 19 April 2020, available at <<https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/>>.

<sup>176</sup> Cf. ECtHR, *Avotins v. Latvia*, Appl. No. 17502/07, judgment of 23 May 2016; ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], Appl. No. 45036/98, judgment of 30 June 2005, para 160-65.

<sup>177</sup> Vassileva, “Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism”, 26(3) *European Public Law*, (2020), 741–768.

<sup>178</sup> Cf. Joined Cases C-83/19., C-127/19., C-195/19., C-291/19., C-355/19. és C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*, EU:C:2021:393.

<sup>179</sup> Pech and Bárd, *The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values* (Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, 2022), available at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL\\_STU\(2022\)727551\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL_STU(2022)727551_EN.pdf)>.

<sup>180</sup> Butler, *Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs*, (Civil Liberties Union for Europe, 2018), available at <<https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3IdqCT-eB5iM9/view>>.

<sup>181</sup> Kelemen and Scheppele, “How to Stop Funding Autocracy in the EU”, *VerfBlog*, 10 Sept. 2018, available at <<https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>>.

(EU) No 1303/2013 (**Common Provisions Regulation, CPR**), the Commission could suspend European Structural and Investment Funds (ESIFs) where a Member State does not uphold the Rule of Law.

Judicial capture and lack of functional independence of the prosecutor's offices as described above in relation to potential infringement procedures, could provide as a basis for suspending ESIFs to Hungary.

### The Conditionality Regulation

Instead of making better use of the above tool,<sup>182</sup> European institutions came up with a general Rule of Law conditionality. On 3 May 2018 the Commission put forward the proposal for a **Regulation on the protection of the Union's budget** in case of generalized Rule of Law deficiencies in the Member States.<sup>183</sup> According to the proposal, should the Commission find in one of the Member States generalized deficiencies as regards the Rule of Law, it may suspend or reduce payments to that country from the EU budget and may prohibit to enter into new legal commitments. According to the original Commission proposal, a Commission recommendation for the suspension of a state's funds on Rule of Law grounds would have gone into effect unless the Council rejected the Commission's decision by a qualified majority (this is so-called reverse qualified majority). In April 2019 the European Parliament adopted its first-reading legislative resolution on the proposal, including a new article defining what constitutes generalized Rule of Law deficiencies that might affect the sound financial management or the protection of the financial interests of the EU.<sup>184</sup> These include **attacks on judicial independence, arbitrary and unlawful decisions by public authorities remaining without consequences, limiting the availability and effectiveness of legal remedies, endangering the administrative capacity of a Member State to respect its EU obligations, measures that weaken lawyer-client privilege**. The European Council on 20 July 2020 shifted the focus and underlined the importance of the protection of the Union's financial interests in conjunction with the Rule of Law.<sup>185</sup> The German Presidency watered down the proposal, and the new text was discussed in the Council on 30 September 2020 reflecting the emphasis on financial interests of the EU: Rule of Law breaches will be sanctioned if they affect or seriously risk affecting the budget in a sufficiently direct way. Instead of the original plans of a reverse qualified majority to block the Commission, in the revised version a qualified majority in the Council must support the Commission's decision for it to go into effect. In other words, in the original proposal a supermajority was needed to block the Commission's decision, whereas now a minority can block the decision.

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<sup>182</sup> With regard to the "promotion of economically and environmentally sustainable investments for the waste sector, especially through the elaboration of waste management plans in accordance with Directive 2008/98/EC on waste and the waste hierarchy", the European Commission notified the need to apply Regulation (EU) No. 1303/2013 and the suspension of Cohesion Funds. See Government of Romania, *Fiscal and Budgetary Strategy for the Period of 2019-2021*, available at <[https://www.mfinante.gov.ro/documents/35673/150233/SFB2019-2021en\\_05062019.pdf](https://www.mfinante.gov.ro/documents/35673/150233/SFB2019-2021en_05062019.pdf)>, p. 146. See also the European Parliament resolution of 19 June 2020 on the reopening of the investigation against the Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest (2019/2987(RSP)).

<sup>183</sup> Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. COM(2018)0324 – C8-0178/2018 – 2018/0136(COD).

<sup>184</sup> European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States COM(2018)0324 – C8-0178/2018 – 2018/0136(COD).

<sup>185</sup> Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, EUCO 10/20, 21 July 2020.

Hungary and Poland, the most likely candidates to be affected by the new rules, in a response blocked the approval of the EU's seven-year budget, the Multiannual Financial Framework (MFF) and the Next Generation EU COVID-19 recovery fund (NGEU).<sup>186</sup> The NGEU could have been recreated under enhanced cooperation or by going outside EU law – even if with great difficulties<sup>187</sup> –, but there is no way to circumvent the unanimity requirement for the MFF. As a compromise, **the final text of Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget was agreed to be accompanied by guidelines on the way the Commission should apply the Regulation. The European Council also agreed to finalise these guidelines once an action of annulment under Article 263 TFEU – which Hungary and Poland initiated – was decided upon by the CJEU.** As Alemanno and Chamon argue **this “shows an unprecedented disregard for the Rule of Law.”**<sup>188</sup>

**First, a Regulation is binding and effective as it stands irrespective of any further interpretative measures. The text of the Regulation does not mention any guidelines whatsoever.** Also the nature of the agreement on the guidelines is dubious. **In line with Article 15(1) TEU European Council does not have law-making powers, therefore the guidelines can be interpreted as a step taken *ultra vires*. The European Council cannot give instructions to the Commission, that would go beyond its mandate.**<sup>189</sup> As to the latter aspect, it is sufficient to invoke Article 278 TFEU, according to which **actions before the CJEU do not have suspensory effect.** Nevertheless, the Commission kept its promise made in violation of the Rule of Law, and waited for the CJEU to pass its judgment. Finally, on 16 February 2022 the CJEU dismissed the Hungarian and Polish claims on all accounts,<sup>190</sup> and on 2 March the guidelines had been adopted.<sup>191</sup>

Connecting the vote on the MFF, which requires unanimity and the NGEU to the watering down of a whole different legal instrument, the Conditionality Regulation can only be seen as blackmailing, or as put by Scheppele, Pech and Platon, hostage taking. They point out that this type of hostage taking in the EU seems to be “rewarded even if it means breaching the EU Treaties.”<sup>192</sup> The European Parliament in a Resolution<sup>193</sup>

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<sup>186</sup> Valero, “Hungary and Poland veto stimulus against pandemic”, *EURACTIV*, 16 Nov. 2020, available at <<https://www.euractiv.com/section/economy-jobs/news/hungary-and-poland-veto-stimulus-against-pandemic/>>; Herszenhorn and Bayer, “EU in crisis over Hungary and Poland’s €1.8T hold-up”, *Politico*, 16 Nov. 2020, available at <<https://www.politico.eu/article/eu-in-crisis-over-hungary-poland-budget-hold-up/>>.

<sup>187</sup> On the legal concerns that may arise in relation to enhanced cooperation see Nettesheim, “Keine Verstärkte Zusammenarbeit zu Lasten aller: Oder wie ‘Next Generation Europe’ nicht realisiert werden kann”, *VerfBlog*, 20 Nov. 2020, available at <<https://verfassungsblog.de/keine-verstarkte-zusammenarbeit-zu-lasten-aller/>>.

<sup>188</sup> Alemanno and Chamon, “To Save the Rule of Law you Must Apparently Break It”, *VerfBlog*, 11 Dec. 2020, available at <<https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/>>.

<sup>189</sup> Dimitrovs, “Op-Ed: “Rule of law-conditionality as interpreted by EU leaders”, *EU Law Live*, 11 Dec. 2020, available at <<https://eulawlive.com/op-ed-rule-of-law-conditionality-as-interpreted-by-eu-leaders-by-aleksej-dimitrovs/>>.

<sup>190</sup> Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v Parliament and Council*, EU:C:2022:98.

<sup>191</sup> Communication from the Commission, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, Brussels, 2.3.2022 C(2022) 1382 final.

<sup>192</sup> Scheppele, Pech, and Platon, “Compromising the Rule of Law while Compromising on the Rule of Law”, *VerfBlog*, 13 Dec. 2020, available at <<https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/>>.

<sup>193</sup> European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP)).

forcefully objected against this move and took a principled position towards the enforcement of EU laws including the Conditionality Regulation. It held the European Council conclusions on the Conditionality Regulation to be superfluous; and recalled that the European Council must not exercise legislative functions. **The European Parliament emphasized that it is the duty of the Commission to ensure the application of the Treaties and other pieces of EU laws, and that the Commission must “abide by law, dura lex sed lex”.**<sup>194</sup> This means that the Conditionality Regulation must be enforced as of 1 January 2021, irrespectively of any potential annulment actions and political statements by the European Council.<sup>195</sup> **The European Parliament even threatened the Commission to file an action for annulment according to Article 263 TFEU against the Commission, if the latter fails to fulfil its Treaty obligations,**<sup>196</sup> and due to the Commission’s reluctance to trigger the mechanism, this is what eventually happened: **the European Parliament sued the Commission over its inaction.**<sup>197</sup>

Irrespective of the above shenanigans, now that the guidelines had been adopted, and the judgment on the legality of the instrument was rendered, nothing should stand in the way of triggering the mechanism. Judicial capture and lack of functional independence of the prosecutor’s offices in Hungary, as described above in relation to potential infringement procedures, should provide as a basis for suspending funds under Regulation 2020/2092. Professors Scheppele, Kelemen and Morijn collected all the reasons justifying the suspension of funds to Hungary under the Conditionality Regulation.<sup>198</sup>

The EU funding the autocratic Hungarian regime instead of enforcing the Rule of Law

**The following overview shows how the EU ended up funding the Hungarian regime with few strings attached. It is hard to imagine the survival of the regime without the immense inflow of EU funds. We can see that the lack of independent oversight domestically prevented action in government-sponsored corruption cases. The Common Provisions Regulations could have been triggered in the past on various occasions and it is still good law in future cases, however the Conditionality Regulation, which is broader, is likely to render it irrelevant. But the present section describes issues that could be candidates for infringement procedures, suspension of ESIFs under the Common Provisions Regulation, or suspension of funds under the Conditionality Regulation, equally.**

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<sup>194</sup> Ibid., point 6.

<sup>195</sup> Ibid., point 9.

<sup>196</sup> Ibid., point 8.

<sup>197</sup> European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP)); European Parliament resolution of 8 July 2021 on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)); European Parliament, “Parliament prepares legal proceedings against Commission over rule of law mechanism”, 20 Oct. 2021, available at <https://the-president.europarl.europa.eu/en/newsroom/parliament-prepares-legal-proceedings-against-commission-over-rule-of-law-mechanism>;

Letter of the President of the European Parliament to the Parliament’s legal service dated 20 October 2021, available at <https://the-president.europarl.europa.eu/files/live/sites/president/files/pdf/Letter%20Conditionality%20Regulation%2020-21/Letter%20Sassoli-Drexler%20Conditionality%20Regulation.pdf>.

<sup>198</sup> Scheppele, Kelemen and Morijn, *The EU Commission has to cut funding to Hungary: The Legal Case* (Greens/EFA group in the European Parliament, 2021), available at <https://www.greens-efa.eu/en/article/document/the-eu-commission-has-to-cut-funding-to-hungary-the-legal-case>, Appendix I (An analysis of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget and its legal context).

A central feature of Rule of Law backsliding, the domestication of formerly independent institutions has had predictable consequences for corruption. GRECO, the Council of Europe anti-corruption body concluded that compliance with its recommendations by Hungary is “globally unsatisfactory”.<sup>199</sup> A US Department of State report cites criticisms about “the appointments of Fidesz party loyalists to the heads of quasi-independent institutions like the Competition Authority, the Media Council, and the State Audit Office”.<sup>200</sup> Hungary has been constantly sliding back, since 2012, on the corruption perception scale of Transparency International. In 2020, Hungary was tied with Bulgaria and Romania as the most corrupt EU Member States.<sup>201</sup> A dataset based on 248,404 contracts showed that in the first months of 2020, i.e. before the adoption of the full scale of COVID-related measures that further restricted Rule of Law guarantees and oversight, corruption risk has been the highest since 2005.<sup>202</sup> This is partly a result of the increased ratio of invitation-only, non-transparent tenders (20-30% between 2005–2009 and 59-63% between 2014–2018) and of single-bidder procedures (36% of EU-related procurements in 2016).<sup>203</sup> A Bertelsmann report found that this cost “€1-1.26 billion to taxpayers (3.0-3.7% of Hungarian GDP) each year”.<sup>204</sup>

The role of EU funds in Hungary cannot be overstated; the illiberal regime could not have possibly survived without the steady flow of European money.<sup>205</sup> Yet, unlike in the pre-accession era, with no meaningful control that could have prevented the consolidation of the regime financed through incoming euros. EU-funded projects are the “largest source of corruption in Hungary”, and “the massive influx of EU funds reduced competition and increased levels of corruption risk”.<sup>206</sup>

As with many other areas of Rule of Law backsliding, the resulting clientelism and centralization of decisions and control is being sold as legitimate government policy, best captured by a commentator (and prominent government ally) who claimed that what is criticized as cronyism is the essence of the government’s policy to create a strong national entrepreneur class.<sup>207</sup> It is probably a result of the high-volume corruption that manifests itself in OLAF statistics. In the 2015–19 period, the “financial recommendations” as a result of “detection of irregularities”, in the percentage of payments show a rate of

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<sup>199</sup> Group of States against Corruption (GRECO), “Second Interim Compliance Report of Fourth Evaluation Round on Hungary” (Strasbourg, 2020), 11, available at <<http://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a062e9>>.

<sup>200</sup> US Department of State, “2020 Investment Climate Statements: Hungary,” available at <<https://www.state.gov/reports/2020-investment-climate-statements/hungary/>>.

<sup>201</sup> Transparency International, *Corruption Perceptions Index 2020* (TI, 2021), available at <[https://images.transparencycdn.org/images/CPI2020\\_Report\\_EN\\_0802-WEB-1\\_2021-02-08-103053.pdf](https://images.transparencycdn.org/images/CPI2020_Report_EN_0802-WEB-1_2021-02-08-103053.pdf)>.

<sup>202</sup> Corruption Research Center Budapest, *New Trends in Corruption Risk and Intensity of Competition in the Hungarian Public Procurement from January 2005 to April 2020, CRCB Flash Report* (CRCB, 2020), available at <[https://www.crcb.eu/wp-content/uploads/2020/05/2020\\_hpp\\_0520\\_flash\\_report\\_1\\_200526.pdf](https://www.crcb.eu/wp-content/uploads/2020/05/2020_hpp_0520_flash_report_1_200526.pdf)>.

<sup>203</sup> Bertelsmann Stiftung, *Bertelsmann Transformation Index 2020, Country Report - Hungary*, (BTS, 2020), available at <[https://www.bti-project.org/content/en/downloads/reports/country\\_report\\_2020\\_HUN.pdf](https://www.bti-project.org/content/en/downloads/reports/country_report_2020_HUN.pdf)>, p. 34.

<sup>204</sup> Bertelsmann Stiftung, p. 34.

<sup>205</sup> A state-sponsored KPMG and GKI study found that GDP growth in the period 2006–15 would have been negative (1.8%) without EU funds but in fact was 4.6% (a difference of 6.4%). KPMG, “A Magyarországi Európai Unió Források Felhasználásának És Hatásainak Elemzése a 2007-2013-as Programozási Időszak Vonatkozásában - Makrogazdasági Elemzések Összefoglalása,” March 2, 2017, available at <<http://www.palyazat.gov.hu/download.php?objectId=69961>>, at 1 and 8.

<sup>206</sup> US Department of State, 2020 Investment Climate Statements: Hungary, available at <<https://www.state.gov/reports/2020-investment-climate-statements/hungary/>>.

<sup>207</sup> Cziráj, “Lánczi András: Viccpartok színvonalán áll az ellenzék,” *Magyar Idők*, 21 Dec. 2015, available at <<https://www.magyaridok.hu/belfold/lanczi-andras-vicepartok-szinvonalan-all-az-ellenzek-243952/>>.

3.93 per cent (Hungary) against an average of 0.36 per cent (EU, including Hungary), with the second highest value at 0.53 per cent (Slovakia).<sup>208</sup>

The phenomenon is widely described as “state capture” where economic success is shaped not by market forces but by centralized political designation.<sup>209</sup> The establishment of national network of tobacco shops based on exclusive licensing is a manifestation of this practice, where the political will to handpick loyalists was captured in a recording made public.<sup>210</sup> Formerly powerful or aspiring figures have faced sanctions after they were deemed to present a threat to government control, forced to give up virtually all of their positions.<sup>211</sup> At the same time, government favourites could rise quickly, the most infamous case being Lőrinc Mészáros, Prime Minister Orbán’s friend and former mayor of his home village, a gas-fitter by training who has been collecting a fabulous fortune, becoming the richest man in Hungary in a matter of years.<sup>212</sup>

All this effectively relativizes the notion of property in an increasing number of fields where government regulation can easily raise fortunes or make businesses worthless. E.g. an owner was forced to sell its business when a law made it impossible to continue its practice of placing advertisements along public roads. Once ownership was transferred to a government oligarch, the law was lifted.<sup>213</sup> The creation of the pro-government media conglomerate KESMA where formally private owners gave up their properties for free<sup>214</sup> also illustrates this understanding that government loyalists regard their holdings as ultimately belonging to the party.

Similarly to other Rule of Law areas, authorities tasked with fighting corruption operate in a generally fair manner outside the field of direct government interests. However, where this latter applies, even basic guarantees dissipate. In some cases, this is a result of mere (non-transparent) practice, e.g. by politically motivated selective prosecution, the choice by law enforcement and prosecution not to pursue certain cases or go after actors other than the main perpetrators in areas as diverse as public prosecution,<sup>215</sup> competition

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<sup>208</sup> European Commission and European Anti-Fraud Office, *The OLAF Report 2019: Twentieth Report of the European Anti-Fraud Office, 1 January to 31 December 2019* (LU: Publications Office, 2020), available at <<https://data.europa.eu/doi/10.2784/8525>>, p. 39.

<sup>209</sup> The most recent Bertelsmann Transformation Index Report concludes: ‘Instead of classic state capture where economic interests take over a weak executive, in Hungary a powerful executive cooperates in a non-transparent manner with business circles that it has itself created.’ Bertelsmann Stiftung, “Bertelsmann Transformation Index 2020, Country Report - Hungary.”

<sup>210</sup> “Hungary’s Tobacco Law: Leaked Tape Causes Outrage,” *BBC News*, 2 July 2013, available at <<https://www.bbc.com/news/world-europe-23146659>>.

<sup>211</sup> The most prominent example is Lajos Simicska, the closest ally (roommate and university friend) of Prime Minister Orbán from the birth of FIDESZ, but the fate of Zoltán Spéder was hardly different.

<sup>212</sup> Martin, “Olajozza vagy csikorgatja a fogaskerekeket?” in Kolosi, Szelényi and Tóth (Eds.), *Társadalmi Ríport 2020* (TÁRKI, 2020), pp. 60-89.

<sup>213</sup> Bátorfy, “His Majesty’s Media: From State Capture to Controlled Market – Hungary’s Media Landscape after 2014,” *Media Governance and Industries Lab Blog*, 23 Feb. 2017, available at <<https://univienneamedialab.wordpress.com/2017/02/23/his-majestys-media-from-state-capture-to-controlled-market-hungarys-media-landscape-after-2014/>>.

<sup>214</sup> Máriás et al., *Centralised Media System. Soft Censorship 2018* (Mérték, 2018), available at <<https://mertek.eu/wp-content/uploads/2020/01/MertekFuzetek18.pdf>>.

<sup>215</sup> TI has long been documenting this, see e.g. Ligeti et al., *Corruption, Economic Performance and the Rule of Law in Hungary - The Results of the 2019 Corruption Perceptions Index* (TI Hungary, 2020), pp. 15–16.

law,<sup>216</sup> party financing (see below), or interference with a referendum initiative.<sup>217</sup> (Doubts as to the functional independence of the prosecutor's office is discussed *supra*.) The trend includes PM Orbán's son-in-law István Tiborcz whose lighting company Elios benefited from public procurement practices found to be in violation of EU norms by OLAF. No Hungarian legal consequences followed, shielding Elios (and Tiborcz) from sanctions, instead, Hungarian taxpayers took up the bill, and OLAF chose not to publish the report.<sup>218</sup> In a separate case, following deals with the government of Hungary, Microsoft had to pay "an \$8.7 million Department of Justice fine and an additional \$16.6 million fine to the U.S. Securities and Exchange Commission for violations of the Foreign Corrupt Practices Act". Hungarian authorities, however, failed to act and no charges followed in Hungary; in fact, two of the four top executives dismissed by Microsoft were subsequently hired by the government for positions that previously did not exist.<sup>219</sup>

In other cases, it is not simply the practice that helps state-sponsored corruption, but exemptions are created through legislation or even by amending the Fundamental Law. Mergers and acquisitions can be labelled "of strategic importance" by government decision, exempting such transactions from competition oversight. The European Commission in a leaked document criticized Hungary this year for its inadequate public procurement rules and urged the country to "curb 'systemic fraud' before billions of euros from the EU pandemic recovery fund become available".<sup>220</sup> Hungary had also been monetizing access to the Schengen area by selling settlement bonds. The uniqueness of the scheme was that the state ended up losing on the program, the profits ending up instead in government-linked companies with opaque and offshore ownership structures.<sup>221</sup>

A general trend that facilitates the increase in central control to the detriment of transparency and democratic control is the weakening or elimination of checks by institutions whose constitutional function would be to apply independent scrutiny. This would ideally include bodies like the State Audit Office, the Economic Competition Office, the Media Authority, the Public Procurement Authority, Public Prosecution, or even the Tax and Custom Authority tasked with even-handed enforcement of tax obligations. Creating legal exemptions is one if recurring element, the wider trend is to undermine the independence of such bodies often by nominating loyalists who function legally in most cases but are careful to avoid applying effective remedies where the stakes are high for the government. In the leading project of the Paks nuclear plant expansion based on a contract with Russia, the governing majority moved to make key information on the project secret for thirty years. The Constitutional Court saw no violation of freedom of information

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<sup>216</sup> A Bertelsmann report finds that "GVH [the competition authority] generally operates fairly and evaluates cases along professional considerations; however, it remains liable to government interference or self-censorship in cases when pro-government businesspeople or strategically important sectors are involved." Bertelsmann Stiftung, "Bertelsmann Transformation Index 2020, Country Report - Hungary," BTS, *ibid*, at 20.

<sup>217</sup> In a case captured on video, muscular men pushed, in the office of the electoral committee, a socialist opposition politician away, physically preventing him to submit a referendum initiative. Despite a dedicated clause in the Criminal Code on this type of crime [Article 350(1)e)] and the video recording, no charges followed.

<sup>218</sup> Hungarian Civil Liberties Union, Az Elios-ügy miatt beperelte az Európai Bizottságot a TASZ és az Eleven Gyál, *tasz.hu*, 11 Feb. 11 2020, available at <<https://tasz.hu/cikkek/az-elios-ugy-miatt-beperelte-az-europai-bizottsagot-a-tasz-es-az-eleven-gyal>>.

<sup>219</sup> Wynn, "Hungarian Microsoft corruption prompts U.S. to intervene", *Daily News Hungary*, 25 Aug. 2018, available at <<https://dailynewshungary.com/hungarian-microsoft-corruption-prompts-us-to-intervene/>>.

<sup>220</sup> Euractive / Reuters, "Citing 'systemic' Fraud, Commission Pushes Hungary to Change Procurement," *EurActiv*, 8 Feb. 2021, available at <<https://www.euractiv.com/section/justice-home-affairs/news/citing-systemic-fraud-commission-pushes-hungary-to-change-procurement/>>.

<sup>221</sup> Romhányi, *Corruption by Design – the Economic and Financial Impact of the Government's Golden Visa Bonds in Hungary. The Role of Residency State Bonds in Financing the Hungarian Government 2013-2017* (Fiscal Responsibility Institute Budapest - TI Hungary, 2018).



requirements.<sup>222</sup> Considering the subject of nuclear energy, there is direct European involvement that did not deter practices that raise serious corruption risks.<sup>223</sup> Similar concerns surround two other gigaprojects involving China, which are financed by Hungary: the Belgrade-Budapest railway project<sup>224</sup> and the planned Budapest Fudan University campus.<sup>225</sup>

### Assets declarations

Rules on asset declarations have also been subject to recurrent criticism by Hungarian and foreign NGOs and international organizations for many years. According to the Hungarian rules, MPs and high-ranking government and state officials must publish their asset declarations on a yearly basis on the Internet. However, this obligation does not extend to their relatives whose asset declarations are not made public which provides the possibility for MPs and other leading officials to keep their real enrichment undisclosed. The reliability and the validity of the information included cannot be verified and the declarations are published in a format which significantly impedes any search in their content and the comparison of them which prevents the general public from tracking the changes of their decision-makers' financial situation. The 2020 Second Interim Compliance Report of GRECO stressed that Hungary still lacks an effective supervisory mechanism in this field. It is primarily the Parliamentary Committee on Immunity which can start a review procedure, but the committee is generally reluctant to do it, and the prosecution service also fails to launch any investigation even in case of apparently flagrant deficiencies and discrepancies in these declarations. Consequently, due to the lack of an effective and independent enforcement mechanism, providing incomplete or false information has no real consequences in the Hungarian system. Some Hungarian NGOs reiterate the need for establishing a separate criminal offence for violations of rules on asset declaration.<sup>226</sup>

The other side of uneven enforcement is to sanction opposition parties, as it happened right before the 2018 elections, for violations that have been chiefly practiced by Fidesz. The State Audit Office tasked with independent supervision ended up fining opposition parties right before the 2018 elections for a practice that Fidesz has long been documented doing. The cited Bertelsmann report concludes: "The national audit office (NAO) is formally responsible for auditing state spending. The independence of its chairman since 2010, László Domokos, is questionable as he has been a member of Fidesz since the party's foundation and has also served as a member of parliament. NAO has fined opposition parties on a number of different occasions. For instance, Jobbik was fined €2.08 million (approximately 17 months of state support provided to the party) four months before the 2018 general election, while the state audit office (headed by László

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<sup>222</sup> Erdélyi, "Az Alkotmánybíróság szerint rendben van, hogy a kormány 30 évre titkosította a Paks2-projektet", *Átlátszó*, 25 Jan. 2021, available at <<https://blog.atlatszo.hu/2021/01/az-alkotmanybirosag-szerint-rendben-van-hogy-a-kormany-30-evre-titikositotta-a-paks2-projektet/>>.

<sup>223</sup> Szabó, "Nuclear power plant Paks 2 rescheduled to favor the Russians", *Direkt36*, 9 June 2020, available at <<https://www.direkt36.hu/en/addig-nyomultak-az-oroszok-hogy-nekik-kezvezoen-utemezték-at-paks-2-t/>>.

<sup>224</sup> Katus, "Beperli a Külügyminisztériumot a Budapest-Belgrád vasútvonal irataiért Szél Bernadett" *Átlátszó*, 17 Sept. 2020, available at <<https://blog.atlatszo.hu/2020/09/feljelenti-a-kulugyminiszteriumot-a-budapest-belgrad-vasutvonal-irataiert-szel-bernadett/>>.

<sup>225</sup> Panyi, "To please China, Orbán's government shifted plans to favor Fudan's campus over Student City", *Direkt36*, 14 May 2021, available at <<https://www.direkt36.hu/en/kina-megmondta-hogy-nagyon-fontos-neki-a-budapesti-fudan-az-orban-kormany-most-mindent-felborított-a-kedveert/>>.

<sup>226</sup> Transparency International Hungary, Assets declarations, available at <<https://transparency.hu/en/kozszektor/vagyonnyilatkozati-rendszer/>>.

Domokos, a former Fidesz member of parliament) never fined or issued a warning despite the fact that the same practice was applied by Fidesz as well.”<sup>227</sup>

## Promising proposals

While new proposals may be promising it is worth noting that politicians seem too focused on creating their own new tools, rather than simply pressing for the use of existing tools, resulting by now in an excessive proliferation of unused tools.<sup>228</sup> Having this in mind, let us list a number of proposals that have the potential of providing meaningful oversight over Rule of Law decline.

In its Resolution adopted on 8 September 2015,<sup>229</sup> the European Parliament called on the Commission to draft an internal strategy on the Rule of Law “accompanied by a clear and detailed new mechanism, soundly based on international and European law and embracing all the values protected by Article 2 TEU, in order to ensure coherence with the Strategic Framework on Human Rights and Democracy already applied in EU external relations and render the European institutions and Member States accountable for their actions and omissions with regard to fundamental rights.” The tools are supposed to include the establishment of a scoreboard on the basis of common and objective indicators by which democracy, the Rule of Law and fundamental rights will be measured; monitoring, based on the scoreboard and a system of annual country assessment; empowering the Fundamental Rights Agency to monitor the Rule of Law situation in Member States; issuing a formal warning if assessment shows that a Member State is violating the Rule of Law or fundamental rights; and improvement of coordination between the EU institutions and agencies, Member States, the Council of Europe, the United Nations and civil society organizations.<sup>230</sup> **The European Parliament in October 2016 passed a Resolution calling upon the Commission to initiate legislation on a comprehensive Rule of Law, democracy, and fundamental rights (DRF) scoreboard.**<sup>231</sup> **The Commission initially rejected the proposal, but in 2019 it came up with the proposal to launch annual Rule of Law reports with respect to all EU Member States.** (See supra in 7.1.) As Wouter van Ballegooij rightly noted, four major differences distinguish the European Parliament’s proposal from that of the Commission. First, the former is based on an inter-institutional agreement, second, the former of broader in scope covering democracy, the Rule of Law and fundamental rights, not just Rule of Law matters, third, the European Parliament invites an expert panel to do the assessment, whereas the Commission wishes to take up this task itself, and fourth, the European Parliament emphasized the need for a follow up, whereas

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<sup>227</sup> Bertelsmann Stiftung, pp. 34–35.

<sup>228</sup> Laurent Pech talks about a “multiplication of new instruments but in an uncoordinated manner”. Pech, *The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox* (RECONNECT, 2020), available at < <https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf>>, p. 16.

<sup>229</sup> European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)).

<sup>230</sup> Ibid., para. 10.

<sup>231</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409; van Ballegooij and Evas, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in 't Veld)*, (EPRS, 2016), PE.579.328; Annex I; Pech, Wennerström, Leigh, Markowska, de Keyser, Gómez Rojo and Spanikova, *Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights*; Annex II, Bárd, Carrera, Guild and Kochenov, with a thematic contribution by Marneffe, *Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights*.

the Commission opts for more dialogue, i.e. inter-parliamentary debates within Parliament and discussions within Council.<sup>232</sup> **Making use of the European Parliament’s right to propose an interinstitutional agreement, a European Parliament resolution was adopted on the mechanism in October 2020.**<sup>233</sup> **In order to remedy the shortcomings of the Annual Rule of Law Report, and to bring the exercise closer to the DRF idea, the European Parliament adopted further resolutions.**<sup>234</sup>

Even in the lack of a DRF mechanism, a systemic and all-encompassing monitoring of EU values in the criminal justice sector could be created. **Article 70 TFEU** allows the adoption of measures for an objective and impartial evaluation of the implementation of Union policies in the area of freedom, security and justice, in order to facilitate the full application of the principle of mutual recognition.

EU bodies could play a more vital role in Rule of Law enforcement. The extension of the future role of the **EU Fundamental Rights Agency** could be carefully considered, so that the Agency plays a more meaningful role in the supervision of Article 2 TEU values. As explained in the previous chapters, the CJEU already interpreted the provisions of the Charter extensively. But academic and political proposals suggest to go one step further and **abolish Article 51 of the Charter of Fundamental Rights, so that all Charter rights become directly applicable and justiciable in the Member States.**<sup>235</sup> Such a move would make the Charter become a “union standard” as, **it would eventually “irrespective of the subject-matter at issue, that is to say irrespective of whether it falls within federal or State competence.”**<sup>236</sup> Since many Rule of Law problems have direct human rights implications, tackling the latter might also be beneficial from the perspective of the Rule of Law.<sup>237</sup>

The role of the **European Anti-Fraud Office (OLAF)** could be strengthened. At the minimum its findings could be publicly shared when Member States are irresponsive to the mischiefs indicated in those reports.

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<sup>232</sup> van Ballegooij, *European Added Value Assessment. European added value of an EU mechanism on democracy, the rule of law and fundamental rights. Preliminary assessment*, (EPRS, 2020), PE 642.831, available at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642831/EPRS\\_BRI\(2020\)642831\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642831/EPRS_BRI(2020)642831_EN.pdf)>; van Ballegooij, “Addressing violations of democracy, the rule of law and fundamental rights”, EPRS Ideas Paper (2020), 5. PE 652.070, available at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652070/EPRS\\_BRI\(2020\)652070\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652070/EPRS_BRI(2020)652070_EN.pdf)>.

<sup>233</sup> European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)), Rapporteur: MEP Michal Šimečka.

<sup>234</sup> See European Parliament resolution of 24 June 2021 on the Commission’s 2020 Rule of Law Report, COM(2020) 580 (2021/2025(INI)), Rapporteur: MEP Domènec Ruiz Devesa. See also the draft report on the Commission’s 2021 Rule of Law Report (2021/2180(INI), LIBE Committee, Rapporteur: Terry Reintke, 21 January 2022. For an overall assessment see Pech and Bárd, *The Commission’s Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values* (Policy Department for Citizens’ Rights and Constitutional Affairs, Directorate-General for Internal Policies, 2022), available at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL\\_STU\(2022\)727551\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL_STU(2022)727551_EN.pdf)>, p. 51.

<sup>235</sup> Reding, *The EU and the Rule of Law – What Next?*, *Press Corner*, 4 Sept. 2013, available at <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_13\\_677](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677)>.

<sup>236</sup> Lenaerts, “Respect for Fundamental Rights as a Constitutional Principle of the European Union” 6 CJEL 1 (2000), 1–25, at 21; Knook, “The Court, the Charter, and the vertical division of powers in the European Union” 42 CML Rev. 2 (2005), 367–398.

<sup>237</sup> On further possible avenues the Charter may open for tackling rule of law violations see Kochenov and Morijn, *Augmenting the Charter’s Role in the Fight for the Rule of Law in the European Union: The Cases of Judicial Independence and Party Financing*, *RECONNECT Working Paper No. 11* (2020), available at <[https://reconnect-europe.eu/wp-content/uploads/2020/10/RECONNECT\\_WP11\\_Kochenov\\_Morijn.pdf](https://reconnect-europe.eu/wp-content/uploads/2020/10/RECONNECT_WP11_Kochenov_Morijn.pdf)>.

An EU mechanism could be introduced which can lead to EU consequences attached to OLAF findings of corruption autonomously, irrespectively of the Member States' prosecution offices.

It has been suggested to connect participation in the **European Public Prosecutor's Office (EPPO)**, the EU's decentralized prosecution office, to accessing certain EU funds.<sup>238</sup> Thus far neither of the Member States undergoing Article 7(1) TEU proceedings acceded to it. **Alternatively, the EU could create incentives through additional EU funds made available to those countries that join the EPPO.**

Finally, the **Authority of European Political Parties and European Political Foundations** could ensure EU political parties' adherence to Article 2 TEU values. **Funding for the whole European party as foreseen by Regulation 1141/2014 could be suspended until Rule of Law backsliding conducted by a national member party is addressed.**<sup>239</sup> By setting up the independent Authority for European political parties and European political foundations to register, control, and impose sanctions on Europarties and European political foundations<sup>240</sup>, and a Committee of Independent Eminent Persons<sup>241</sup> to help it with providing evidence about EU values compliance or breach considerably helped compliance verification with Article 2 TEU values. **The start of an Article 7 TEU procedure should automatically trigger Article 2 TEU verification mechanism under the Regulation. This could make sure that no Europarty is contaminated by a party in violation of EU law, and that no party in violation of Article 2 TEU is shielded by its party family from criticism.** European political parties tend to turn a blind eye to Rule of Law problems within their families partially for keeping their votes, but at times also because their existence depends on them. Easing the registration requirements and going below the threshold of being present in at least one quarter of the Member States, might help Europarties, so that no hard choices and difficult compromises have to be made. Finally, not only Europarties, but also political groups should be checked for compliance with Article 2 TEU values.<sup>242</sup>

## Conclusions

As apparent from the above analysis, most EU tools available are there for monitoring, benchmarking, assessing Member States in light of their Rule of Law compliance. But as argued in Paper 1 they are not suited for enforcement, and some of them are ill-suited even for monitoring.

The enforcement tools are – in contrast with popular belief and the claims of Member States and EU institutions – numerous. But almost all of the enforcement tools have some weaknesses. Article 7(2)-(3) TEU is not regular, Member States are not treated equally (or one could say somewhat cynically that they are equally ignored by EU institutions, whether or not they have Rule of Law issues). The sanctioning prong of Article 7 would have potentials for imposing dissuasive sanctions, but it is not triggered, and certainly not in due time, as a consequence of the high threshold triggering the procedure and bringing it to an end, furthermore for the lack of deadlines. Articles 258-260 TFEU on infringement procedures are also underused, they are not a regular exercise either, the equality of the Member States due to its case-by-case

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<sup>238</sup> Šelih, Bond and Dolan, *Can EU funds promote the rule of law in Europe?*, (Center for European Reform, 2017), available at <[https://www.cer.eu/sites/default/files/pbrief\\_structural\\_funds\\_nov17.pdf](https://www.cer.eu/sites/default/files/pbrief_structural_funds_nov17.pdf)>.

<sup>239</sup> On the limitations and potentials of Regulation 1141/2014 see Morijn, "Responding to "populist" politics at EU level: Regulation 1141/2014 and beyond", 17 *IJCL* 2, (2019), 617–640.

<sup>240</sup> See Article 6 of Regulation No 1141/2014 and <<http://www.appf.europa.eu/appf/en/authority/welcome.html>>.

<sup>241</sup> *Ibid*, Art. 11.

<sup>242</sup> Morijn shares his recommendations for the European Commission on the International Day of Democracy, *RECONNECT EU*, 15 Sept. 2020, available at <<https://reconnect-europe.eu/news/prof-john-morijn-shares-his-recommendations-for-the-european-commission-on-the-international-day-of-democracy/>>.

nature could be questioned, the judgments are often rendered too late, when the irreparable harm had already been done, and the sanctions are not sufficiently followed up. Article 267 on preliminary requests is not designed to tackle Rule of Law issues, but the case-law shows that rulings have important consequences for various aspects for the Rule of Law. By nature they are however scattered, typically only accelerated if the individual concerned is incarcerated, the contextual and systemic nature of Rule of Law backsliding is not considered, and finally the aim of the procedure is not to impose dissuasive legal consequences on a Member State, but to interpret EU law. Regulation 1303/2013 and the Conditionality Regulation are both important tools for preventing Rule of Law backsliding and for meaningfully responding to it. The former however is not regular, and might thereby invoke criticism about double-standards, furthermore the scope of both pieces of EU law is limited to the financial interests of the European Union. A mechanism based on Article 70 TFEU would satisfy most of the principles discussed in the previous chapter, however its scope would by definition and due to the conferral of powers be limited to the Area of Freedom, Security and Justice. Finally, the DRF Pact, as proposed by the European Parliament, could incorporate all our suggestions on the principles that should guide a methodologically correct, efficient i.e. dissuasive Rule of Law enforcement mechanism.

**Table 3: Existing and proposed EU tools of enforcement – summary**

	monitoring	enforcement	weakness
<b>EXISTING TOOLS</b>			
The European Semester	YES	NO	vague country specific recommendations
The EU justice scoreboard	YES	NO	no contextual assessment of data
Rule of Law Framework	YES	NO	not even suited for monitoring
The European Commission's annual Rule of Law report	YES	NO	does not reflect systemic RoL backsliding
The Council's dialogues on the Rule of Law	YES	NO	not even suited for monitoring
Article 7(1) TEU: The preventive arm	YES	NO	does not even fulfil its monitoring role, since underused
Article 7(2)-(3) TEU: The sanctioning arm	NO	YES	it has potential, but only after Treaty change
Infringement proceedings Article 258	NO	YES	underused; one could emphasize systemic nature of DRF infringements
Infringement proceedings Article 259	NO	YES	underused; one could emphasize systemic nature of DRF infringements
Preliminary references	NO	YES	implementation depends on national courts, CJEU seems to give preference to EU law principles over EU values
Regulation (EU) No 1303/2013 (Common Provisions), Art. 142(1)(A)	NO	YES	forgotten; limited to financial matters
<b>PROPOSED TOOLS</b>			
Annual Inter-Parliamentary debate on the state of the DRF	YES	NO	too early to assess

Council's reviewed dialogues	YES	NO	unlikely to be improved, too political
Tie funding participation to EPPO	NO	YES	legal basis is doubtful
Rule of law budgetary conditionality	NO	YES	limited to financial matters
Tool on the basis of Article 70 TFEU	YES	YES	only applicable to the AFSJ
DRF Pact	YES	YES	Commission's and Council's resistance

*Source: Authors*

Tools suited for enforcement of Article 2 TEU values are marked light green, and those not designed for enforcement (i.e. those irrelevant for our purposes) are marked grey.

Only comprehensive tools are mentioned, whereas those that could cover very specific issues only, such as whistle-blower protection, or direct support of civil society, are not indicated.

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