ARTICLES

BALL IN THE COMMISSION'S COURT: ENSURING THE EFFECTIVENESS OF EU LAW THE DAY AFTER THE COURT RULED

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ABSTRACT: In mid-April 2021, the Hungarian government announced the withdrawal of the 2017 Transparency Law. In its ruling in case C-78/18, in the context of a Commission-led infringement procedure, the Court declared such law in violation of civil society organisations (CSO) and foreign funders' freedom of movement of capital as well as their freedom of association, right to respect for private and family life, and right to protection of personal data. Following intense months of dialogue with the European Commission, in mid-May 2021, the Hungarian Parliament repealed the law. However, at the same time, it adopted a new one on the Transparency of CSOs, which still presents the same shortcomings as the previous one and, consequently, continues to prevent CSOs from exercising their role of democracy watchdogs. This *Article* argues that the new law is the latest manifestation of Hungary's tendency towards autocratic legalism. By relying on a creative compliance-based approach, the Hungarian legislator proposed a law that is only in appearance in line with and based on the ruling of the Court. The *Article* argues that such a strategy, if winning, has the potential to spread its effects beyond the Hungarian border. It claims the Commission finds itself forced to choose between continuing the existing infringement procedure or accepting a merely formalistic implementation of the Court's ruling, in a historical moment where the legitimacy of the Court of Justice to decide on values-related cases is more than ever questioned.

KEYWORDS: rule of law – civil society organisation – *Transparency of Associations* – infringement procedures – creative compliance – autocratic legalism.

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I. Introduction

Over the last decade, EU institutions and scholars have increasingly focused on 'rule of law backsliding'. Although there is no unanimous definition of this phenomenon, it can be explained as "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party".[1]

The phenomenon has been addressed under different points of view, particularly concerning the impact on the effectiveness of EU law and the coherence of the system of EU constitutional values and principles. Several suggestions have been proposed to tackle the problem, ranging from overcoming the limits of the "nuclear option" under art. 7 of the Treaty on the European Union (TEU) to making a more consistent use of infringement procedures or leveraging the economic power of EU funds against those Member States that refuse to respect EU values.[2]

However, little has been said on the effectiveness of the use of such instruments. While most scholars call for more action, particularly from the European Commission, few positive changes have occurred so far that may support the argument that such actions are indeed effective in bringing defying Member States back in line. This is an essential aspect that EU institutions and actors should keep in mind when promoting or developing strategies to counter democratic backsliding. In the absence of a proper assessment of the effectiveness of the current tools, one runs the risk to water down any effort to address the phenomenon, by playing the same game that autocratic governments play: limiting oneself to formalistic action, while forsaking the substance.

This contribution addresses this second, and mostly neglected, aspect of the EU's battle for the rule of law. By relying on the case study of the infringement procedure against Hungary's anti-NGO legislation, it argues that, in a context of increasing 'creative compliance' by Hungary, the European Commission should focus more on the enforcement stage of infringement procedures (as provided by art. 260(2) TFEU), verifying to what extent the concerned Member State effectively complies with the Court's instructions. This contribution aims, first, at exposing a strategy (hereafter referred to as "creative compliance"[3] in a context

[1] KL Scheppele and L Pech, 'What is Rule of Law Backsliding?' (2 March 2018) Verfassungsblog verfassungsblog.de.

[2] See, among others, P Bárd, B Grabowska-Moroz and VZ Kazai, 'Rule of Law Backsliding in the European Union Lessons from the Past, Recommendations for the Future' (15 January 2021) RECONNECT www.reconnect-europe.eu; P Bárd and A Śledzińska-Simon, 'Rule of law infringement procedures. A proposal to extend the EU's rule of law toolbox' (2019) CEPS Paper in Liberty and Security www.ceps.eu; and L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3.

[3] A Batory, 'Defying the Commission: Creative compliance and respect for the rule of law in the EU' (2016) Public Administration 685.

of "authoritarian legalism"[4]), put more and more into practice by autocratic governments, to comply with the ruling of the Court of Justice of the EU (hereafter "CJEU" or "the Court") only formally while, in practice, adopting pieces of legislation that allow them to pursue their illiberal agenda. Second, it provides for possible alternative ways to counter that strategy.

The choice of Hungary as a case study is not a casual one. Over the last decade Hungary has progressively departed from democratic values by increasingly concentrating power in the hands of the government and State officials loyal to the ruling party, *Fidesz*, and its political leader, Orbàn.[5] This phenomenon cannot be easily summarised by reference to selected areas of power or of the society, insofar as the Hungarian government's strategy is more and more based on consolidating its power in a broad range of sectors. Consequently, we are observing the progressive implementation of a scheme based on capturing all different areas of the State, ranging from institutions, such as the Parliament and the judiciary, to telecommunication networks and civic space.[6]

This *Article* does not seek to provide a comprehensive overview of the different reforms and strategies adopted by the Hungarian government to consolidate *Fidesz*' power. Conversely, it will focus on the legislative measures targeting civil society organisations (hereafter "CSOs") in the context of the much-criticised Law No LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad (hereafter 'Transparency Law').[7]

Following the ruling of the Court of 18 June 2020 in *Transparency of Associations*,[8] in April 2021 the Hungarian government announced the withdrawal of the debated Transparency Law.[9] Following intense months of negotiation and increasing threats by the European Commission to ask the Court to impose financial penalties,[10] in mid-May 2021,

[4] KL Scheppele, 'Autocratic Legalism' (2018) UChiLRev 545.

[5] For an overview of the political and legislative developments that took place in Hungary over the last decade, see P Bárd and L Pech, 'How to build and consolidate a partly free pseudo-democracy by constitutional means in three steps: The 'Hungarian model" (RECONNECT Working Paper October 2019) 4.

[6] See, in this regard, the sections on the judicial system, media freedom and checks and balances of the Commission Staff Working Document SWD (2020) 316 final from the Commission of 30 September 2020 on 2020 Rule of Law Country Chapter – Hungary and Commission Staff Working Document SWD (2021) 714 final from the Commission of 20 July 2021 on 2021 Rule of Law Country Chapter – Hungary.

[7] While the author acknowledges that different definitions and classifications of civil society organisations exist, this *Article* will refer to civil society organisations (CSOs) and non-governmental organisations (NGOs) interchangeably to describe all actors carrying out forms of social action and serving the general interest through a democratic process and independently from State's authorities, playing the role of mediator between public authorities and citizens.

[8] Case C-78/18 *European Commission v Hungary (Transparency of associations)* ECLI:EU:C:2020:476.

[9] Hungarian Parliament, Act LXXVI of 2017 on the transparency of organisations supported from abroad, of 13 June 2017.

[10] On 18 February 2021, the European Commission sent a letter of formal notice to Hungary (available at: ec.europa.eu), asking for clarification as to the implementation of the ruling of the Court in case C-78/18. The letter of formal notice, sent under the procedure provided for in art. 260, para. 2, TFEU, allows the European Commission to ask the Court of Justice for the imposition of financial penalties in the event Hungary does not

the Hungarian Parliament officially repealed the law, while at the same time adopting a new package of legislative measures.[11] While welcoming the withdrawal, the European Commission showed a certain reticence in considering the problem solved. As a matter of fact, the infringement procedure is still open.[12]

In light of Hungary's withdrawal of the 2017 Transparency Law and adoption of the new law in May 2021, it is worth examining the latter with a view to understanding to what extent Hungary took into consideration the issues pointed out by the Court in its ruling. In so doing, the *Article* seeks to expose and analyse the Hungarian illiberal strategy of misusing EU law – and the interpretation provided by the Court – to formally implement the Court's ruling while in practice pursuing its initial goal of progressively closing civic space. To do so, the *Article* will firstly set the scene for the analysis of the Hungarian strategy, addressing the concept of 'autocratic legalism' and the use of a 'creative compliance'-based strategy to legitimise democratic backsliding (section II). Subsequently, it will clarify the context preceding the adoption of the 2021 legislative package (section III), by providing an overview of the 2017 Transparency Law (section III.1) and of the problematic aspects that led the Court of Justice to consider it in violation of EU law (section III.2). It will then analyse the new legislative package in light of the supposed implementation of the Court's ruling (section IV). The *Article* will argue that the new law merely represents a new expression of the Hungarian government's attempt to control civil society and political dissent.

The *Article* will conclude that the new legislative package does not substantially implement the Court's ruling (section V). Nonetheless, it limits itself to a formalistic implementation, thus giving the European Commission a choice between two possible roads to take: accepting the reform, thus avoiding the need to take further action, or acknowledging that the new law poses the same threats to EU law already identified by the Court, while at the same time creating additional legal uncertainty and further hindering CSOs' action, thus requiring action under art. 260 TFEU.

In this light, the *Article* will address the broader impact that a lack of compliance with the Court's rulings may have on the authority of the Commission and the effectiveness of the EU legal system. It will analyse the role of infringement procedures as an enforcement tool, both in their pre-judicial and judicial phase. It will argue that, while in a context of cooperation and mutual respect for commonly shared rules, EU Member States tend to adapt to the Commission's pre-judicial requests and eventually to respect the Court's

comply with the Court's ruling. As a response, first, the Hungarian government informally announced the withdrawal of the Transparency Law and, subsequently, the Hungarian Parliament repealed it.

[11] Such a package comprises the withdrawal of Act LXXVI of 2017 on the Transparency of Foreign-Supported Organisations (Transparency Law), as well as a set of amendments to the cardinal law establishing the State Audit Office (Act LXVI of 2011 on the State Audit Office). The new law was adopted on 17 May 2021, and it entered into force on 1 July 2021.

[12] See infringement procedure no. INFR(2017)2110 against Hungary, Violation of EU Law by the Act on the Transparency of Organisations Supported From Abroad (Act LXXVI/2017) adopted on 13 June 2017, still active at the time of writing, available at ec.europa.eu.

ruling, values-related infringements present their own peculiarities. The *Article* will conclude that, to protect its credibility, the Commission should acknowledge the need to change its approach by (i) constantly and thoroughly analysing new legislation allegedly adopted in order to comply with a Court's ruling and (ii) start making consistent use of the sanctioning phase of the infringement procedures, by systematically relying on art. 260(2) TFEU. Finally, the *Article* will acknowledge some of the limits of the proposed approach and conclude with some remarks on the effectiveness of the existing enforcement tools at the disposal of the Commission (Section VI). While the Commission frequently presents itself as fully equipped to address rule of law backsliding, this *Article* will conclude that the reality does not correspond to this picture, thus making the need of changes evident.

II. Overturning democracy in the name of the law: the use of creative compliance by EU autocratic legalists

The theoretical framework underpinning the concept of autocratic legalism provides a useful starting framework to understand to what extent the Hungarian government and its Prime Minister Orbán selectively make use of EU law to increase electoral support and suppress dissent.

Kim-Lane Scheppele refers to autocratic legalism as the phenomenon where autocratic governments make use of their electoral mandates, coupled with constitutional and legislative procedures to pursue their illiberal agenda.[13]

In her studies on this topic, Scheppele points out the difference between the *old* autocrats and the *new* ones. She stresses that new autocratic governments have developed innovative strategies. They avoid adopting excessively restrictive legislation by opting for a gentler approach which comprises repurposing State's institutions and revising constitutional benchmarks and procedures, while leaving some dissent in play, and relying on a flexible ideology that allows them to meet populistic demands.[14]

Even more importantly, she highlights a specific technique put in place by such autocrats to hinder opponents' actions, namely that of driving them out of the country or forcing them to change the activity they are engaged in through specifically designed economic and political measures.[15] In so doing, autocrats establish a generalised climate of hostility and threat, which eventually leads their opponents to either stop their activities or move into another country to be able to pursue them. An emblematic example is that of the adoption of the 2017 Lex CEU in Hungary,[16] which imposed that foreign universities could continue operating in Hungary only if they were also operating in the country of

[13] KL Scheppele, 'Autocratic Legalism' cit.
[14] *Ibid.* 573-574.
[15] *Ibid*. 575.
[16] Amendments to the Act on National Higher Education in Parliament of 28 March 2017.

origin. In practice, the Lex CEU was aimed at disrupting the activities of the Central European University (CEU), founded by George Soros and accredited to operate under United States (US) law but conducting no activities in the US.[17] While the academic environment immediately reacted against the proposed Lex CEU, it took three years for the Court of Justice of the EU to rule against the law.[18] However, by the time the ruling was adopted and Hungary amended the law, the CEU had been forced to partially relocate to Austria, where its second campus currently seats.[19]

An important aspect that characterises legalistic autocrats is their apparent reliance on the constitution and the formalistic aspects of the law and the legislative process. A recurring element in the analysis of autocratic legalism is the (ab)use of constitutional institutions and procedures to justify the majority's illiberal agenda.[20] In such a context, one can witness laws justified in light of the protection of constitutionally guaranteed rights and freedoms, or with reference to international standards. However, those same laws are at the heart of the deceiving strategy aimed at annihilating the party's political opponents.

Such a phenomenon, particularly the reference to international standards, raises further concerns in the framework of the European Union's legal system. In such a setting, Member States are bound to ensure compliance with EU rules and the judgments of the Court of Justice. Such obligations imply, among others, that domestic laws that have an impact on or are the implementation of EU legislation need to be analysed by national legislators in light of EU law. This is the essence of the relationship between domestic and EU law and can be defined by reference to the judicially developed concept of primacy of EU law over domestic law, which requires, among other things, that national laws must be in compliance with EU law.[21]

Compliance with EU law can be defined as the conformity of a domestic piece of legislation with a prescribed rule or benchmark enshrined in EU law. The establishment of such compliance is, however, difficult to assess, especially in rule of law-related issues, given the broad and undefined reference to EU values provided for in the EU Treaties.[22]

[17] G Halmai, 'Legally sophisticated authoritarians: the Hungarian Lex CEU' (31 March 2017) Verfassungsblog verfassungsblog.de.

[18] Case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792.

[19] E Inotai, 'Legal victory for Central European University is too little, too late' (6 October 2020) Reporting Democracy balkaninsight.com. See also CI Nagy, 'Case C-66/18 Commission v. Hungary (Central European University)' (2021) AJIL 700.

[20] It shall be pointed out that, while illiberal agendas are usually put into action by the government, the main actor behind them can frequently be identified in the majority party. This is particularly true in a captured State, such as Hungary, where the separation of powers (in particular between the legislative and executive powers, but to a certain extent also concerning the judiciary) cannot be ensured anymore. In such contexts, the leader behind the illiberal agenda shall be considered the majoritarian party, rather than the government or the Parliament.

[21] Case 6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66 para. 3.

[22] On the vagueness of art. 2 TEU with regard to the value of the Rule of Law, see W Schroeder, 'The Rule of Law as a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in A von Bogdandy and

The challenge of establishing a clear difference between what is compliant and what is not has been correctly described by Zürn, who highlights that a dichotomy does not provide sufficient clarity.[23] This *Article* will distinguish between formalistic and substantive compliance. While the first may imply, for instance, formal transposition of a Directive into national legislation, the second requires the concretisation of such transposition, i.e., ensuring the effectiveness of the Directive.[24]

This is particularly relevant in light of the Hungarian case study. As it will be argued, on the one side, the Hungarian legislator justifies the 2021 legislative package as adopted following the ruling of the Court of Justice and in order to comply with it.[25] On the other side, simultaneously, it creates a new legislative framework which, as the contribution will show, achieves the same result, namely discouraging CSOs from expressing their political dissent.

The conundrum between autocratic tendencies and the need to appear compliant with EU law has given birth to several remarkably creative pieces of legislation. The new 2021 anti-CSO law provides a clear picture of such a contrast and the need, for autocratic governments, to keep up appearances. Agnes Batory clearly examines the phenomenon in her work on the use of creative compliance by autocratic governments.[26] She describes creative compliance as the strategy adopted when "a member state [...] pretends to align its behaviour with the prescribed rule or changes its behaviour in superficial ways that leave [its] original objective intact".[27] This strategy allows the Member State to adopt "measures that in their totality render enforcement action inconsequential".[28] Several scholars in EU studies have described the above concept. For instance, Noutcheva refers

others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 105, and LD Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision', in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit. 237; LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) German Law Journal 1182.

[23] M Zürn, 'Introduction: Law and compliance at different levels', in M Zürn and C Joerges, *Law and Governance in Postnational Europe* (Cambridge University Press 2005) 1.

[24] See E Versluis, 'Even Rules, Uneven Practices: Opening the "Black box" of EU Law in Action' (2007) West European Politics 50-67, for an in-depth study of the substantive degree of implementation of Directives in different Member States compared with their formalistic transposition into domestic law.

[25] See the explanatory note attached to Bill no. T/15991, where the government (author of the bill) clarifies that, in view of the findings of the Court of Justice of the EU in case C-78/18, Transparency of Associations, the Bill repeals the 2017 Transparency Law. Furthermore, Bill T/15991 is described as based on the judgment of the Court, which is interpreted as confirming that the need to ensure the transparency of non-governmental organisations with a significant influence on public life can be an overriding reason based on public interest (and thus justify a limitation of EU fundamental freedoms). For this reason, the Bill also creates a new legislative framework regulating CSOs' activities and their accounting and reporting obligations.

[26] A Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' cit.

[27] *Ibid*. 688.

[28] *Ibid.*

to it as "fake compliance",[29] while Dimitrakopoulos and Richardson define it "tick the boxes implementation", at the same time pointing out that it consists of "conscious attempts by member states to dilute or undermine EU policy".[30] In the following pages, the *Article* shows how creative compliance consists of three stages: first, the Member State announces its willingness to comply with a court's ruling; second, it adopts measures that, formalistically, align with such ruling; third, it adopts a piece of legislation that is announced as in line with EU law and, at first sight, seems to be falling within the limits of EU law. In so doing, the Member State seems *prima facie* to be respectful of their obligations under EU law and the Court's authority. However, at a less superficial level, one will find out how the new piece of legislation is meant to achieve the same unlawful goal already reported by the Court as non-compliant with EU law.

III. Setting the context: the Court's ruling in *Transparency of Associations*

Before diving into the analysis of the new legislative package, it is worth clarifying the general context around the *Transparency of Associations* case. To do so, this section first addresses the content of the 2017 Transparency Law and subsequently points to the problematic aspects as identified by the Commission during the infringement procedure, the justifications provided by Hungary and, finally, the reasoning of the Court.

III.1. The 2017 Transparency Law

The 2017 Transparency Law introduced a set of obligations for CSOs receiving funds from donors which have their legal seats outside Hungary. Given the difficult access to public funding in Hungary and the generalised (and frequently criticised[31]) practice of allocating

[29] G Noutcheva, 'Fake, Partial and Imposed Compliance: The Limits of the EU's Normative Power in the Western Balkans' (2009) Journal of European Public Policy 1065. Although Noutcheva refers to fake compliance in the context of candidate countries' accession to the EU – in particular with regard to institutional reforms, good governance and the rule of law – the notion can also be applied to the context of Member States' compliance with EU law and the Court's ruling.

[30] S Dimitrakopoulos and J Richardson, 'Implementing EU Public Policy', in J Richardson, *European Union: Power and Policy-making* (2nd edition Routledge 2001) 335.

[31] See, among others, Á Vass, 'No Deal Reached on Norway Grants Worth EUR 215 Million' (27 July 2021) HungaryToday hungarytoday.hu, as concerns the reasons underpinning the decision of Norway and other EEA countries to refuse the disbursement to Hungary of €215 million, meant to support CSOs. See also Á Vass, 'Gov't Outsources State Assets and Unis to 'Raise Competitiveness,' Opposition Believes It's Robbery' (28 April 2021) HungaryToday hungarytoday.hu, as concerns the widespread practice of transferring State assets to public interest asset management foundations, in order to remove those funds from public authorities' oversight as to their use. See also Transparency International EU's observations, endorsed by other six NGOs, pointing out that, for years, Hungary's authorities have been overbudgeting and overpricing projects covered by EU funds, thus providing no guarantees as to the independent allocation and control over the disbursement of such funds (L Pearson for Transparency International EU, 'Open letter to the European Commission on Hungarian Resilience and Recovery Facility Plan' (29 September 2021)

funds to CSOs politically close to the majority party, CSOs active in sensitive areas and politically not aligned with the government found in foreign donors their main funding sources.[32] The Transparency Law was adopted and entered into force at a time when CSOs reported increased allegedly State-sponsored "smear campaigns".[33] against organisations funded from abroad and active in migrants and refugees' reception and integration programmes,, as well as against the philanthropist George Soros and its foundation, Open Society.[34]

The Transparency Law was officially aimed at addressing the cases were "support from unknown foreign sources [to civil society organisations] is liable to be used by foreign public interest groups to promote – through the social influence of those organisations – their own interests rather than community objectives in the social and political life of Hungary".[35] Such support "may jeopardise the political and economic interests of the country and the ability of legal institutions to operate free from interference".[36] To address such issue, the law introduced the following obligations:

- Transparency obligations. Every organisation receiving support from abroad was required to submit a declaration to the competent court informing it of the name, place of registration and identification number of the CSO concerned. CSOs should also inform about the amount of support received and the number of donors providing such contributions. If the donor was a natural person, the declaration should also indicate the name, country and city of residence of such a person, while, if a legal person, it should indicate

Transparency International transparency.eu). Finally, see the concerns raised by the European Commission in its 2021 Rule of Law Report – Hungary Country Chapter, where it points out that "the Hungarian authorities frequently withdraw projects from EU funding when OLAF issues a financial recommendation, or sometimes when the authorities become aware that an OLAF investigation has been opened. Furthermore, it appears that amounts due are not systematically recovered from the economic operator who committed the irregularity or fraud. In such cases, the EU subsidy is simply replaced by national funds, with a negative impact on the deterrent effect of an OLAF investigation and higher risks for the national budget" (2021 Rule of Law Country Chapter – Hungary cit.).

[32] P Sárosi, 'Outsourcing Autocracy: The Rise of the Hungarian Deep State' (28 April 2021) Autocracy Analyst autocracyanalyst.net.

[33] International Service for Human Rights, 'The Situation of Human Rights Defenders – Hungary' (September 2015) UPR Briefing Paper ishr.ch. See also M Szuleka, 'First victims or last guardians? The consequences of rule of law backsliding for NGOs: Case studies of Hungary and Poland' (CEPS Paper in Liberty and Security in Europe 06/2018). Finally, see R Csehi, *The Politics of Populism in Hungary* (Routledge 2021), with a specific focus on section "Legislation regulating civil society organizations and non-governmental organizations – the abuse of law".

[34] R Csehi, *The Politics of Populism in Hungary* cit., with a specific focus on Chapter 2, section 'Legislation regulating civil society organizations and non-governmental organizations – the abuse of law'". See also L Bayer, 'Hungary steps up anti-Soros crackdown ahead of election' (17 January 2018) POLITICO www.politico.eu, and Human Rights Watch, *Hungary's Government Strengthens Its Anti-NGO Smear Campaign* (20 January 2018) www.hrw.org.

[35] *European Commission v Hungary (Transparency of associations)* cit. para. 3.

[36] *Ibid.*

the business name and its registered office.[37] Upon receipt of such declaration, the Court was required to register the organisation as an organisation receiving support from abroad and transmit all relevant information concerning the CSO to the Ministry competent for the management of the civil information portal, freely accessible to the public.[38]

- Advertising obligations. CSOs receiving support from abroad were required to indicate on their website and their publications that they have been identified as organisations receiving support from abroad.[39]

The law also provided for specific sanctions should CSOs fail to provide and display information on their revenue source. Such sanctions ranged from a fine to the dissolution of the organisation.[40]

In July 2017, the Commission started the pre-litigation phase, arguing that the law was not in compliance with the free movement of capital and violated arts 7, 8 and 12 of the Charter "by introducing discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organisations through the provisions of the Transparency Law, which impose obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold, and which provide for the possibility of applying penalties to organisations not complying with these obligations".[41] Following the lack of meaningful replies by Hungary, in December 2017, the Commission brought the action before the Court of Justice.

III.2. The Court is in session!

In the context of the judicial phase, the Commission brought forward its claims.

First, concerning the free movement of capital, the Commission submitted that the Transparency Law introduced a discriminatory measure against donors established outside of Hungary. While the law did not introduce a discrimination based on nationality, it nonetheless treated differently donors within Hungary and those established in other Member States or third countries.

Hungary replied that the law was not discriminatory *per se*, since it did not introduce a nationality criterion, but one merely based on the source of the income. It also held that such distinction was justified on the basis that financial support from Hungary could be more easily monitored, compared to support from abroad, hence requiring a different approach.

[37] Annex I to the Transparency Law.

[38] Art. 2(1), (2) and (4) of the Transparency law.

[39] Art. 2(5) of the Transparency Law.

[40] Art. 71G(2) of Law No CLXXXI of 2011 on the registration of civil society organisations with the courts and on the applicable rules and procedure.

[41] *European Commission v Hungary (Transparency of associations)* cit. para. 18.

With regard to this latter justification, the Commission argued that the place of establishment could not "be used as a parameter to assess the objective comparability of two situations".[42] It also argued that, in any case, the law had a deterrent effect on CSOs established in Hungary and donors established outside of Hungary: the "obligations of declaration and publication would deter the persons granting such aid from continuing to do so and would discourage other persons from doing so".[43]

As to such deterrent effect, Hungary replied that the provisions of the law were drafted in neutral and objective terms.[44] However, in the event the law was found as not compliant with art. 63 TFEU, Hungary argued that it was justified on the basis of an overriding reason in the public interest, namely that of increasing the transparency of the financing of CSOs having an influence on public life.[45] The Commission contended that, even in such a case, the law went beyond what was necessary and proportionate to reach such objectives.[46]

Second, concerning the violation of the Charter, the Commission argued that the law violated freedom of association since it made it more difficult for Hungarian CSOs to operate and stigmatised CSOs receiving funds from abroad while threatening their existence, by providing for the possibility of their dissolution. In addition, by requiring the disclosure of donors' personal data to the general public, the law violated the right to respect for private life and the right to data protection.[47]

Conversely, Hungary claimed that the Transparency Law merely regulated CSOs receiving funds from abroad and did not, as such, limited their freedom of association. It further reiterated that the law was drafted in neutral terms. Furthermore, it argued that the data to be disclosed could not be considered personal data within the meaning of art. 8 of the Charter, inasmuch as donors should be regarded as public persons – given their influence on public life – and thus enjoyed less protection than individuals.[48]

In its ruling of 18 June 2020, the Court endorsed the Commission arguments. It found that, with regard to the free movement of capital,

> "Those various measures, which were introduced together and which pursue a common objective, put in place a set of obligations which, having regard to their content and their combined effects, are such as to restrict the free movement of capital which may be relied upon both by civil society organisations established in Hungary [...] and by the natural and legal persons who grant them such financial support and who are therefore behind those capital movements".[49]

[42] *European Commission v Hungary (Transparency of associations)* cit. para. 41.
[43] *Ibid*. para. 42.
[44] *Ibid.* cit. paras 43 and 44.
[45] *Ibid.* para. 73.
[46] *Ibid*. para. 71.
[47] *Ibid*. paras 105-107.
[48] *Ibid*. paras 108 and 109.
[49] *Ibid*. para. 57.

Such provisions singled out CSOs and their donors, thus stigmatising them and creating a climate of distrust "apt to deter natural or legal persons from other Member States or third countries from providing them with financial support".[50]

The Court also rejected Hungary's attempts to justify the law, holding that the law was not based "on the existence of a genuine threat but on a presumption made on principle and indiscriminately that financial support that is sent from other Member States or third countries and the civil society organisations receiving such financial support are liable to lead to such a threat".[51] Nor could the presumption of such a threat be considered genuine, present and sufficiently serious to justify the restriction.[52]

Moreover, in relation to the Charter, the Court found, firstly, that freedom of association includes the right for CSOs to act freely from unjustified interventions of the State, including as concerns raising funds.[53] Secondly, it held that a piece of legislation which

> "renders significantly more difficult the action or the operation of associations, whether by strengthening the requirements in relation to their registration, by limiting their capacity to receive financial resources, by rendering them subject to obligations of declaration and publication such as to create a negative image of them or by exposing them to the threat of penalties, in particular of dissolution is nevertheless to be classified as interference in the right to freedom of association".[54]

Lastly, it upheld the Commission's argument on the deterrent effect of the law, stressing that the Transparency Law was such as "to create a generalised climate of mistrust vis-à-vis the associations and foundations at issue, in Hungary, and to stigmatise them".[55]

On the protection of private life and personal data, the Court refused Hungary's argument that natural persons providing support to CSOs should be regarded as public figures, holding that granting financial support cannot be considered as exercising a political role. Hence, natural persons providing donations to Hungarian CSOs should benefit from the most extensive right to data protection.

The Court eventually concluded that, by adopting a law

> "which impose[s] obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and which provide for the possibility of applying penalties to organisations that do not comply with those obligations, Hungary has introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations,

[50] *Ibid*. para. 58.
[51] *Ibid*. para. 93.
[52] *Ibid*. paras 94-95.
[53] *Ibid*. para. 113.
[54] *Ibid.* para. 114.
[55] *Ibid*. para. 118.

in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union".[56]

In the wake of the ruling, Hungary should have taken the necessary measures to comply, as provided by art. 260(1) TFEU. Following the lack of meaningful measures, on 18 February 2021 the European Commission announced that it was ready to trigger the second stage of the infringement procedure, namely by asking the Court the imposition of financial penalties pursuant to art. 260(2) TFEU.[57]

In its 2021 'February infringement package' press communication, the Commission declared that it sent a letter of formal notice to Hungary for failing to comply with the ruling of the Court in Case C-78/18, on the basis of art. 260(2) TFEU.[58] It held that Hungary had not yet, at the time, taken the necessary measures to comply with the Court's ruling, notably by repealing the law. The Commission gave Hungary a two-months deadline to reply. In the absence of a satisfactory response, the Commission highlighted the possibility of referring the case to the Court for the imposition of financial penalties.[59] Few weeks after, Hungary announced the withdrawal of the Transparency Act and the simultaneous adoption of the 2021 law. As of today, however, the Commission has not closed the infringement against Hungary yet. The following sections analyse the feasibility and interest of pursuing an action under art. 260(2) TFEU in such a case.

IV. (Almost) New actors, same old story: State Audit Office v civil society

This section examines the new law on "Non-Governmental Organisations Carrying Out Activities Suitable for Influencing Public Life" or 2021 anti-NGO law, adopted following the withdrawal of the 2017 Transparency Law.[60] It aims to show how the new law, while formally complying with the ruling of the Court in the *Transparency of Associations* case, leads in practice to the same negative impact on the effectiveness of EU law already identified by the Commission and confirmed by the Court. Even more, it is liable to further restrict civic

[56] *Ibid*. para. 145.

[57] See the European Commission's February 2021 Infringement Package, available at ec.europa.eu and infringement procedure no. INFR(2017)2110 against Hungary, *Violation of EU Law by the Act on the Transparency of Organisations Supported From Abroad (Act LXXVI/2017)*, adopted on 13 June 2017, still active at the time of writing, available at ec.europa.eu.

[58] European Commission's February 2021 Infringement Package cit.

[59] It is worth recalling that, in evaluating whether to trigger this second stage of the infringement procedure, the Commission enjoys the same level of discretion that it has when evaluating whether to launch a procedure under art. 258 TFEU. See E Várnay, 'Discretion in the Articles 258 and 260(2) TFEU procedures' (2015) Maastricht Journal of European and Comparative Law 836.

[60] Act XLIX of 2021 on "Non-Governmental Organisations Carrying Out Activities Suitable for Influencing Public Life". The Hungarian version of the law is available online at www.njt.hu.

space, by contributing to escalating the already established and generalised "climate of distrust"[61] against CSOs and thus having a chilling effect on their ability to conduct their activities freely. It also shows how the Hungarian legislator has, over the years, refined its "creative compliance" approach: while the new law certainly creates several grey areas, it is much more difficult, compared to the Transparency Law, to identify clear violations of EU law.

In addition to withdrawing the 2017 Transparency Law, the new law amends the law establishing the State Audit Office (Act LXVI of 2011 on the State Audit Office – hereafter "SAO Act"), providing for the expansion of its powers.

Art. 43 of Hungary's Fundamental Law designates the SAO as the financial and economic control body of the Parliament, whose primary role is to monitor the implementation of the national budget, the management of public finances, the use of public funds and the management of national assets. The new law expands such powers by providing the SAO with the power to audit all CSOs performing activities influencing public life, regardless of whether they receive public funds.

According to the Hungarian Fundamental Law, the SAO carries out its audits according to the principles of lawfulness, expediency, and effectiveness.[62] Similarly, the new law prescribes that, when auditing CSOs, the SAO should base its work on the principle of lawfulness.

In essence, such a principle relates to the obligation, for national authorities, to act within limits prescribed by the law. The correct implementation of this principle is directly related to the principle of legal certainty, recognised as a general principle of EU law.[63] Respect for such principles is even more critical in cases where judicial proceedings or investigations are ongoing. Indeed, the principle of legal certainty implies that national legislation is drafted sufficiently precisely to allow all individuals to be aware of their rights and obligations under the applicable legal framework.

While a full analysis of the new law is beyond the scope of this *Article*, it is worth mentioning a few points, allowing to clarify the climate of legal uncertainty it establishes.

CSOs' reporting obligations and public authorities' power to control the lawfulness of their activities are laid down in Act CLXXV of 2011 "on the right of association, the public benefit status, and the operation and support of non-governmental organisations".[64] CSOs are required to prepare an annual report on their operations, property, financial and income situation.[65] The report shall include a balance sheet, the income statement, and the bookkeeping information. In addition, CSOs having a public benefit status are required to

[61] *European Commission v Hungary (Transparency of associations)* cit. para. 58.

[62] Art. 43(1) of the Fundamental Law. The English translation of the Fundamental Law is available at www.parlament.hu.

[63] Case C-323/88 *SA Sermes v Directeur des services des douanes de Strasbourg* ECLI:EU:C:1990:299.

[64] The Hungarian version of the law is available at ilo.org.

[65] Arts 28(1) and 30(1) of Act CLXXV of 2011.

submit a public benefit annex, detailing the use made of public funds.[66] Finally, CSOs are required to transmit the report to the body responsible for its publication on the Civil Information Portal. CSOs shall also make the report publicly available on their website.[67]

While Act CLXXV refers to such reporting obligations, neither such law nor the SAO Act explains on which grounds the SAO may start an investigation. For instance, it is not clarified whether the SAO may only challenge the lack of respect of the submission or publication obligation, or whether it is also entitled to question the content of the report. In other instances, for example concerning the SAO's power to audit political parties and political foundations, such elements are clarified in specific methodological guidelines adopted by the SAO itself.[68] Concerning CSOs, no such guidelines have been adopted yet.[69]

Similarly, there is no indication of the threshold that evidence provided by third parties needs to reach for the SAO to launch an investigation. On this basis, the SAO could decide to launch an investigation based on circumstantial evidence, inputs provided by the Government and the Parliament, allegations from anonymous parties or on its own motion.[70]

While the elements of the law mentioned so-far may determine legal uncertainty and fall within the already mentioned grey-area established by the new law, an additional problematic element consists in CSOs' limited possibility to judicially challenge the results of the SAO's investigations.

According to the SAO Act, the findings stemming from the SAO investigations may be commented on by the audited CSO. However, the possibility to provide observations does not make the remedy effective. As the Hungarian Constitutional Court held in its ruling no. 32/2019 (XI. 15),[71] the SAO is to be considered as a non-authority. Therefore, its reports cannot be challenged before a judicial body, as specified in art. 1 of the SAO Act. This is particularly important considering that the reports of the investigation carried out by the SAO are public, as provided for by art. 32(3) of the SAO Act, and frequently advertised. This also applies with regard to the names of the inspected individuals, or the head of the legal persons and personal data related to the audited activities.

All the elements above need to be considered together within the general framework of lack of independence of the SAO from *Fidesz*, the political party holding a strong majority both in the Government coalition and in the Parliament. The lack of clear limits as to the margin of discretion of the SAO when launching and conducting investigations as

[66] Art. 29 of Act CLXXV of 2011.

[67] Art. 30(3) and (4) of Act CLXXV of 2011.

[68] Art. 23(1) of Act LXVI of 2011 on the State Audit Office.

[69] A list of the existing guidelines per sector is available at www.asz.hu.

[70] See, in this regard, art. 3 of the SAO Act, stating that the SAO may carry out inspections at the request of the Government and is obliged to do so on the basis of a decision of the Parliament.

[71] Hungarian Constitutional Court (Cúria) judgment no. 32/2019 (XI. 15) of 15 November 2019 *Establishing a constitutional requirement, on rejection of a constitutional complaint v. Section 1.6 of Act no. LXVI on the State Audit Office and on rejection of a constitutional complaint v. Ruling 2.Kpkf.670.489/2018/3 of the Budapest-Capital Regional Court and Ruling 101.K.31.401/2018/2 of the Budapest-Capital Administrative and Labour Court* paras 47, 48 and 54.

well as the lack of access to an effective legal remedy are even more worrying in light of the numerous accusations by newspapers, opposition parties and CSOs as to the SAO's lack of independence and impartiality.

The independence of the SAO is questioned first and foremost due to the strong political links between its President, László Domokos, and the Hungarian leading party, *Fidesz*. He was a member of the party between 1991 and 2010 and an elected Member of the Parliament for *Fidesz* between 1998 and 2010. His affiliation with the party formally ended in 2010, when he was appointed as President of the SAO. However, in 2010, the former leader of *Fidesz*, János Lázár, proudly announced the goal achieved by *Fidesz* through the appointment of a political party man as the President of the SAO.[72]

The political affiliation between Domokos and *Fidesz* has been highlighted several times by CSOs and opposition political parties. Among others, Transparency International argued that its studies show the SAO's biases in acting on behalf or at least in favour of *Fidesz*, notably by pointing out that the SAO's investigations found irregularities only with regard to opposition parties.[73] This happened despite substantial concerns as to the misuse of public funds by *Fidesz* to financially support its electoral campaign in 2018.[74]

In addition, suspicions have been raised concerning the timing of investigations and adoption of sanctions and the nature of sanctions adopted against opposition political parties. While the SAO acted within its remits, the timing is a source of concern in light of the possibility that it made more substantial use of its powers specifically during election campaigns, to limit the financial resources available to opposition political parties to run their campaigns. The OSCE raised such doubts in its report on the fairness of the 2018 Hungarian Parliamentary Election.[75] Additional allegations concern the disproportionate fines adopted against opposition political parties, leading some of them to consider dismantling the party.[76] The combination of a gentle approach towards *Fidesz* and its ally with the adoption of disproportionate sanctions against opposition parties has been highlighted by several CSOs,[77] stating that

[72] MTI/Hvg.hu, *Szakpolitikus pártembert jelöl az ÁSZ elnökének a Fidesz* (14 June 2010) www.hvg.hu.

[73] See, among others, the interview released in 2017 by Miklos Ligeti of Transparency International Hungary, who argued that, in the light of the studies carried out by Transparency International Hungary, it is evident that the choice of the SAO to investigate political parties' financial expenses is the result of a party political decision, available at www.reuters.com.

[74] See also C Adam, 'The Hungarian State Audit Office's assault on democracy' (9 January 2018) hungarianfreepress.com.

[75] OSCE, Office for Democratic Institutions and Human Rights, Hungary – Parliamentary Elections of 8 April 2018, ODIHR Limited Election Observation Mission – Final Report of 27 June 2018.

[76] See M Dunai, 'Hungary's Jobbik party says might disband after second audit fine' (1 February 2019) Reuters www.reuters.com; The Associated Press, *Fines may force Hungary's nationalistic Jobbik party to fold* (1 February 2019) abcnews.go.com; and Hungary Matters, *Opposition Parties Decry Audit Office Fines* (3 February 2019) hungarymatters.hu.

[77] See the report 'Contributions of Hungarian NGOs to the European Commission's Rule of Law Report', signed by Amnesty International Hungary, Eötvös Károly Institute, Hungarian Civil Liberties, Hungarian

> "The SAO has for decades been underusing its powers and has proven incapable to uncover and sanction questionable spending by political parties, who tend to underreport expenditure. The SAO also denies measuring political parties' declarations on campaign expenses against the reality, and this leaves the systemic overspending unsanctioned.[78] The SAO continues the practice of imposing excessive fines on opposition parties while there is no direct opportunity for legal remedy, which is seen by many as the misuse of power[79]".

The above further uncovers the problematic aspects of the SAO's approach towards transparency and accountability of public funds in Hungary. While transparency in public expenditure is a widespread concern in Hungary,[80] transversally applicable to opposition and majority parties, the SAO's focus on opposition parties further exacerbates the problem. The perceived lack of independence of the SAO is characteristic not only of opposition political parties and CSOs but is widespread among the population, with 44 per cent of Hungarians not believing in the independence and impartiality of the SAO.[81] As it emerges from the concerns reported above, by both CSOs, political parties and international bodies,[82] the generalised perception concerning the SAO's activity is that of expecting investigations particularly against political opponents, whether political parties or, following the new law, CSOs.

In light of the above, this preliminary analysis of the legal framework created by the 2021 anti-CSO law allows considering that the latter is likely to create a climate of general distrust as to the possibility for CSOs to seek redress in case of reputational damages or loss of financial opportunities stemming from the publicity of the SAO's reports. Even though in the subsequent proceedings the CSO may be found not guilty of any irregularity, the mere fact that the SAO may launch and make the public aware of their investigations, coupled with CSOs' impossibility to launch judicial proceedings against abusive investigations and the SAO's lack of independence and impartiality, is liable to intimidate CSOs, thus posing a threat to the free conduct of their activities.

Building on such analysis, some preliminary conclusions can be drawn.

Helsinki Committee, K-Monitor, Mertek Media Monitor, Political Capital and Transparency International Hungary (March 2021) transparency.hu 21.

[78] For details, see: Transparency International, 'Campaign Spending in Hungary: Total Eclipse' (2015) transparency.hu.

[79] See Hungarian Civil Liberties Union, *Our resolution on the sanctions imposed by the State Audit Office on opposition parties* (17 January 2018) tasz.hu, and HVG's comprehensive press report entitled '*4 év alatt 816 millió forintot szedetett be az ellenzéki pártoktól az ÁSZ*' ['The SAO has collected HUF 816 million from opposition parties over four years+'] (31 January 2019) hvg.hu. See also Index, *We have calculated how much money the State Audit Office has collected so far from opposition parties* (31 January 2019) index.hu.

[80] See, among others, Budapest Institute, *Open Budget Tracker Case Study – Hungary* (September 2014) www.budapestinstitute.eu; Gabriela Baczynska, 'Worried by 'systemic irregularities", EU ties recovery funds to Hungary procurement reform' (8 February 2021) Reuters www.reuters.com.

[81] See Daily News Hungary, *Over two-fifths of Hungarians say audit office lacks independence – Survey* (16 September 2020) www.dailynewshungary.com.

[82] See in particular footnotes n. 89 and 93 to 97.

First, as regards the impact on internal market freedoms, it is worth noting the refined strategy adopted by the Hungarian government which is still likely to have a chilling effect on civil society. The Hungarian legislator proved to have learnt from its past mistakes and, in full application of a creative compliance approach, it adopted a piece of legislation that, at least formalistically, does not provide for any discrimination. Indeed, the new law equally applies with regard to all CSOs established in Hungary, regardless of their sources of revenue.

However, it is still likely to deter the action of CSOs and donors. By considering holistically the elements provided above concerning the SAO's action and, in particular, (i) the possible abuse of its discretionary investigative powers, notably concerning which CSOs shall be subject to its controls and in light of the previous auditing practices concerning political parties, (ii) the public character of the results of the SAO's investigations, namely as regards the identities and personal data of the members of the organisations and their donors, and (iii) the SAO's lack of independence and impartiality, the new law is such as to maintain the same climate of distrust created by the previous one.

Although such characteristics only qualify the SAO as operating in a grey area – thus making problematic the same determination of violations of EU internal market law identified by the Court in *Transparency of Associations* – they should nonetheless be considered together with the most important shortcoming of the new law, notably the lack of access to effective legal remedies to seek redress in case of abuse of power or damages stemming from the SAO's action. The latter further impairs civic space, by depriving CSOs of any possibility to judicially react against abusive practices.

In light of the unfair allocation of public funds in Hungary,[83] the new provisions are likely to have an unbalanced effect on CSOs receiving funds from abroad, especially those proposing projects non-aligned with *Fidesz*' political programme, thus further hindering the development of a pluralistic political opposition.

Second, as regards the right to data protection, the explanatory note attached to the law clarifies the extent of the publicity of the SAO's findings. It states that "The report of the State Audit Office is public, but the published report may not contain classified information or other secrets protected by law". However, according to art. 32 of the SAO Act, data such as the "name of the individual or the head of the legal person under investigation and *the personal data related to the activity under investigation, with the exception of sensitive data, are public data in the public interest* and may be made public in the report or otherwise made available" (emphasis added). In other terms, nothing in the new law prevents the SAO from publishing the financial reports of the audited organisations, including the data concerning their donors, both public and private, and the correspond-

[83] P Sárosi, 'Outsourcing Autocracy: The Rise of the Hungarian Deep State' (28 April 2021) autocracyanalyst autocracyanalyst.net.

ence between the SAO and the audited organisations concerning the additional supporting information to be provided by the latter, as long as such data can be considered as public data in the public interest.

Consequently, the new law is likely to amount to a similar restriction of individuals' right to data protection already identified by the Court in *Transparency of Associations*. Finally, given the lack of access to legal remedy against the SAO's report, there is no real and effective possibility to seek rectification of such data and no guarantee of an independent authority verifying compliance with such rules, as required by the Charter.

Similarly, as regards the violation of freedom of association, it is worth reminding that, in *Transparency of Associations*, the Court argued that it considers CSOs' capacity to receive financial resources and operate without being exposed to the threat of penalties as essential elements allowing CSOs to pursue their action and, consequently, exercise their freedom of association.[84]

As already pointed out, the general legal framework of the new anti-CSO law does not introduce a discriminatory element, which could in itself be considered a limitation to the freedom of association. Hungary's refined strategy foresees a deterrent effect equivalent to that identified by the Court in *Transparency of Associations*, which finds its origin in the climate of legal uncertainty and lack of effective judicial remedy. The publicity of the SAO's reports, coupled with the lack of methodological guidelines as to the frequency of the audit controls, the grounds on which an investigation can be started and the minimum threshold of reliability that allegations need to reach to be considered by the SAO, are likely to discourage CSOs from pursuing their activities. In this context of legal uncertainty, CSOs may fear to be targeted by the SAO, thus being subject to onerous and time-consuming investigations and public exposure of their alleged misconduct, while having no possibility to seek redress for the reputational damage. Furthermore, abuses by the SAO of its investigative and publicity powers are likely to lead to a further stigmatisation of the non-profit sector in Hungary, thus contributing to the already existing climate of mistrust described by the Court.

To conclude, as it appears from the Table 1 below, the Transparency Law and the 2021 law impair the effectiveness of the same EU law provisions, thus confirming the initial hypothesis, namely that the new law represents only a formalistic implementation of the Court's ruling.

[84] *European Commission v Hungary (Transparency of associations)* cit. paras 114-115.

Relevant EU law provisions as identified by the Court	Non-compliant domestic provisions of the 2017 Transparency law	Non-compliant domestic provisions of the 2021 anti-CSO law
Freedom of movement of capital	– Registration requirements – Publicity requirements – Sharing of personal data requirements – Excessive penalties (including dissolution)	– Legal uncertainty as to the SAO's powers of investigations and the sanctions connected to them – No access to effective legal remedy – No independent judicial authority to rely upon to challenge the SAO's report or the Prosecutor's decision to sue the CSO
Freedom of association	– Publicity and registration requirements' dissuasive effect on both CSOs and foreign donors	– Legal uncertainty as to the possibility to conduct a project due to uncertainty as to SAO's possibility to launch abusive investigations (onerous procedures and reputational damage)
Right to respect for private life and family life Right to protection of personal data	– Publication of donors' name, liable to deter them from continuing allocating their financial support – No access to venues to ask correction to an independent authority	– Inclusion in CSOs annual reports of personal data of all individuals providing financial support – Publicity of the SAO's reports, including personal data of the inspected individuals, the head of the legal person and any other personal data related to the audited activity – No access to venues to ask correction to an independent authority

TABLE 1. Comparison between the effects on EU law of the 2017 and 2021 Hungarian laws.

It is worth underlining, however, how their similarity in the effects on EU law does not necessarily lead to the possibility to consider the 2021 law as in violation of the same provisions. In fact, any attempt by the Commission to argue that the 2021 law violates the same provisions already identified by the Court in *Transparency of Associations* would need to be based on the SAO's practice and actual implementation measures of the 2021 law. This would not only require a factual assessment of the SAO's daily practice, but also an analysis performed over a certain amount of time, in order to collect sufficient evidence to support such a factual allegation.

V. Beyond the Hungarian case: the impact of creative compliance on the effectiveness of EU law

It stems from the analysis above that the context of mistrust against CSOs and foreign donors translates into the strategic use of legislative practices. Both the withdrawal of the Transparency Law and the simultaneous adoption of the new law represent two logical steps in autocratic legalists' use of creative compliance to pursue their illiberal goals. One can find not only the use of legislative reforms to introduce burdening obligations and to threaten political opponents but also the formal reliance on international standards.

According to the explanatory note attached to the 2021 anti-CSO law, the latter is presented as a form of implementation of the Court's ruling in the *Transparency of Associations* case.[85] However, at the same time, it emerges from the explanatory note how the Hungarian legislator aims to make use of such a ruling to push its illiberal agenda by relying on a creative compliance-based mechanism. As a matter of fact, the explanatory note states that

> "In that case, the Court confirmed that ensuring the transparency of aid granted to organizations capable of exercising significant influence over public life and public debate may constitute an overriding reason in the public interest. *For this reason*, at the same time as the repeal, *the Proposal aims to create new regulations in line with EU law* [...]. *The scope of the proposal is the same as in the Transparency Act, with the difference that the powers conferred on the State Audit Office are a guarantee of professionalism and independence*".[86]

This latest move of the Hungarian legislator is likely to have a widespread impact on the effectiveness of EU law. In this light, the Hungarian case study proves useful to analyse to what extent the reliance on creative compliance-based techniques by autocratic legalists may ultimately negatively impact the credibility and authority of the European Commission as guardian of the Treaties and of the first step of infringement procedures (and thus of the ruling of the Court) as an effective way to induce compliance with EU law.

In rule of law-related cases, the Court of Justice and the Commission are suffering incessant attacks against their authority and power to intervene. Some recent examples can be found in the ruling of the Polish Constitutional Tribunal in case K3/21, where the Polish highest court found the principle of primacy of EU law, the principle of sincere cooperation among EU and Member States' institutions and the principle of judicial cooperation among national courts and the Court of Justice in contrast with the Polish Constitution.[87]

In light of such developments, it is worth rethinking the role that enforcement tools, particularly infringement procedures, can have in inducing Member States to comply with EU law, thus ensuring its effectiveness at the domestic level. Traditionally, in the majority of infringement cases, the mere fact of sending a letter of formal notice in the pre-judicial phase of the infringement procedure is sufficient to ensure Member States' compliance.[88] Even when brought up to the judicial phase, the rulings of the Court under art. 258 TFEU are sufficiently authoritative to push Member States to comply, thus making the use of art. 260(2) TFEU an extremely rare case.[89]

[85] Explanatory note attached to the Bill no. T/15991, amending the SAO Act and repealing the law on the Transparency of NGOs. Hungarian version available at www.parlament.hu.

[86] Explanatory note attached to the Bill no. T/15991 cit. (emphasis added).

[87] Polish Constitutional Tribunal judgment in the name of the Republic of Poland of 7 October 2021 no. K 3/21 *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*.

[88] K Boiret, 'Selective Enforcement of EU Law – Explaining Institutional Choice' (2016 European University Institute – Department of Law) 119-124. See also Table 3 as concerns the data regarding the timeframe 2016-2020.

[89] See Table 3.

Table 2 below refers to the use by the Commission of its informal and formal enforcement tools when dealing with alleged infringements from Member States. It reports on the use of the EU Pilot informal dialogue mechanism and the subsequent use of infringement procedures.[90] The Commission handles several new EU Pilot cases each year, most of which do not reach the stage of the infringement procedure (on average – in the timeframe 2016-2020 – the Commission solved through EU Pilot 72,4 per cent of cases each year). It is worth recalling that the Commission has a wide margin of discretion in evaluating whether to rely on the EU Pilot mechanism or to formally launch an infringement procedure.[91] This is in line with the goal of the EU Pilot mechanism, namely "to quickly resolve potential breaches of EU law at an early stage in appropriate cases".[92] It follows that "the Commission will launch infringement procedures without relying on the EU Pilot problem-solving mechanism, unless recourse to EU Pilot is seen as useful in a given case".[93]

Year	No. cases handled by the Commission	Solved through EU Pilot	Main policy areas
2020	171	108 (63%)	Environment, mobility and transport, energy, taxation and customs union (altogether: 71%)
2019	244	187 (77%)	Energy, maritime affairs, Justice and Home Affairs ("JHA" particularly cybercrime, legal migration and integration, information systems for borders, migration and security), environment (altogether: 71%)
2018	397	290 (73%)	Energy, environment, migration and home affairs (police cooperation, legal migration and integration, cybercrime), taxation and customs (altogether: 83%)
2017	512	393 (77%)	Environment, energy, climate action, taxation and customs (altogether: 77%)
2016	875	630 (72%)	Environment, taxation and customs, internal market, mobility and transport

TABLE 2: Bottom-up regional groups in the European Union.

As shown by the high percentage of cases successfully closed by the Commission in the context of the EU Pilot mechanism, the use of EU Pilot in those cases selected by the

[90] The EU Pilot mechanism consists in an online platform launched by the Commission in to communicate with national legal services and clarify the factual and legal background of national measures which may result in lack of conformity with EU law and undermine the correct application of EU law. Further information on the mechanism can be found at www.single-market-scoreboard.ec.europa.eu.

[91] Communication 2017/C 18/02 from the Commission of 19 January 2017 on EU law: Better results through better application

[92] *Ibid*.

[93] *Ibid.*

Commission effectively achieves its prospected goal, namely reducing the burden of lengthy infringement procedures. However, being a dialogue-based mechanism, its effectiveness stems from the willingness to cooperate from both sides. It follows that it is mostly effective in those fields that are less politicised.

In addition to the EU Pilot dialogue mechanism, the Commission has broad discretion in making use of its enforcement powers by launching a formal infringement procedure.[94] As shown in Table 3, the Commission resolves a high percentage of infringements before the case reaches the Court's stage. Many cases are closed right after the Commission's letter of formal notice, while additional cases are closed after the Commission sends its reasoned opinion. Finally, some residual cases are closed after the Commission informs the Member State of its intention of submitting the case to the Court, but before it does so. This trend can be explained by reference to the dissuasive effect that infringement actions have on Member States, inducing compliance to avoid the reputational and economic costs connected to handling an in-Court proceeding.[95]

Year	No. infringement cases open at the beginning of the year	No. cases solved after the letter of formal notice	No. cases solved after sending reasoned opinions	No. cases closed after deciding to submit application to the Court	No. of financial penalties cases (260(2) TFEU)
2020	1564 (end of 2019)	510	144	27	1
2019	1571 (end of 2018)	604	160	41	2
2018	1559 (end of 2017)	355	219	58	2
2017	716 (new cases)	560	209	43	3
2016	986 (new cases)	520	126	27	-

TABLE 3: Commission's handling of infringement cases under Art. 258 TFEU.

In conclusion, out of the total number of infringement cases the Commission opens each year, only a small minority reaches the judicial phase and comes to a conclusion with a ruling of the Court. Even a smaller minority of cases advances to the next stage of the infringement procedure, namely art. 260(2) TFEU.[96] The data support the conclusion

[94] L Prete, *Infringement Proceedings in EU Law* (Kluwer 2017) 38-41 and 347-350 and L Prete and B Smulders, 'The coming of age of infringement proceedings' (2010) 47 CMLRev 14-16.

[95] A Schrauwen, 'Fishery, Waste Management and Persistent and General Failure to Fulfil Control Obligations: The Role of Lump Sums and Penalty Payments in Enforcement Actions Under Community Law' (2006) JEL 289-299; and E Várnay, 'The Institutionalisation of Infringement Procedures in EC Law – The Birth of a Community Sanction' (2006) European Integration Studies 9-10. See also Joined Cases C-514/07 P, C-528/07 P and C-537/07 PS *Sweden v API* ECLI:EU:C:2010:541 para. 119.

[96] See Table 3.

that the prospective use, by the Commission, of the second stage of infringement procedures induces compliance in Member States, thus reinforcing the overall dissuasive effect of infringement procedures. It is also relevant to note that most cases concerned policy areas such as environment, competition, and internal market.

Differently, as concerns the field of the rule of law, the most relevant case of imposition of financial penalties for lack of compliance with a Court's order can be found in relation to Poland, and it sees the imposition by the Court of a daily penalty of €1'000'000 for lack of compliance with its previous interim order imposing Poland to suspend the functions of the Disciplinary Chamber of the Polish Supreme Court.[97]

Out of the four infringement procedures lodged by the Commission before the Court concerning rule of law backsliding in Poland,[98] the abovementioned interim order is the only case of imposition of a financial penalty in relation to rule of law backsliding and judicial independence.

While such limited use of art. 260(2) TFEU in the field of the rule of law is consistent with the practice of the Commission in other areas of EU law, it is questionable whether the adoption of a similar strategy is able to reach similar results. In fields such as environment and competition, the Commission's monitoring exercises on the implementation of EU law reports high rate of compliance, either voluntary or induced.[99] This is confirmed by the data contained in the tables above concerning the effectiveness of the EU Pilot mechanism and the dissuasive effect that follows the launch of formal infringement actions. However, the same cannot be said as concerns the field of rule of law.

[97] Case C-204/21 R *Commission v Poland* ECLI:EU:C:2021:593. However, it shall be noted that this case does not represent an example of use of art. 260(2) TFEU after lack of compliance by a Member State of a ruling of the Court adopted under art. 258 TFEU. Indeed, in the case at hand, following the Commission's request, the Court adopted first an interim order (on 14 July 2021) ordering Poland to suspend the provisions of national legislation relating to the Disciplinary Chamber of the Supreme Court. Subsequently, following another request from the Commission and due to Poland's lack of compliance with the Court's interim order, the latter adopted a new order imposing Poland the payment of the already mentioned financial penalty.

[98] L Pech, P Wachowiec and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (Hague Journal on the Rule of Law 2021) 1. See also Case C-204/21 *Commission v Poland* pending; C-791/19 *Commission v Poland (Régime disciplinaire des juges)* ECLI:EU:C:2021:596; C-619/18 R *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531; C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924.

[99] Commission Staff Working Document SWD(2021) 212 final of 23 July 2021 on General Statistic Overview Accompanying the document Report from the Commission Monitoring the application of European Union Law – 2020 Annual Report.

An example of the need for a different strategy can be found in the Polish saga on judicial independence.[100] Following the already mentioned imposition of fines,[101] the government announced the future dismantling of the Disciplinary Chamber of the Supreme Court for the purpose of establishing a new body under the control of the Ministry of Justice.[102] While Poland dismantled the Disciplinary Chamber in July 2022, it also adopted a new law on the Supreme Court. This case may easily represent another example of creative compliance, as pointed out by the Polish opposition, which stressed that it merely represents a cosmetic change, since the old judges of the Disciplinary Chamber may be appointed as new ones and will, at worst, be re-assigned to other chambers of the Supreme Court.[103]

A similar strategy has been followed by the Hungarian government in the context of its plans aimed at curbing civic space and controlling political opponents, particularly in the civil society sector. It is worth recalling that the 2021 law has been announced by the government as aimed at implementing the Court's ruling in *Transparency of Associations.* What one can witness in the present case can be considered as an attempt to misguide EU institutions by entrusting the functioning of a newly created mechanism of control of CSOs' activity to a parliamentary body whose independence from the Government and the majority party is – at best – questionable. The consequences of such a strategy are at least twofold.

First, if not properly identified and addressed by the Commission, this tactic is likely to be reproduced (if it is not already – as the Polish saga seems to indicate) in the context of other infringement procedures, thus giving rise to a growing set of creative compliance-based national measures.

Second, such a strategy, coupled with the Commission's reluctance in making consistent use of the second stage of infringement procedures, is likely to lead to a loss of credibility of the effectiveness of the EU enforcement mechanisms. This is happening in a

[100] For an in-depth overview of the different cases concerning judicial independence in Poland, see L Pech and D Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (SIEPS Stockholm 2021).

[101] See, in particular, the cases of Judges Niklas-Bibik and Gąciarek (see IUSTITIA, 'November 24, 2021 National Board of the Polish Judges` Association "Iustitia" resolution on the suspension of judges Maciej Ferek and Piotr Gąciarek done by the Disciplinary Chamber' (25 November 2021) www.iustitia.pl), suspended for setting aside domestic law to ensure the primacy of EU law and for referring a question for a preliminary ruling to the Court of Justice, and Judge Ferek (Polish News, 'Cracow. Judge Maciej Ferek is facing disciplinary proceedings because he did not want to adjudicate with the judges selected by the new National Council of the Judiciary' (6 November 2021) polishnews.co.uk), for refusing to adjudicate in a panel comprised of members unlawfully appointed by the National Council of the Judiciary. See also M Jałoszewski, 'Judge Niklas-Bibik suspended for applying EU law and for asking preliminary questions to the CJEU' (30 October 2021) Rule of Law ruleoflaw.pl; and M Jałoszewski, 'The illegal disciplinary chamber is working again. And has suspended Judge Ferek for applying EU law' (16 November 2021) THEMIS themis-sedziowie.eu.

[102] Reuters, 'Poland says it will dismantle disciplinary chamber for judges' (17 August 2021) www.reuters.com.

[103] Notes from Poland, 'Poland closes judicial disciplinary chamber at heart of dispute with EU' (15 July 2022) notesfrompoland.com.

historical moment when such reliability is particularly needed, especially in the field of the protection of EU values. In turn, this could lead to other Member States adopting similar tactics to deceive and avoid compliance with EU law, even beyond values-related fields.

The Commission would need to act firmly and avoid accepting any situation of creative compliance. In practical terms, this would imply a careful review of national legislation supposedly adopted in compliance with the Court's ruling under art. 258 TFEU and a quick analysis of the factual situation in those cases where it is apparent that the new legislation only formalistically implements the judgment while in practice reproducing the same shortcomings identified by the Court. This reaction implies a shift in the approach of the Commission *vis-à-vis* Member States. Previously, and especially in non-values-related infringement procedures, the Commission regarded Member States as cooperative partners. In turn Member States, although adopting stalling tactics, avoided reaching the point of infringements actions and Court's rulings. Conversely, values-related cases require a different approach.[104]

The long-lasting struggle between EU institutions and Poland and Hungary over the rule of law has proven that rule of law violations are not a matter of political dialogue and involuntary infringement anymore. Both countries have repeatedly stated that they have a different understanding of EU values and are unwilling to accept the EU institutions' view on such issues.[105] Consequently, the Commission needs to stop relying on dialogue-based mechanism and make consistent use of its enforcement toolbox.[106]

As already experienced in the context of the infringement procedure on freedom of expression and the CEU,[107] the time that elapses between the entry into force of a new law and its effective withdrawal can allow autocratic governments to reach their political goal, thus nullifying the intent of the infringement action and, in essence, the effectiveness of EU law. In the abovementioned case, while Hungary was in the end forced to repeal the so-called *Lex CEU*, it did so only several months after it entered into force. At that point, the law had already irreparably damaged freedom of expression.[108] By the

[104] Different scholars have elaborated on the need for different approaches, suggesting for instance to rely on systemic infringement procedures (KL Scheppele, D Kochenov and B Grawoska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) Yearbook of European Law 3) or to make stronger use of interim orders (L Pech, P Wachowiec and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' cit.).

[105] See, among others, Orban's 2014 announcement (full speech available at budapestbeacon.com) of its plan to turn Hungary into an "illiberal state": A Juhász, 'Announcing the "illiberal state"' (21 August 2014) Heinrich Böll Stiftung www.boell.de.

[106] This encompasses not only the second stage of infringement procedures, widely discussed in this contribution, but also additional tools, such as the rule of law conditionality mechanism (see Regulation (EU, Euratom) 2020/2092 cit.), and infringement actions based on the violation of the duty of sincere cooperation ex art. 4(3) TEU.

[107] Case C-66/18 *European Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792.

[108] E Inotai, 'Legal victory for Central European University is too little, too late' cit.

time it took to condemn Hungary, the goal of its government, namely stigmatising and forcing out of the country a university providing academic programmes not in line with the government's political view, had already been achieved.

In order to prevent a similar strategy being deployed against CSOs in Hungary, thus further hindering freedom of association, the Commission has only one possibility within the general framework of infringement actions: asking the Court the imposition of daily financial penalties against Hungary for failure to implement the ruling of the Court in *Transparency of Associations*. In doing so, the Commission could rely on the argument that the new law, although it repeals the Transparency Law, limits itself to a merely formalistic implementation of the Court's ruling. However, as already stressed, hurdles remain with this approach: it would require a factual analysis of the practical measures put in place by the SAO and their impact on freedom of association.

While an action under art. 260(2) would be a first of its kind situation in a rule of law-related case, it seems necessary in the context of the increasing democratic backsliding. The use of the second stage of the infringement action would remarkably distinguish this case from the Polish one, as penalties would be adopted at the end of a full judicial proceeding, where a court of law has had the opportunity to hear the parties and decide on the matter. Hence, it would benefit from greater consideration than penalties adopted in the context of an interim order. However, when fines are imposed, especially in the form of lump sums, the Commission should immediately enforce their recollection to ensure that the dissuasive character of sanctions does not get neutralised by the unlikelihood of their effective enforcement.

To conclude, the Commission could build on the Court's case law regarding abuses of the procedure by Member States through the adoption of merely formalistic changes during the infringement procedure.[109] It should argue that changes to a law considered by the Court as not in compliance with EU law shall not be limited to solely aesthetic changes but should address the intrinsic issues pointed out by the Court and the factual impact of the measures adopted at the national level. In the absence of the compatibility of such factual impact with the Court's ruling, Member States should not be allowed to argue that they are complying with the Court's judgment.

[109] For a more comprehensive analysis on the case where a Member State amends its domestic law during the infringement procedure without, in the view of the Commission, bringing it in line with EU law, see L Prete, *Infringement Proceedings in EU Law*, cit. 161: "the Court has rejected an overly formalistic reading of the Treaty rules, and has found that: where, after an action against a Member State for failure to fulfil its obligations has been brought, the national legislation which allegedly did not meet the obligations of the Member State in question under [EU] law is replaced by other legislation having the same content, the fact that in the course of the proceedings the Commission imputed its claims concerning the previous legislation to the legislation which replaced it does not mean that it has altered the subject-matter of the dispute", referring to Case C-42/89, *Commission of the European Communities v Kingdom of Belgium* ECLI:EU:C:1990:285 para. 11.

VI. Conclusion

The analysis above provided a practical case study analysing the impact on the effectiveness of EU law that an increased use of legalists' creative compliance strategy may have., particularly in a rule of law backsliding context. To do so, the *Article* focused on the case study of the 2021 Hungarian approach towards civic space and provided a comparative analysis of the 2017 Transparency Law and the new 2021 law. The analysis concluded that the two laws impact the same provisions of EU law, as interpreted by the Court of Justice in the *Transparency of Associations* case. At the same time, it has been noted that it would be problematic to identify comparable violations of EU law, in light of the need to perform a factual analysis of the practices put in place by the SAO over a certain amount of time. Subsequently, the *Article* addressed the impact of a creative compliance-based mechanism on the effectiveness of EU law and the opportunity for the Commission to question such approach through infringement procedures. It concluded that the effectiveness of infringement procedures in values-related cases strongly relies on the Commission's readiness to make use of the second stage of the procedure and ask the Court the imposition of financial penalties.

Given the obstacles and limitations underlined above, doubts remain as to the appropriateness of this enforcement tool *per se*. As the case study has shown, autocratic legalists will reasonably refine their strategy, thus making it more and more difficult for the Commission to identify technical and evident violations of EU law in rule of law-related cases. At the same time, other tools, such as art. 7 TEU, proved their ineffectiveness.[110] The implementation of the recently adopted Rule of Law conditionality mechanism,[111] which had been presented as the completing brick of the set of tools at the disposal of the Commission, is still lagging behind. The first move from the European Commission dates from 18 September 2022, more than one and a half years after the entry into force of the regulation.[112] The long-awaited enforcement of the regulation came however with many limits: Hungary will still remain entitled to around 80% of funds allocated under the EU multi annual financial framework.

The only mechanism that proved able, over the last months, to generate some change, is the conditionality mechanism embodied within the procedure for the disbursement of EU funds connected to the Recovery and Resilience Facility. However, even for such tool, the case of the cosmetic changes introduced by Poland to push the Commission to unfreeze the funds proves that illiberal governments will not easily abide.

[110] T Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) Res Publica 693; KL Scheppele and L Pech, 'Is Article 7 Really the EU's "Nuclear Option"?' (6 March 2018) Verfassungsblog verfassungsblog.de.

[111] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[112] European Commission, Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principle of the Rule of Law in Hungary, COM(2022) 485 final of 18 September 2022.

Ultimately, one could question whether the current system of enforcement is adequate to handle systemic rule of law backsliding. What we are facing is a situation of only apparent abundance of instruments, while neither of them is fully effective in countering rule of law backsliding. How can we expect the Commission to be able to react against the deterioration of EU values, when the reality is that we are asking it to empty the ocean with a soup spoon?