

ROLE MODELS OF POLITICS DISGUISED IN TECHNIQUE: CASES C-78/18 ON ASSOCIATIVE TRANSPARENCY AND C-66/18 ON ACADEMIC FREEDOM IN HUNGARY / Irene Marchioro

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Abstract: *The article analyses two decisions of the European Court of Justice issued last year against Hungary, with the aim of outlining a new trend in the Court's caselaw, where threats to the rule of law are confronted without making express reference to it. The profiles of the two judgements that are investigated are three, and namely: the timing of the procedures, the role of discrimination in the assessment of violations of the TFEU rules on the freedom of movement of capital and services, the assessment of violations of the Charter of Fundamental Rights of the European Union alongside TFEU violations. The purpose of the article is to prove that the infringement procedure under Art. 258 TFEU can be successfully used to hinder antidemocratic drifts and illiberal trends even when a case is designed as purely technical and the rule of law is not called in, which may ultimately shield the Court itself from accusations of being too politically involved in Member States' affairs.*

Key words: *European Union law; rule of law; infringement proceedings; fundamental rights; transparency of associations; academic freedom; Hungary*

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1. THE WIDER CONTEXT: CONSTITUTIONAL REGRESSION IN CENTRAL EUROPE AND THE ECJ TAKING THE CENTRE OF THE STAGE

Over the last decade, Hungary has witnessed an antidemocratic drift, which notably started in 2011, when a new, much criticised Constitution entered into force, and sparked a vague of "constitutional regression" and "rule of law backsliding" in other Central European States (Adamski, 2019; Besselink et al., 2019; Milani, 2019; Orlandi, 2019; Scheppele and Pech, 2018; Spadaro, 2021; Várnay and Varju, 2019). Ever since, the Hungarian legislature and government have adopted or proposed measures intended to weaken the legal position of subjects at risk of marginalization, such as LGBTs and migrants, while conducting a policy aimed at stifling any opposing voice both at the political and at the social level, and endangering the role of balancing powers, first and foremost the judiciary and the media (Benvenuti, 2020; Mori, 2020; Sena, 2020).

All these steps clearly indicate that Hungary is, together with Poland, one of the main protagonists of a constitutional regression that clearly endangers the very essence

of the EU. Yet the reaction of the European Union at the political level has been so far quite timid or otherwise ineffective. After the triggering of the procedure under Art. 7 of the Treaty on the European Union¹ against Hungary in September 2018,² indeed, the Council has failed in making effective use of it, as the European Parliament harshly stated in its resolution of January 2020.³

Consequently, the ECJ is increasingly taking on the role of guardian of the rule of law and other founding values enshrined in Art. 2 TEU. This latter role has so far materialised, it is true, in cases not directly involving Hungary, as it prompted the reinterpretation of Art. 19 TEU as a limit to the national competence concerning the organisation of the judiciary, in the Polish judges' saga,⁴ as well as the proclamation of the 'non-regression' principle concerning those values, in a Maltese case.⁵

Still, as not just the Polish "spectre", but also the Hungarian one is haunting Europe, one is always waiting for the Court to enter the scene of a Hungarian case with rabbits "masterfully put out of the wizard's hat" (Kochenov and Dimitrovs, 2021).

Such theatrical developments, however, carry the risk of appearing too politically embroiled, and even to contradict the spirit of Art. 4(2) TEU, with its stress on the national identity of Member States. To avoid such criticism, be it justified or not, the ECJ should wisely resort to some form of "prudent self-restraint" (Spadaro, 2021, p. 201).

2. SETTING THE RESEARCH QUESTIONS AMONG THE VARIOUS LEGAL ISSUES RAISED BY THE COMMENTED CASES

It is precisely in this vein that the present essay will approach the judgements rendered last year by the ECJ on the Hungarian Transparency Law,⁶ on one side, and on the limits imposed to academic freedom by the 2017 amendment of the Hungarian Act on National Higher Education (so called "Lex CEU"),⁷ on the other side.

The attempt will be, indeed, to show that the ECJ rulings in these two Hungarian cases can be analysed as purely technical applications of EU internal market rules, complemented by a fundamental reference to the Charter of Fundamental Rights of the European Union. The idea is that both judgements are, in other words, expression of a prudent, though uncompromising, judicial self-restraint, that should be prioritized over any redundant assessment of the violation of the rule of law or other founding values of the European Union.

The intended approach explains why this paper will not, in particular, look into the GATS infringements that have been assessed by the Court in the case on academic freedom. While such infringements were indeed relevant in that case, and while the findings of the Court in that area are of extreme interest on their own (Nagy, 2021a, 2021b;

¹ Hereinafter referred to as "TEU".

² European Parliament, the resolution, 2017/2131(INL) (12 September 2018).

³ European Parliament, the resolution, 2020/2513(RSP) (16 January 2020).

⁴ Starting from notorious CJEU, the judgement of 27 February 2018, Associação Sindical dos Juizes Portugueses, C-64/16, ECLI:EU:C:2018:117, followed by multiple and well-known decisions on the independence of judges and the judiciary in Poland (see CJEU judgements of 24 June 2019, Commission v. Poland, C-619/18, ECLI:EU:C:2019:531; of 19 November 2019, A.K. v. Krajowa Rada Sądownictwa and CP, DO v. Sąd Najwyższy, in joint cases C-585/18, C-624/18, C-625/18, ECLI:EU:C:2019:982; of 2 March 2021, A.B. C.D., E.F, G.H, I.J. v. Krajowa Rada Sądownictwa, C-824/18, ECLI:EU:C:2021:153).

⁵ See CJEU, the judgement of 20 April 2021, Repubblica, C-896/19, ECLI:EU:C:2021:311.

⁶ CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476.

⁷ CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792.

Vesperini, 2021; Vranes, 2021),⁸ it remains that, on one side, such findings are not always decisive - as the assessment of the Treaty on the Functioning of the European Union⁹ infringements would stand even without the GATS infringements; on the other side, that they constitute the judicial reflection of a very special Hungarian feature in that case, with no apparent risk of extension to other back-sliding States.

As it will emerge from the following paragraphs, the assessment of an infringement of the rules of the internal market that do eventually rebound on the rule of law can be used as a means to protect the rule of law itself. In this understanding, the assessment of the discriminatory character of a measure, even when it is not strictly necessary for the pronouncement of its illegitimacy as such, can be useful in order to enhance the blame for its adoption. Similarly, the assessment of a violation of the Charter of Fundamental Rights of the European Union, even when it results in a sort of duplication of the decision on the infringement of internal market rules, can be crucial to mark the difference between an 'ordinary' violation and a particularly odious one.

Lastly, the context in which a case arises is also to be taken into consideration. The factual context, indeed, may cast light and attention on politically relevant issues, prompting the appointed institutions to make their stand against acts and laws that appear to be in breach of fundamental rights and of the rule of law. That being the situation, even a judicial case designed by the Commission as technical – as are the two cases that will be analysed in the following paragraphs – can profit from the position statements of external bodies or other EU institutions, for example when it comes to justifying the special urgency of the triggering of an infringement procedure. These three features are all present in cases C-78/18 and C-66/18.

In view of the above, the following paragraphs will, in the first place, describe the content of the two Hungarian acts that have been brought to the attention of the Court. Then, the essay will focus on the timing of two prelitigation procedures and on the correct balancing between the need for the Commission to act fast, on one side, and the respect of Hungary's defence rights, on the other. Subsequently, attention will be given to the role and the emphasis of the discriminatory character of measures affecting the internal market. The last part of the essay will look into the reasons for a double assessment of the very same violation under TFEU rules and the Charter of fundamental rights of the European Union.

3. FEATURES AND CRITICALITIES OF THE TRANSPARENCY LAW AND OF THE ACT ON NATIONAL TERTIARY EDUCATION

Hungarian Law on the Transparency of Organisations which receive Support from Abroad (2017),¹⁰ which is the object of one of the two judgements under comment, is clearly in line with the antidemocratic drift described so far. The law, which was issued in July 2017, declaredly relies upon the assumption that civil society organisations "contribute [...] to democratic scrutiny of and public debate about political issues", thus

⁸ The ECJ was in fact led to affirm there for the first time that GATS violations also represent EU law violations, since the EU, which detains exclusive competence in the field of commercial policy, could be held internationally liable for infractions of international obligations from its Member States.

⁹ Hereinafter referred to as "TFEU".

¹⁰ Hereinafter referred to as "Transparency Law".

performing “a decisive role in the formation of public opinion”.¹¹ When they receive money from abroad, therefore, they might allegedly become the channel through which foreign public interest groups promote their own interests in the social and political life of Hungary, thus threatening national security (Bárd, 2020a).

For all these reasons, according to this law, the transparency of such organisations must be especially scrutinised. This purpose was reached through the creation of a complex and burdensome set of duties imposed on the organisations of the civil society that receive economic support from abroad, regardless of their legal qualification, with the sole exception of sports organisations, organisations that carry out a religious activity, and organisations that represent and protect the interests of a national minority.

In short, the Transparency Law obliged associations and foundations to declare to the competent court for the place of registration, within fifteen days of its promulgation, that they receive money from abroad, when this exceeds a certain fixed amount. Then, the competent ministry was supposed to make the information openly available to the public. When the economic support was to be considered particularly relevant, further detailed information about its source had to be given, including, for natural persons, the name and the country and city of residence, and, for legal persons, the business name, and the registered seat. If an organisation did not comply with all these duties, severe fines could be applied.

At the time of its promulgation, the law was strongly criticised both nationally and internationally, with Amnesty International defining it as a “vicious and calculated assault on civil society” (*Hungary: NGO Law a Vicious and Calculated Assault on Civil Society*, 2017) and the European Parliament calling for the withdrawal of the draft before it was even approved.¹² It was clear, indeed, that the law wanted to harm NGOs, that are among the few voices critical of the Hungarian government and the few subjects active in the promotion of the rule of law and of the rights of migrants, refugees and other marginalised groups. Furthermore, the law drew the attention of the European Commission for suspected infringements of both the free movement of capital and fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, originating the judgement of the Court in the case *Commission v. Hungary*.¹³ As we will see, said infringements were eventually assessed by the Court; yet Hungary complied with the decision only after almost a year, and after the procedure under Art. 260 TFEU had been triggered (Mori, 2020).

In April of the same year, 2017, the Hungarian Parliament also passed, by means of an urgency procedure, an amendment to the Act on National Higher Education.¹⁴ The amendment was supposedly meant to guarantee a higher quality level of non-Hungarian universities, at the same time preventing forms of unfair competition.

In order to do so, a burden of new stringent requirements was imposed on foreign-funded universities that intended to operate on Hungarian soil. Specifically, the new law prescribed that institutions having a seat outside the territory of the EU or the European Economic Area could function in Hungary only on condition that an intergovernmental agreement was concluded between Hungary and the other country where the university is located by 1 January 2018 (the deadline was later put off until January 2019). Plus, whenever the foreign country has its seat in a federal country, the

¹¹ English translation is drawn CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476.

¹² See European Parliament, the resolution, 2017/2656(RSP) (17 May 2017), § 6.

¹³ CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476.

¹⁴ Hungarian Act on the Amendment of Act CCIV of 2011 on National Tertiary Education (2017).

international agreement with the foreign state had to be supported by a prior agreement signed by the federal government.

In the third place, the name of the foreign university was required to be clearly distinguishable from the name of any other Hungarian institution. This provision, as pointed out by the Venice Commission, “contribute[d] to the general impression that the recent amendments are aimed at one specific university”,¹⁵ insofar as the Central European University would be the only entity troubled by the provision. Lastly, foreign universities – situated both inside and outside the EU and the EEA – were required to prove that they genuinely offered educational activities in the country of origin, and visiting professors were no longer exempted from acquiring a work permit in order to engage in academic activities in Hungary (Bárd, 2020b; Benvenuti, 2020).

Commentators and critics immediately warned that these rules were “dependent on the political approval of those in power and appear[ed] to target one institution only, namely the Central European University” (Bárd, 2020b, p. 90; see also Hoxhaj, 2021, p. 3 and subsequent), founded by George Soros back in 1991; in fact, the law was renamed “Lex CEU”. In its Resolution of May 2017 mentioned above,¹⁶ the European Parliament regretted “that the developments in Hungary have led to a serious deterioration of the rule of law, democracy and fundamental rights over the past few years”, and cited, *inter alia*, the undermining of academic freedom; scholars also pointed out the systematic character of the limitation of academic freedom in Hungary (Halmay, 2018; Ziegler, 2019). In April 2017, the Parliamentary Assembly of the Council of Europe adopted a resolution lamenting the “alarming developments” in Hungary, which concentrated specifically on the “Lex NGO” and the “Lex CEU”.¹⁷ This law, just like the “Lex NGO”, was eventually contested by the Commission, which started an infringement procedure a few weeks after its promulgation, namely on 27 April 2017.

4. THE TIMING OF THE PROCEDURES

As anticipated, the factual context did impact the timing of the procedures, which, on both occasions, were especially rapid. Therefore, before analysing the substance of the case, the ECJ was asked to focus on the pre-litigation procedure, and specifically on its timing, which Hungary considered too fast and thus detrimental to its rights.

As for the timing of the procedure against the Transparency Law, events unfolded as follows. The law was voted on 13 July 2017, and the following day the European Commission had already sent a letter of formal notice, accusing Hungary of several violations of the Treaties. In that first letter, the Commission only granted one month to submit observations, and a Hungarian request for an extension was rejected. Hungary eventually replied with two series of comments. Although the second series of comments was received after the deadline indicated by the Commission, it was nonetheless taken into consideration and evaluated.

Unsatisfied by the reply of Hungary, the European Commission issued a reasoned opinion on 5 October 2017, and, once again, it granted only one month for observations, refusing a renewed request for an extension from Hungary. The comments were eventually sent on 5 December 2017, one month too late, but the Commission again decided to take them into account anyway. Yet it was not convinced by the arguments of

¹⁵ Venice Commission, the preliminary opinion, 891 / 2017 (11 August 2017), § 108.

¹⁶ See European Parliament, the resolution, 2017/2656(RSP) (17 May 2017).

¹⁷ See Parliamentary Assembly, the resolution, 2162 (2017) (27 April 2017).

the Hungarian government, and, therefore, an action was brought in front of the ECJ on 7 December 2017.

Hungary challenged the admissibility of the action claiming in the first place that the time limits granted for its reply comments were too short, so that the Commission would have allegedly breached the principle of loyal cooperation of Art. 4(3) TFEU, the right to good administration enshrined in Art. 41 of the Charter and the rights of defence.

It is common knowledge that the prelitigation stage has three main objectives: to define the subject-matter of the dispute; to allow the Member State to put an end to the infringement; to enable it to exercise its rights of defence (Prete, 2017). Now, this last objective was somehow neglected by the Commission, when it claimed in its reply to Hungary that "in this case, an extension of the time limit for responding to the reasoned opinion could have been granted only in order to enable the member state to adopt the measures necessary for it to comply with the reasoned opinion",¹⁸ Fairly enough, then, Advocate General Campos Sánchez-Bordona contested, in his Opinion, that this argument of the Commission was "not compatible with the settled case-law of the Court",¹⁹ nor did the ECJ recall this statement of the Commission in its decision.

Still, Advocate General and the ECJ agreed that the contentions of Hungary on the inadmissibility of the action were ill-founded on two other grounds. In the first place, it was noted that the Commission took into consideration all comments made by Hungary, including those received after the time limits set by the Commission,²⁰ so that Hungary had in fact made use of the extension it had asked for, even if it had been formally rejected. According to the settled case-law of the ECJ, indeed, the Commission cannot simply ignore belated observations, which shall be duly considered (Prete, 2017).

On top of that, both the ECJ and Advocate General reckoned that Hungary had failed to prove "the fact that the Commission's conduct rendered it more difficult for Hungary to refute the complaints raised by that institution and thereby infringed the rights of defence".²¹ In its findings on this point, the Court recalled three of its precedents. Two of them, namely judgements in cases C-287/03 and C-546/07,²² actually focused on a rather different topic, as they addressed the contention that the prelitigation stage had allegedly taken too long. With regard to the shortness of the time limit, indeed, the Court made reference to just one precedent, which is its judgement of 31 January 1984 in a *Commission v Ireland* case,²³ but merely in order to declare that the Court's case-law shows that "the pre-litigation subject to short time limits is not in itself capable of leading to the inadmissibility of the subsequent action".²⁴ In his Opinion, Advocate General mentioned two other previous judgements of the Court, which are cases C-490/04 and C-293/85.²⁵ The former, again, dealt with an allegedly too long prelitigation phase; the

¹⁸ See CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 16.

¹⁹ See Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:1, § 35.

²⁰ See Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:1, § 37 and CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 31.

²¹ See CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 32.

²² CJEU, the judgement of 12 May 2005, *Commission v Belgium*, C-287/03, ECLI:EU:C:2005:282, and of 21 January 2010, *Commission v Germany*, C-546/07, ECLI:EU:C:2010:25.

²³ CJEU, the judgement of 31 January 1984, *Commission v Ireland*, C-74/82, ECLI:EU:C:1984:34.

²⁴ CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 30.

²⁵ Respectively, CJEU, the judgement of 18 July 2007, *Commission v Germany*, C-490/04, ECLI:EU:C:2007:430, and of 2 February 1988, *Commission v Belgium*, C-293/85, ECLI:EU:C:1988:40.

latter, which is more adherent to the case, was only marginally recalled in the Opinion's footnotes.²⁶

In this context, it must be admitted that a closer look at the ECJ's case-law seems to be revealing a certain cherry-picking attitude by the Court. On many occasions, in fact, the Court has rejected applications of inadmissibility with the motivation that the applicant had not proven that an excessively long preliminary procedure had hindered its defence.²⁷ When it has come to deciding on time limits being too *short*, however, the Court has displayed a quite different set of reasonings, which, in this very occasion, was disregarded.

Starting from a judgement of 1988, indeed, the Court has repeatedly dismissed – or accepted – such challenges of inadmissibility claiming that “very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission’s views long before the procedure starts”.²⁸ Tight deadlines, in short, shall be justified only by reason of special urgency, or otherwise when the adverse position of the Commission had been long known to the Member State before the procedure was even started.

It seems, therefore, that ever since 1988 the case-law on the scheduling of the prelitigation stage has taken two different paths, one regarding such stage lasting too long, the other its excessive shortness. Nor is this differentiation surprising. Long terms, in fact, do not in themselves reduce the chances of a proper defence, but may rather trigger other kinds of obstacles. That may be the case, for example, when a persistent breach by the State is based on the reliance that the Commission has decided not to undertake judicial actions:²⁹ in such cases, it is surely up to the Member State to prove that their defence has been hindered by the Commission’s conduct. On the contrary, short time limits can affect the substantial quality of the arguments reversed in the observations rendered by the Member State. It follows, in my understanding, that in this latter case the ECJ has lightened the burden of proof weighing on the State, in so far as it should be up to the Commission to argue that in a concrete case there were indeed reasons of urgency, or otherwise that its position had long been known to the Member State, even before the start of the proceeding.

It is curious, then, that in its judgement the Court mentioned the only precedent which founded the rejection of an inadmissibility application because of too short time limits on the failure to meet the burden of proof, resorting to outdated judgement

²⁶ See Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:1, footnotes No. 9 and 14.

²⁷ See for instance CJEU, the judgement of 16 May 1991, *Commission v the Netherlands*, C-96/89, ECLI:EU:C:1991:213; of 21 January 1999, *Commission v Belgium*, C-207/97, ECLI:EU:C:1999:17; of 12 May 2005, *Commission v Belgium*, C-287/03, ECLI:EU:C:2005:282; of 8 December 2005, *Commission v Luxembourg*, C-33/04, ECLI:EU:C:2005:750; of 18 July 2007, *Commission v Germany*, C-490/04, ECLI:EU:C:2007:430; of 24 April 2007, *Commission v the Netherlands*, C-523/04, ECLI:EU:C:2007:244; of 21 January 2010, *Commission v Germany*, C-546/07, ECLI:EU:C:2010:25.

²⁸ CJEU, the judgement of 2 February 1988, *Commission v Belgium*, C-293/85, ECLI:EU:C:1988:40, § 14. The same principle has been later reaffirmed (either expressly or implicitly) on multiple occasions, e. g. CJEU, the judgement of 28 October 1999, *Commission v Austria*, C-328/96, ECLI:EU:C:1999:526; of 13 December 2001, *Commission v France*, C-1/00, ECLI:EU:C:2001:687; of 15 November 2005, *Commission v Austria*, C-320/03, ECLI:EU:C:2005:684; of 30 November 2006, *Commission v Italy*, C-293/05, ECLI:EU:C:2006:750; of 2 April 2020, *Commission v Poland, Hungary and the Czech Republic*, joint cases C-715/17, C-718/17, C-719/17, ECLI:EU:C:2020:257.

²⁹ This argument was raised, for example, in the CJEU, the judgement of 12 May 2005, *Commission v Belgium*, C-287/03, ECLI:EU:C:2005:282.

Commission v Ireland of 31 January 1984, whereas no account has been given, in the judgement, to the subsequent case-law on this topic. It feels like the Court wanted to settle the issue as swiftly as possible, and it opted for the sharper and more definitive declaration that the burden of proof was not met.

In my view, rejection of the inadmissibility contention could have been more correctly explained and justified underlying that Hungary had been aware of the European institutions' position on the Transparency Law since its drafting, so much that the European Parliament had adopted a resolution calling for its withdrawal months before the approval of the law. The mere fact that the Commission notified the formal letter of notice on the very first day after its promulgation strongly suggests – although related documents are not available – that discussions were already under way between Hungary and the Commission *before* the adoption of the law. This being the case, Hungary had all tools, at the time of drafting, to foresee an upcoming letter of formal notice from the Commission and, therefore, to start working on its defence. It can thus be concluded that in the concrete case circumstances were such as to render the time limits granted by the Commission only apparently short, but in fact, adequate.

In short, it can generally be agreed that “it makes no sense to prolong the dialogue with a party that acts in bad faith abusing legal concepts and hiding its real objective to dismantle the rule of law” (Bárd, 2020a) and that, therefore, it was high time “to acknowledge that further dialogue will only result in granting sufficient time to complete the capture of state institutions and solidifying an authoritarian state structure” (Bárd, 2019). Still, it seems to me that this urge could (and should) have been justified by the Court with a reference to the fact that Hungary was aware of the Commission's objections of legitimacy of the law, and yet consciously persevered in its adoption. This motivation would have led to the rejection of the inadmissibility application and, at the same time, would have been more coherent with the Court's previous case-law. Furthermore, a solid-founded motivation on the reasons for the shortness of the time limits would have shielded the Court – and the Commission itself – more efficiently from any possible accusations of being politically prejudiced against Hungary.

Several months later, indeed, the ECJ faced an almost identical contention – and here we come to the “Lex CEU” – of inadmissibility for time limits in the prelitigation stage being too short. In that case, the infringement procedure was activated sixteen days after the law had been promulgated, and Hungary was granted only one month to reply to the letter of formal notice and to the reasoned opinion, respectively.

On that occasion, the Court justified the swiftness of the Commission's action making express reference to its case-law according to which “a short period may be justified in particular circumstances, especially where there is [urgency] or where the Member State concerned is fully aware of the Commission's views long before the procedure starts”,³⁰ and thus founded the rejection of the inadmissibility contention on the need to settle the case quickly, before the new law on higher education, whose legitimacy was being examined, would cast its effects on the admission of new students into institutions that did not satisfy the conditions laid down by said law. Only subordinately did the ECJ recall that, “in any event”, it is up to the contending Member State to give proof of the infringement of its rights of defence, due to time limits being too short.³¹

In similar cases, both designed as technical but implicitly affecting Hungary's democratic resilience, therefore, the very same timing of the prelitigation procedure was

³⁰ See CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, § 47.

³¹ See CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, §52.

equally contested by Hungary, but differently justified by the ECJ. It seems, in my view that in its decision on academic freedom the Court has somehow adjusted its focus, dismissing Hungary's contentions and, at the same time, resorting to a coherent and flawless explanation of the reasons why the time limits granted to Hungary by the Commission must be considered adequate. It appears desirable that in future disputes the Commission (first) and the ECJ (then) will replicate this pattern, highlighting the criticism an act may have received even before its promulgation and emphasizing the threats it may cast over the rights of people that are affected by the measure, in order to justify the urgency of an infringement procedure.

5. ON THE ROLE OF DISCRIMINATION IN THE INVESTIGATION OF TFEU INFRINGEMENTS

5.1 *Lex NGO: infringement of the movement of capital*

Coming to the substance of the "Lex NGO" case, the Court investigated in the first place into the alleged infringement of the movement of capital. The reasoning of the Court is divided into two parts: first, the judges wondered if, in the given case, there actually was a restriction on the movement of capital; then, they looked for possible justifications thereof.

As for the first question, in Section VI, par. A(1) of the judgement³² the Court analysed the constitutive elements of a restriction on the movement of capital. In the first place, the Court assessed that the Transparency Law does indeed concern the movement of capital, since it applies to "donation of money or other assets coming [...] from abroad, regardless of the legal instrument", thus including, for example, donations, inheritances, loans, and credits, which fall in the definition of movement of capital according to the settled case-law of the Court itself.³³ Secondly, the Court confirmed the existence of a restriction of such movement, in so far as the Law creates a climate of distrust and sets of burdens that deter potential investors from financing organisations of the civil society. Thirdly, the Court found that the Transparency Law constitutes indirect discrimination on the basis of nationality since it creates a differentiation between Hungarian organisations receiving money from abroad and those receiving money from an internal source, but also treats "the persons who provide those [organisations] with financial support sent from another Member State or third countries differently from those who do so from a place of residence or registered office located in Hungary".³⁴

Once the restriction on the movement of capital and, therefore, the triggering of Art. 63(1) TFEU, has been assessed, the Court turned its attention to possible justifications thereof. In this respect, the Court found that the objective of increasing

³² See CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, §§ 40 – 65.

³³ The definition of 'capital' in the context of art. 63 TFEU relies on the nomenclature contained in Annex I of Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty (1988) (see CJEU, the judgement of 17 October 2013, *Welte*, C-181/12, ECLI:EU:C:2013:662); yet the list is not to be considered exhaustive, and also other kinds of transmissions of assets may be included in the notion of movement of capital (see e. g. CJEU, the judgement of 12 February 2009, *Block*, C-67/08, ECLI:EU:C:2009:92.)

³⁴ See CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 62. The Court only implied what Advocate General said openly about the discrimination having an indirect character, namely that "the foreign provenance requirement is much more likely to affect nationals of other Member States than Hungarian nationals, even though the latter may also reside outside Hungary and, accordingly, be affected by the measures at issue" (Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:1, § 111).

transparency may, indeed, represent an overriding reason in the public interest under Art. 65 TFEU. Yet, according to the Court, the measures introduced by the Transparency Law are not proportionate to this objective³⁵. Above that, the justification of the law is denied in so much as it illegitimately relies on the presumption made on principle that any organisations of the civil society that receive money from abroad are potential threats to the political and economic interests of Hungary.³⁶ Lastly, the Court dismissed the argument of Hungary that the Transparency Law shall be justified by the ground of public policy or public security under Art. 65(1)(b) TFEU,³⁷ to eventually conclude that “the Transparency Law can be justified neither by an overriding reason in the public interest linked to increasing the transparency of the financing of associations nor by [...] grounds of public policy and public security”.³⁸

Now, I do not intend to dwell upon the substance of the reasoning of the Court, which is supported by a settled and undisputed case-law. Yet the systematic of the reasoning appears to be quite curious. As said, indeed, the constitutive elements indicated by the Court to identify an illegitimate restriction on the movement of capital are apparently three: whether the subject matter of the measure is actually a movement of capital; whether such movement has been hindered or restricted; whether the restriction is discriminatory. The previous case-law of the Court, however, had clearly stated that a violation of the movement of capital, just like for all other freedoms of movement, is independent of the discriminatory character of the measure. Examples thereof are numerous,³⁹ and they all state that the prohibition of restrictions on the movement of capital “goes beyond the mere elimination of unequal treatment, on the grounds of nationality, as between operators on the financial markets”,⁴⁰ like scholars have also highlighted (see Gobbato, 2004). Coherently, the case-law of the ECJ shows that the assessment of the discriminatory character of a measure is usually laid down in the section of the judgement dedicated to the justifications and not, instead, when talking about the existence of a restriction.⁴¹

In the given case, therefore, it appears that the Court has dwelled upon the discriminatory character of the measure with the aim of highlighting that the

³⁵ Although the Court does not expressly mention proportionality in its judgement (unlike Advocate General in its Opinion; Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:1, § 157 and subsequent), this principle clearly underpins the statement that “Hungary has not explained why the objective [shall be reached through] obligations applying indiscriminately to any financial support from any other Member State or any third country [and] to all organisations which fall within the scope of that law, instead of targeting those which [...] are genuinely likely to have a significative influence on public life and public debate” (CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 82).

³⁶ CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 86.

³⁷ CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, §§ 88 and subsequent.

³⁸ CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 96.

³⁹ See e. g., CJEU, the judgement of 4 June 2002, *Commission v Portugal*, C-367/98, ECLI:EU:C:2002:326; of 4 June 2002, *Commission v France*, C- 483/99, ECLI:EU:C:2002:327; of 13 May 2003, *Commission v Spain*, C-463/00, ECLI:EU:C:2003:272.

⁴⁰ CJEU, the judgement of 4 June 2002, *Commission v France*, C- 483/99, ECLI:EU:C:2002:327, § 40.

⁴¹ See e. g. CJEU, the judgement of 21 May 2019, *Commission v Hungary*, C-235/17, ECLI:EU:C:2019:432 (especially § 107); of 4 May 2017, *Commission v Greece*, C-98/16, ECLI:EU:C:2017:346; of 20 September 2018, *EV v Finanzamt Lippstadt*, C-685/16, ECLI:EU:C:2018:743. The judgement of 16 March 2018, *Segro*, C-52/16 and C-113/16, ECLI:EU:C:2018:157 (which is notably a preliminary ruling) adopts a slightly different approach: the investigation on the discriminatory character of the measure at issue is indeed displayed in the section dedicated to the existence of a restriction on the movement of capital, and yet the question whether it must be regarded as discriminatory is only addressed after the assessment that such legislation constitutes a restriction on the fundamental freedom guaranteed in Art. 63 TFEU (see § 66 and § 67 of the judgement).

Transparency Law does not only constitute a restriction prohibited under EU law, but it is *also* discriminatory. Indeed, the judgement underlines that the concept of a restriction of movement includes “*in particular* [...] State measures which are discriminatory in nature”,⁴² and subsequently investigates whether the measure at issue is actually discriminatory. In this sense, the assessment of the discriminatory character of the measure seems to be meant to emphasize its illegitimacy, thus fuelling to some extent the blame for its adoption.

5.2 *Lex CEU: infringement of the freedom of establishment*

As for the substance of the case on academic freedom, as anticipated above,⁴³ I shall not linger on the applicability of the GATS and on the assessment of the infringements thereof that have already been fully analysed by scholars. I would rather concentrate on the issues raised by Art. 76(1)(b) of the Hungarian Act on National Tertiary Education on the obligation to genuinely offer higher education in the country in which the institution has its seat, which, unlike the provision of Art. 76(1)(a), also applies to institutions that have their seat in a Member State of the EEA, and thus raises a possible infringement of the freedom of establishment guaranteed by Art. 49 TFEU. The goal is to make a comparison between the assessment of an infringement of the freedom of establishment under Art. 49(1) TFEU within this judgement and the assessment of the infringement of Art. 63 TFEU in the decision on the associative transparency, analysed above.

In this occasion, too, the Court followed the usual pattern. In the first place, indeed, it maintained that the conditions required under Art. 76(1)(b) of the Hungarian Act on National Tertiary Education, according to which foreign education institutions would be bound to supply services in the country of their seat, are in fact covered by Art. 49 TFEU, as far as those conditions also concern institutions that have their seat in a Member State other than Hungary and offer remunerated education services in Hungary.⁴⁴

Secondly, the Court wondered whether there was a restriction of such freedom, and answered positively, stating that the requirement for foreign education institutions to genuinely operate in the State where they have their seat “is liable to render less attractive the exercise of the freedom of establishment in Hungary”, and therefore such a requirement “constitutes a restriction of the freedom of establishment, within the meaning of Article 49 TFEU”.⁴⁵

Thirdly, the Court confirmed that no possible justification could be invoked by Hungary to legitimise its law under Art. 52 TFEU. Specifically, Hungary did not manage to prove that the activity of foreign institutions that do not provide for services in the country where they have their seat could be a genuine and sufficient threat to a fundamental interest of the society; nor did it prove that such a requirement could, in any way, help prevent deceptive practices or ensure a higher standard of education. For all these reasons, the ECJ concluded that the requirement imposed by Art. 76(1)(b) “cannot be justified by Hungary’s arguments based on maintaining public order, nor on those based on overriding reasons in the public interest relating to the prevention of deceptive

⁴² CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 53.

⁴³ Third paragraph of subchapter 2.

⁴⁴ CJEU, the judgement of 6 October 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:792, § 163.

⁴⁵ CJEU, the judgement of 6 October 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:792, § 169 and § 170.

practices and the need to ensure the good quality of higher education".⁴⁶ Hence, the infringement of Art. 49 TFEU was confirmed.

Discrimination, of course, underpins this judgement just like it had done in the judgement on associative transparency; yet in this case, the Court only mentioned discrimination when it talked about the infringement of the GATS, and not specifically when it handled the violations of the TFEU. That marks a difference with the decision on the "Lex NGO".

On the contrary, Advocate General Kokott, in her Opinion on the case,⁴⁷ had underlined the discriminatory character of Art. 76(1)(b) of the Hungarian Act on National Tertiary Education,⁴⁸ and that she had done precisely in the paragraph that analysed possible justifications to the infringement of Art. 49 TFEU. Indeed, Advocate General concisely dismissed the arguments of Hungary concerning the protection of public policy, the alleged necessity to prevent deceptive and fraudulent practices and the struggle to improve the quality of the education system, and eventually concluded that, in any case, "a justification for other overriding reasons in the public interest can be taken into consideration only in the case of restrictions of freedom of establishment which are applied without discrimination on grounds of nationality".⁴⁹

All considered, the systematic order in which Advocate General Kokott handled the topic of discrimination when dealing with the possible infringement of Art. 49 TFEU seems to me the most convincing. In case C-78/18 on the Transparency Law, indeed, the ECJ had righteously emphasised the discriminatory character of the measure, and yet, as was made clear, it seemed to imply that the discrimination was a constitutive element of the notion of restriction to the freedom of movement of capital. In case C-66/18 on academic freedom, instead, the Court decided to overlook the discriminatory character of the measure when it dealt with the violation of Art. 49 TFEU. More convincingly, Advocate General did not fail to note the discrimination underlying the Act on Tertiary Education, and placed it systematically at the most appropriate spot, namely when considering possible justifications for the limitation.

6. ON THE INFRINGEMENT OF THE CHARTER OF FUNDAMENTAL RIGHTS

As mentioned above, the Commission also accused Hungary of infringement of several articles of the Charter of Fundamental Rights of the European Union. On this topic, the judgements at issue assessed, in the first place, that both the Transparency Law and the Act on National Tertiary Education do indeed implement European Union law according to Art. 51(1) of the Charter, and therefore they must comply with the rights enshrined therein.

The applicability of the Charter in the "Lex CEU" case, in particular, is drawn by the Court first from the fact that anytime "Member States are performing their obligations under [GATS], they must be considered to be implementing EU law, within the meaning of Article 51(1) of the Charter"⁵⁰ (Nagy, 2021b, p. 701 and following; Vranes, 2021, p. 12 and subsequent). In that case, however, the applicability of the Charter is further

⁴⁶ CJEU, the judgement of 6 October 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:792, § 189.

⁴⁷ Opinion of Advocate General Kokott of 5 March 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:172.

⁴⁸ I'm referring specifically to § 158 of the Opinion of Advocate General Kokott of 5 March 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:172, where Advocate General notes that "the discriminatory character of the rules resides precisely in the fact that the activities of foreign higher education institutions are subject to additional conditions because they have their seat in another Member State".

⁴⁹ Opinion of Advocate General Kokott of 5 March 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:172, § 162.

⁵⁰ CJEU, the judgement of 6 October 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:792, § 213.

confirmed, as explained the Court, by the fact that a justification of the freedom of establishment is invoked by Hungary, based on “an overriding reason in the public interest recognised by EU law [so that] such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter”,⁵¹ as it had just been shown in the Transparency case.⁵²

The case-law of the ECJ shows that judgements on the failure to fulfil an obligation under Art. 258 TFEU designed like these ones, namely judgements that declare the infringement of fundamental rights contained in the Charter from a Member State, are very rare. The latest precedent is the judgement on the rights of usufruct over agricultural land of 2019,⁵³ and on that occasion Advocate General Saugmandsgaard had highlighted, in his Opinion, that to his knowledge it was “the first time that the [Commission] has sought a declaration from the Court that a Member State has failed to comply with a provision of the Charter”.⁵⁴ Until then, in fact, the Commission had shown some reticence (Mori, 2018), notwithstanding its own Communication of 2010 on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, where it had expressed its intention to “start infringement procedures against Member States for non-compliance with the Charter in implementing Union law” whenever necessary.⁵⁵ These last couple of years show, therefore, a change in the attitude of the Commission, which seems today to be more determined to demand that states respect the Charter. Similarly, the ECJ, even when the Commission did actually raise the issue of the possible violation of the Charter, often refrained from such a declaration.⁵⁶

In any case, I will go through this section of the judgements very quickly. As for the case on the Transparency Law, the Court did indeed ascertain that the right to freedom of association enshrined in Art. 12(1) of the Charter had been violated due to the deterrent effect on the involvement of foreign donors in the financing of civil society organisations, which made it harder for them to achieve their purposes.⁵⁷ Furtherly, the Commission had also lamented the infringement of Art. 7 and 8 of the Charter on the right to respect for private and family life and on the right to protection of personal data, respectively. The Court assessed that the information concerned by the obligation of declaration and publication contained in the Transparency Law fell within the scope of the protection provided for in Art. 7,⁵⁸ nor could such protection be limited, since financial supporters of civil society organisations were not to be regarded as a public figure.⁵⁹ The Court, therefore, found that the right to respect for private and family life had indeed been violated, and so had Art. 8(2) of the Charter, in so much as the treatment of the data

⁵¹ CJEU, the judgement of 6 October 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:792, § 214.

⁵² CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 101.

⁵³ CJEU, the judgement of 21 May 2019, *Commission v Hungary*, C-235/17, ECLI:EU:C:2019:432.

⁵⁴ Opinion of Advocate General Saugmandsgaard Øe of 29 November 2018, *Commission v Hungary*, C-235/17, ECLI:EU:C:2018:971, § 64.

⁵⁵ Communication from the Commission, COM/2010/0573 final, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (19 October 2010).

⁵⁶ This happened most recently in CJEU, the judgement of 17 December 2020, *Commission v. Hungary*, C-808/18, ECLI:EU:C:2020:1029 (see Colombo, 2021), but also, to make another example, in the CJEU, the judgement of 6 November 2012, *Commission v. Hungary*, C-286/12, ECLI:EU:C:2012:687.

⁵⁷ Cf. CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, §§ 118 – 119.

⁵⁸ CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 128.

⁵⁹ CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 131.

prescribed by the Transparency Law did not meet the requirements of fair processing set out in the Charter.⁶⁰

As for the Act on Tertiary Education, the Commission lamented the infringement of Art. 13 of the Charter on academic freedom and Art. 14(3) and 16 of the Charter on the freedom to found educational establishments and the freedom to conduct a business, respectively. All contentions were upheld by the Court, since, on the one hand, the measures at issue were held capable of “depriving the universities concerned of autonomous organisational structure that is necessary for conducting their academic research and for carrying out their educational activities”⁶¹ and, on the other, they were considered “such as to render uncertain or to exclude the very possibility of founding a higher education institution, or of continuing to operate an existing higher education institution, in Hungary”.⁶²

The Court subsequently analysed the existence of possible justifications accorded by Art. 52(1) of the Charter for limitations that genuinely pursue objectives of general interest recognised by the Union. The reply of the Court on this point appears to be equally lapidary in both decisions: in fact, it recalled that it had already found, at § 96 of the judgement on the transparency of associations and at §§ 132, 138, 154, 155 and 189 of the judgement on academic freedom, that the provisions of the laws at issue “cannot be justified by any of the objectives of general interest recognised by the Union”⁶³ and implicitly affirmed that no more needed to be said on this topic.

It is interesting to note that, despite reaching the same results on the merits, the position of the Court and that of Advocate General Campos Sanchez-Bordona in the case of associative transparency (and, previously, of Advocate Saugmandsgaard in the judgement on “the rights of usufruct”) on the topic of fundamental rights diverged profoundly. According to the latter, in fact, and in line with what Saugmandsgaard had previously expressed, the Court shall not “examine the possible infringement of the Charter ‘independently of the question of the infringement of freedoms of movement’”⁶⁴ because “the rights laid down [in the Charter] must be treated as an integral part of the substance of those freedoms”,⁶⁵ and, subsequently, the two complaints “should not be examined ‘separately’ but rather in an integrated way”.⁶⁶ This systematic approach, claimed Advocate General, had allegedly already been adopted by the ECJ in joint cases *SEGRO* and *Horváth*.⁶⁷

Accordingly, Advocate Campos Sanchez-Bordona proposed to adopt a new, two-folded parameter. Indeed, anytime a violation of Art. 63 TFEU presents itself as a mere and simple illegitimate restriction of the freedom of movement of capitals, the traditional control technique should be applied; on the contrary, when such a violation is actually

⁶⁰ CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 132 and § 134.

⁶¹ CJEU, the judgement of 6 October 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:792, § 228.

⁶² CJEU, the judgement of 6 October 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:792, § 233.

⁶³ CJEU, the judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476, § 140 and of 6 October 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:792, §240.

⁶⁴ Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, *Commission v Hungary*, C 78/18, ECLI:EU:C:2020:1, § 77 and Opinion of Advocate General Saugmandsgaard of 29 November 2018, *Commission v Hungary*, C-235/17, ECLI:EU:C:2018:971, §76.

⁶⁵ Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, *Commission v Hungary*, C 78/18, ECLI:EU:C:2020:1, § 88.

⁶⁶ Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, *Commission v Hungary*, C 78/18, ECLI:EU:C:2020:1, § 49.

⁶⁷ CJEU, the judgement of 16 March 2018, *Segro*, C-52/16 and C-113/16, ECLI:EU:C:2018:157.

instrumental to the infringement of a fundamental right, more stringent review criteria should be used.⁶⁸

Advocate General's concerns about the assessment of possible infringements of the Charter becoming a mere duplication of previous assessments of the violation of a freedom of movement are surely understandable. Yet, the features of these new alleged "more stringent criteria" and, in particular, their difference from the classical ones, seem to me to be quite evanescent and undefined. As for *SEGRO*, on that occasion the Court did not appear to resort to an integrated parameter but rather ascertained that a "legislation [...] which restricts the free movement of capital cannot be justified, in accordance with the principle of proportionality, either by overriding reasons in the public interest [...] or on the basis of Article 65 TFEU, so that it infringes Article 63 TFEU. Accordingly, it is not necessary to examine the aforesaid national legislation in the light of Articles 17 and 47 of the Charter in order to resolve the disputes in the main proceedings".⁶⁹

More importantly, I do not consider the duplication of the assessment of a violation, examined both under the lens of the movement of capital and of fundamental rights, to be a sheer and useless exercise in style. Indeed, in the first place, this approach contributes to the development of a specific case-law of the ECJ on infringement proceedings for breach of the Charter, which, as it was said, is relatively new. Secondly, the assessment that given conduct from a State does not only configure a breach of movement but also entails the violation of fundamental rights somehow enhances the gravity of such conduct. In this sense, I fully share the view according to which "the alleged violation of the Charter may constitute an "aggravating factor", meaning that the seriousness of the infringement goes further than that stemming from the mere breach of the non-Charter provision(s)" (Prete and Smulders, 2021, p. 291).

To conclude, it is interesting to note that, in the case on academic freedom, the whole discussion about the role of the double assessment of violations (both under the lens of the TFEU and of the Charter of Fundamental Rights) remained fully under the radar: which may indicate that a process of normalisation of the assessment of violations of the Charter alongside the assessment of "simple" violations of technical rules of the Treaty is now under way, and may become a new trend in the ECJ case-law.

7. FINAL REMARKS

If one considers the relevance of the double assessment described so far, it does not appear surprising that the ECJ did not mention the values of Art. 2 TFEU in its judgements, like some had wished (Coli, 2020). It is true, of course, that the EU is facing a rule of law crisis which shall be fought tenaciously (Safjan, 2019), and it is also true that Art. 2 TFEU has proven to be very useful, especially when it came to protecting the independence of the judiciary (Rossi, 2020). At the same time, however, I reckon that such a tool should be preserved for situations where it is most necessary and should not be called upon whenever the legislative framework of the European Union is in itself sufficient to condemn and dismiss unlawful conducts. There are, indeed, single and specific complaints the Commission can lodge, and the ECJ can eventually uphold, in order to prevent the Member States from adopting laws and acts that do, at the end of the day, threaten the rule of law, without, though, calling in the rule of law itself. This

⁶⁸ Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, *Commission v Hungary*, C 78/18, ECLI:EU:C:2020:1, § 95.

⁶⁹ CJEU, judgement of 16 March 2018, *Segro*, C-52/16 and C-113/16, ECLI:EU:C:2018:157, §§ 127 – 128.

approach seems to have emerged clearly from the two cases described above, which could serve as role models for future assessments of further violations of the European treaties.

In fact, both cases analysed were set up as technical – not political – cases, and reference to the values of Art. 2 TFUE could have been redundant. Furthermore, as we saw, the implications of the Transparency Law and of the Act on Tertiary Education on fundamental rights have not been neglected by the Court, but rather enhanced, which conferred to the cases an adequate and balanced degree of political relevance. The extreme rapidity of the preliminary procedure and the relatively “easy-going” attitude of the Court in its justification are also symptoms of a strong will to act against Hungary. The emphasising of the discriminatory character of the measures may also be useful, as it serves as a way to underline that a given measure is not only invalid under EU law, it is *also* discriminatory. Lastly, of course, the double assessment of a violation of internal market rules *and* of the Charter underlines that fundamental rights are also involved in the illegitimate conduct of the State.

All considered, it seems to me that these judgements cleverly set a balance between two opposite needs, namely that of suppressing national rules and measures that grossly violate fundamental rights and threaten the rule of law, on the one hand, and of preserving a purely technical – and therefore apolitical – legal and judicial reasoning.

This technical approach to the fight against rule of law backsliding does not only allow for the Commission and the Court to act faster and more effectively but it may also shield its decisions from accusations of being *ultra vires*, confining, whenever possible, rule of law violations into the more “comfortable” field of internal market violations. Possibly, this could also help prevent derailing decisions of national Courts which aim at undermining the application, in their legal orders, of ECJ judgements, contesting that through those judgements European institutions are allegedly disregarding states’ sovereignty – as Poland’s Constitutional Court sadly teaches⁷⁰ (Biernat and Łętowska, 2021; Federico, 2021; Pace, 2021).

Lastly, it must be recalled that it cannot be (solely or mainly) up to the ECJ to react against violations of the rule of law (Casolari, 2020): the Member States shall remain, indeed, the privileged actors of the struggle to protect and restore the rule of law, which they can do not only through the procedure of Art. 7 TEU but also by means of their diplomatic bodies and contractual relations; the new Regulation on a general regime of conditionality for the protection of the Union budget⁷¹ may, of course, constitute another useful tool, the effectiveness of which shall be assessed in the months to come.

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