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Case Note

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Bolstering federal execution of EU law: Case C-123/22 *Commission v. Hungary (Reception of applicants for international protection II)*

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Abstract
With the milestone judgment in Case C-123/22 *Commission v. Hungary (Reception of applicants for international protection II)*, the European Court of Justice ('ECJ') has bolstered federal execution of EU law. The judgment which imposed a EUR 200 million lump sum and a daily penalty payment of EUR 1 million going forward on Hungary for noncompliance with an earlier ruling demonstrates the ECJ's willingness to impose coercive sanctions with teeth on Member States in cases of particularly serious and persistent infringements. Beyond its practical impact, the judgment is highly significant from the perspectives of the development of the EU's constitutional powers of federal execution, the quasi-automatic enforcement character of the Article 260(2) TFEU procedure, the case law on 'deliberate' breaches of EU law, the principle of primacy and judicial conflict, as well as the contentious context of border controls and migrant 'pushbacks' in today's Europe.

Keywords
Border control, asylum, infringement of EU law, enforcement, financial penalties

1. Introduction

On 13 June 2024, the European Court of Justice ('ECJ') dropped a bombshell. Back in December 2020, it had ruled that Hungary was guilty of far-reaching infringements of EU asylum and immigration laws regarding the situation of persons seeking international protection on the Hungarian–Serbian border. As these infringements had not been remedied following that ruling, the European

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Commission deployed the second-round infringement mechanism under Article 260(2) of the Treaty on the Functioning of the European Union (TFEU) against Hungary. Alleging persistent noncompliance, the Commission requested that the ECJ impose financial penalties on that Member State. So far things were as usual: a Member State does not comply with a judgment; the Commission proposes financial penalties.

However, the surprise was total when in Case C-123/22 *Commission v. Hungary (Reception of applicants for international protection II)* (hereafter the 'Enforcement Judgment') the ECJ imposed on Hungary penalties which were close to 200 times higher than what the Commission had asked for, namely a lump sum penalty of EUR 200 million and a total of EUR 1 million per day going forward for as long as the infringement continues.

This Enforcement Judgment constitutes a milestone for the enforcement of EU law. It is argued in this case note that the financial penalties imposed on Member States under Article 260 TFEU are a key instrument of 'federal execution' in EU constitutional law. As confirmed by the ECJ, the purpose of such penalties is to coerce a Member State to comply with its EU law obligations. In a federative polity, this is quintessentially what federal execution is designed to achieve.[1] Understanding these financial penalties in the overall context of the Union's federative legal order highlights their fundamental role as a means to ensure the binding nature of EU law in Member States. While the effectiveness of this instrument has been limited in the past because of the low, at times even symbolic, values of penalties imposed, the present Enforcement Judgment reverses the course in the case law.

In the case under analysis, the ECJ has sent a clear signal that it is willing to make use of the full potential of the financial sanctioning powers in Article 260 TFEU to protect the authority of its judgments and, by extension, the rule of law within the EU legal order. While the Enforcement Judgment concerns Hungary's highly salient violation of asylum seekers' rights at the external borders of the Schengen area, it thus has yet broader constitutional significance. It puts on display the EU's capacity for federal execution against recalcitrant Member States in a context of a deliberate infringement. Moreover, considering that the underlying infringement of the rights of third-country nationals (TCNs) and stateless persons to make an application for international protection is also at the heart of the recent introduction by several Member States of 'push-back' measures at their external borders, the Enforcement Judgment has potential relevance beyond the Hungarian context.

This case note is structured as follows. Section 2 outlines the context of the infringement proceedings. Section 3 describes the ECJ's judgment. Section 4 analyses the Enforcement Judgment from five angles, namely, infringement proceedings as federal execution (A), the quasi-automatic enforcement of penalties and their method of calculation (B), 'deliberate' infringements (C), the instrumentalization of national (constitutional) courts in infringement proceedings (D), and the broader context of migrant pushbacks (E). Section 5 concludes.

2. Context

Over one million migrants arrived in Europe in 2015.[2] In September of that year, Hungary declared a state of emergency due to mass migration and essentially closed its border to Serbia except to a

1. For further analysis on Article 260 TFEU as federal execution, see section 4.A.
2. See 'Is this Humanitarian Migration Crisis Different?' OECD Migration Policy Debates No. 7, September 2015.

very limited number of persons permitted through daily.[3] This legal regime introduced wide-ranging exceptions to EU asylum and immigration law. It has been challenged in various legal proceedings both before the ECJ and the European Court of Human Rights.[4] The infringement procedure and the enforcement measures under analysis constitute, to date, the most comprehensive judicial challenge to the Hungarian border regime.

Immediately once Hungary introduced the new legal framework in 2015, the Commission questioned its legality. The Commission argued that Hungary subjected the potential applicants for international protection to procedures which made seeking asylum in Hungary very difficult, slow or even outright impossible, and detained them, for that purpose, in the transit zones of Röszke and Tompa on the border. The Commission's ensuing infringement action under Article 258 TFEU led, in December 2020, to the judgment in Case C-808/18 *Commission v. Hungary* (*Reception of applicants for international protection I*, hereafter the '2020 Judgment'), whereby the ECJ held that Hungary had failed to fulfil a number of its obligations under EU asylum and immigration law.[5]

The 2020 Judgment was very damning for Hungary. The ECJ ruled that Hungary's 'consistent and generalised' administrative practices breached EU law in numerous regards insofar as that Member State limited the possibility to access the procedure for seeking asylum; systematically detained asylum seekers in the transit zones at the border indiscriminately, for long periods, and without observing the applicable guarantees; deported illegally staying TCNs without respecting their procedural rights; and made the exercise of the right to remain in Hungarian territory, while an appeal was pending against a decision concerning their asylum application, subject to conditions contrary to EU law.[6]

Following that judgment, the Commission enquired of the Hungarian government, in 2021, what measures that Member State had taken to comply with it. The government indicated that, as for the illegal detention of asylum seekers, it had closed down the transit zones in question. Regarding the issues of access to the asylum procedure and the deportation of illegally staying TCNs, the government noted it faced a 'constitutional dilemma' in light of a ruling of the Hungarian Constitutional Court in a case which the government (via its Minister of Justice) had introduced following the 2020 Judgment. According to the government, the Constitutional Court's ruling essentially required the government to limit the entry of migrants so as to protect Hungary's 'identity' under its Constitution, which prevailed over EU law.[7]

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3. See the detailed factual description in 'Hungary as a Country of Asylum: Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016', UNHCR Report, May 2016, available at www.refworld.org/legal/natlegcomments/unhcr/2016/en/110114, p. 5 ff, esp. at 6. See also e.g. AIDA Country Report on Hungary, European Council on Refugees and Exiles (ECRE), https://asylumineurope.org/reports/country/hungary/overview-main-changes-previous-report-update/.
4. See e.g. Case C-564/18 *Bevándorlási és Menekültügyi Hivatal (Tompa)*, EU:C:2020:218; ECtHR [GC] *Ilias and Ahmed v. Hungary*, CE:ECHR:2019:1121JUD004728715; Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and others*, EU:C:2020:367. See also, on related procedures, Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, EU:C:2020:257, and Cases C-821/19 *Commission v. Hungary (Criminalisation of assistance to asylum seekers)*, EU:C:2021:930 and C-823/21 *Commission v. Hungary (Declaration of intent prior to an asylum application)*, EU:C:2023:504.
5. Case C-808/18 *Commission v. Hungary (Reception of applicants for international protection I)*, EU:C:2020:1029.
6. Ibid., para. 315.
7. See Decision 32/2021. (XII. 20.) AB. An English-language translation is available at: https://public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bb1a1/$FILE/32_2021_AB_eng.pdf.

Concluding that Hungary was not taking steps to effectively comply with the 2020 Judgment, the Commission brought, in February 2022, enforcement proceedings under Article 260(2) TFEU. It argued that the closure of the transit zones was an inadequate measure because the legislation still required lodging an asylum application in such transit zones, which had become impossible following their closure. Further, according to the Commission, Hungary continued to deport illegally staying TCNs without observing the substantive and procedural safeguards required by EU law relating to, for example, the health or family life of the persons concerned or the best interest of children. Finally, the conditions for persons seeking international protection to remain in Hungarian territory to effectively appeal a decision in their regard, including pending the outcome of that remedy, remained, for the Commission, unclear.

The Commission further suggested, based on its Communication of 2005 regarding the calculation of financial penalties under Article 260(2) TFEU, that Hungary should be ordered to pay, at a minimum, a lump sum of EUR 1,044,000 and a daily penalty payment of EUR 16,393.16 from the date of the Enforcement Judgment until compliance was achieved.[8]

For its part, Hungary contested the Commission's claims as unfounded. It also contested the Commission's assessment of the gravity of the infringement and, consequently, the level of penalties requested.

3. The Enforcement Judgment

In the judgment under analysis, the ECJ found that Hungary had not complied with the 2020 Judgment. It established, first, that neither the closure of the transit zones nor the introduction of another legal regime requiring asylum seekers to lodge a prior declaration of intent at a Hungarian embassy in a third country and to possess a travel document enabling them to enter Hungarian territory – requirements found incompatible with EU rules in a different procedure[9] – could bring the situation in line with EU law as regards access to the international protection procedure. Secondly, it rejected Hungary's contention that the migratory pressure on the Western Balkan route and the number of displaced persons from Ukraine could justify the removal of TCNs staying illegally on Hungarian territory, insofar as such removal was in breach of applicable substantive and procedural EU safeguards. Thirdly, the ECJ held that Hungary had not amended, as required by the 2020 Judgment, its national legislation regarding the right of persons seeking international protection to remain in Hungarian territory in order to effectively challenge decisions in their regard.

After having thus established that Hungary had failed, as required under Article 260(1) TFEU, to 'take the necessary measures to comply' with the 2020 Judgment, the ECJ proceeded to deal with the Commission's request that financial penalties be imposed under Article 260(2) TFEU.

The ECJ departed dramatically from the level of penalties the Commission had suggested, with the following reasoning. It underlined that Hungary had failed to comply with 'several essential aspects' of the 2020 Judgment. It emphasized the importance of the provisions at issue, namely of Article 6 of the Procedures Directive, which it described as a necessary precondition for the enjoyment of the 'right

8. For the calculation method, see Communication from the Commission – Application of Article 228 of the EC Treaty (now Article 260(2) TFEU), SEC(2005) 1658, as updated by Communication of 13 April 2021, 'Adjustment of the calculation for lump sum and penalty payments proposed by the Commission in infringement proceedings before the Court of Justice of the European Union, following the withdrawal of the United Kingdom', [2021] OJ C129/1.
9. See C-823/21 Commission v. Hungary (Declaration of intent prior to an asylum application), referred to in para. 25 and 49 of the Enforcement Judgment.

to asylum' recognized in Article 18 of the Charter of Fundamental Rights, for the overall effectiveness of that Directive, and for the EU's common policy on asylum as a whole.[10] It further highlighted that Hungary's noncompliance jeopardized the right to effective judicial protection, and noted that Hungary in fact had failed to observe to a large degree the obligations which EU law established concerning removal and expulsion of TCNs, 'a vital component of the common immigration policy'.[11]

Above all, the Enforcement Judgment underlined the constitutional ramifications of Hungary's noncompliance. Here the rather striking language is worth quoting at length *verbatim*.

According to the ECJ, Hungary's failure 'systematically prevent[ed] any access to the international protection procedure' and its 'deliberate evasion' of the 'common policy as a whole' constituted 'an unprecedented and exceptionally serious infringement of EU law', representing 'a significant threat to the unity' of that law.[12] This infringement, the ECJ continued, 'seriously undermine[d] the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States', which 'calls into question observance of the principle of equality of the Member States before EU law', 'strikes at the very root of the EU legal order', and 'seriously undermines the principle of legality and the principle of *res judicata* in a Union based on the rule of law'.[13]

From this standpoint, the ECJ inferred that Hungary's failure to comply with the 2020 Judgment undermined not only the interests of persons seeking international protection on Hungarian territory but also the very foundations upon which the EU's legal order rests. The ECJ further noted that Hungary had contravened the principle of primacy of EU law by deliberately maintaining and extending the effects of the legislation found to be in breach of that law and, in so doing, had failed to act in good faith and observe the principle of sincere cooperation. Finally, the ECJ held that Hungary's conduct which 'systematically prevents any access to the international protection procedure', had 'an extraordinarily serious impact on both the public interest and private interests', had persisted for more than three years, and had occurred concurrently with other unlawful conduct by Hungary in the area of international protection.[14]

On these grounds, the ECJ considered that the lump sum to be imposed on Hungary should amount to EUR 200 million and the penalty payment accruing going forward was to be set at a daily total of EUR 1 million.

4. Analysis

The Enforcement Judgment represents a turning point in the case law on financial penalties. Never before have monetary sanctions of a comparable weight been imposed on a Member State pursuant Article 260(2) TFEU, the main constitutional mechanism for the federal execution of EU law.[15] For example, in the classic Case C-304/02, *Commission v. France (Undersized fish II)*, the ECJ imposed

10. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L180/60 ('Procedures Directive'), and Enforcement Judgment para. 105.
11. Enforcement Judgment, para. 109–111.
12. Ibid., para. 107.
13. See, respectively, ibid. para. 113, 115, 117 and 102.
14. Ibid., para. 106, 129 and 132.
15. On federal measures of coercion in the EU, see e.g. S.R. Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press, 2021), p. 153–156. For a lengthier exposition on federal coercion in the EU, see P. Pohjankoski, *Union Without a Sword: Federal Coercion and the Emergence of Europe's Constitution* (PhD dissertation, University of Helsinki, 2024). For an analysis of the infringement procedure as 'centralized' (public), as

a lump sum of EUR 20 million and a six-monthly penalty payment of EUR 57,761,250, which translates to EUR 320,896 per day.[16] Another instance of high penalties is Case C-204/21 *Commission v. Poland (Independence and private life of judges)*, where the ECJ, to support the interim measures ordered in that case, imposed a daily penalty of EUR 1 million.[17] However, not only are these prior penalties of a lower amount in absolute terms, they concerned France and Poland, that is, much larger economies – which is a key factor for determining the level of financial sanctions.[18] The momentous weight of the penalties in the Enforcement Judgment thus becomes clear when viewed in relation to the Member State concerned.

What did the ECJ seek by imposing such high penalties? In two words: coercive effect. Under settled case law, Article 260(2) TFEU is not a second-round re-litigation of the original infringement but 'a method of enforcement'.[19] The ECJ begins its reasoning in the Enforcement Judgment by noting that Article 260(2) TFEU is aimed at 'ensuring that EU law is in fact applied'.[20] For the ECJ's judgments to enjoy due authority and mandatory effect, the penalties for noncompliance must produce 'coercive force' and 'deterrence'.[21] In the case at hand, the ECJ went to great lengths to emphasize the systematic and deliberate nature of Hungary's infringement and its deleterious effects on the authority of the binding effect of the ECJ's judgments and, by extension, the rule of law itself. Clearly the message the ECJ wished to communicate, in the context of these infringement proceedings, to Budapest and to a wider audience of potential rule-breakers was: this is what a systematic and deliberate breach of EU law will cost you – don't do it.

The Enforcement Judgment is particularly noteworthy for five reasons, which are next addressed in turn: (A) it bolsters the Union's constitutional powers of federal execution, (B) it reaffirms the quasi-automatic character of the enforcement procedure in Article 260(2) TFEU, (C) it consolidates the ECJ's case law on 'deliberate' breaches of EU law, (D) it sanctions a violation of the principle of primacy via the government's instrumentalization of a national constitutional court and (E) it holds broader significance in the contentious context of border controls and migrant 'pushbacks' in today's Europe.

A. Infringement proceedings as federal execution

First, the infringement procedure, particularly its enforcement prong provided in Article 260(2) TFEU, can be seen as a form of federal execution within the EU constitutional order. Under federal theory, 'federal execution' refers to procedures whereby the federal level of government enforces its law against the federation's constituent subunits through sanctions or other executive measures of coercion in order to induce that subunit to comply with the federal constitution.

opposed to decentralized (private), enforcement in relation to Member States, see e.g. R. Bieber and F. Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?', 51 *CMLRev* (2014), p. 1057.

16. Case C-304/02 *Commission of the European Communities v. French Republic (Undersized fish II),* EU:C:2005:444.
17. See Order of the Vice-President of the Court of 27 October 2021 in C-204/21 R, EU:C:2021:878. See also Order of the Vice-President of the Court of 20 September 2021 in Case C-121/21 R, *Czech Republic v. Poland (Turów Mine)*, EU:C:2021:752, where the applicant requested that a daily penalty payment of EUR 5 million be imposed on Poland; however, in the Order, the amount of EUR 500,000 per day was considered sufficiently dissuasive.
18. Indeed, the factors to consider in imposing financial sanctions for past infringements include their seriousness and duration as well as the Member State's ability to pay. See e.g. Enforcement Judgment, para. 101 and the case law cited.
19. See Case C-304/02 Commission of the European Communities v. French Republic (Undersized fish II), para. 92.
20. Enforcement Judgment, para. 96.
21. See Case C-304/02 Commission of the European Communities v. French Republic (Undersized fish II), para. 82 and 104.

From the perspective of federal theory, this constitutional device may be contrasted with 'federal intervention' where the federal union intervenes in defence of a subunit's internal constitutional order.[22] Within the EU, as described by the ECJ itself, the purpose of the procedure in Article 260(2) TFEU is to remedy a persistent infringement, commonly referred to by the French-language epithet '*manquement sur manquement*' – or an 'infringement upon infringement', if you will – by 'inducing a defaulting Member States to comply with a judgment establishing a failure to fulfil obligations'.[23]

Functionally, then, that procedure is equivalent to federal execution. That Article 260(2) TFEU is not conventionally labelled as such is undoubtedly due, at least in part, to the normative baggage that the word 'federal' carries in EU jurisprudence. Indeed, over time many debates have conflated 'federalism' with the idea of a 'federal state' (which the EU is *not*) or substantive constitutionalism regarding the emergence of a European *demos* or otherwise.[24] However, the EU *is* unquestionably federal in the legal-technical sense that its institutional organization comprises two levels – the Union and the Member States – amongst which the powers exercised under EU law are vertically divided.[25] Thus, the EU is constitutionally built upon the basic ideas of federalism.[26] Understanding the Article 260 TFEU penalties in their proper constitutional context, that is, as federal execution, highlights their fundamental role as a means to ensure that Member States respect the binding nature of EU law.

Of course, the functional equivalence between the EU and full-fledged federations is not complete, since the powers of concrete execution at the Union's disposal are notoriously limited. The EU itself has no physical powers of coercion, typically wielded by an army, a police force or other enforcement agents, which could provide autonomous last-resort enforcement capability. Nonetheless, the Enforcement Judgment at hand brings the functional equivalence between the EU's enforcement capacity one incremental step closer to mature federal orders insofar as higher penalties imply greater coercive effect. The EU's financial-penalty leverage is enhanced with the possibility to set off unpaid penalties against any sums due to the Member State in question from the EU budget.[27] As a matter of law, the ECJ has had the power to impose high penalties since the inception of the European Union with the entry into force of the Maastricht Treaty; however, for a long time it exercised this power cautiously.[28] The Enforcement Judgment, together with other recent rulings, implies a shift in how the ECJ views the practical deployment of its sanctioning power.

22. See on federal execution and federal intervention in the EU context, S.R. Larsen, *The Constitutional Theory of the Federation and the European Union*, p. 153–156, and P. Pohjankoski, *Union Without a Sword: Federal Coercion and the Emergence of Europe's Constitution*, p. 231–252.
23. Enforcement Judgment, para. 96.
24. On substantive or 'prescriptive' constitutionalism, see e.g. R. Schütze, 'Constitutionalism(s)', in R. Mastermand and R. Schütze (eds), *Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press, 2019), p. 41.
25. See e.g. K. Lenaerts, 'Federalism: Essential Concepts in Evolution – The Case of European Union', 21 *Fordham Int'l LJ* (1998), p. 746, 748–49, and R.J. Goebel, 'Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union after the Treaty of Lisbon', 20 *Colum J Eur L* (2013), p. 77, 83–84.
26. On federalism generally, see e.g. W.H. Riker, *Federalism: Origin, Operation, Significance* (Boston, Little, Brown and Company, 1964), M. Burgess, *Federalism and European Union: the Building of Europe, 1950–2000* (Routledge, 2000), and R. Schütze, *From Dual to Cooperative Federalism* (Oxford University Press, 2009).
27. See P. Pohjankoski, 'Rule of Law with Leverage: Policing Structural Obligations in EU Law with the Infringement Procedure, Fines, and Set-off', 58 *CML Rev* (2021), p. 1341, 1356ff.
28. P. Pohjankoski, *Union Without a Sword: Federal Coercion and the Emergence of Europe's Constitution*, p. 224 ff.

Finally, this development mirrors the overall increase in the sums of money which the EU institutions have appropriated or withheld, by various methods including conditionality, to coerce Member States in recent years.[29] While, theoretically speaking, some of the conditionality measures which the EU has applied against Member States might be more properly classified as instruments of 'federal intervention' (as opposed to federal execution) to the extent they have tended to focus on upholding the Member States' *internal constitutional order*,[30] the various measures clearly pursue the same overall goal of securing the authority of EU law and EU values within Member States. Looking at this picture, the Enforcement Judgment fits in with the trend of providing Union-level sanctions which have teeth.

B. Quasi-automatic enforcement of financial penalties

Secondly, the Enforcement Judgment was rendered by a chamber of five judges (as opposed to the Grand Chamber) and without an Advocate General's opinion. This rather modest procedural posture underlines the quasi-automatic enforcement character of the procedure under Article 260(2) TFEU.

That no Advocate General's opinion was considered necessary implies, with reference to Article 20 of the Statute of the Court of Justice of the European Union, that 'the case raises no new point of law'. Indeed, from that standpoint, the enforcement proceedings against Hungary could have been attributed, in principle, even to a chamber of three judges, which constitutes a typical formation to decide 'routine' cases. It is difficult to divine precisely from the outside why the Enforcement Judgment was rendered by a chamber of five judges. However, it is possible that the case could indeed have been attributed to a three-judge chamber if only the judge rapporteur in the case had not been a president of a five-judge chamber. In fact, the judges, who for three years at a time preside over a five-judge chamber, do not, by virtue of that role, sit in any of the ECJ's three-judge chambers.

Be that as it may, the ECJ clearly decided that the case, despite the high financial stakes, was not legally challenging. Even if, at first sight, it might appear surprising that a judgment of this magnitude is delivered by a smaller chamber and without an Advocate General's opinion, it is worth noting that the 2020 Judgment, which originally established Hungary's infringements, was decided by the Grand Chamber and with an Opinion. It is therefore fully understandable that the ECJ estimated that it was not necessary to cast such an extensive regard at the case in the context of the second-round enforcement proceedings, where the only issue to be answered was whether Hungary had complied with the 2020 Judgment or not. The simple procedural treatment highlights the Article 260(2) TFEU proceedings as a means of enforcement.

Nonetheless, one issue which raises questions is the ECJ's laconic reasoning regarding the calculation of the sums. To recall, according to a well settled case law, the ECJ is not bound by the Commission's proposal for penalties but may decide them *ex aequo et bono*.[31] Moreover, in the context of the procedure under Article 260(2) TFEU the principle of civil procedure that the court may not go beyond the parties' claims does not apply.[32] While the Enforcement Judgment

29. On the relative weight of infringement penalties and financial conditionality, see T. Nguyen, 'How Much Money is a Lot of Money? The Recovery Fund and the Battle over Rule of Law in Poland' *Verfassungsblog* (17 September 2021), https://verfassungsblog.de/how-much-money-is-a-lot-of-money/, DOI: 10.17176/20210917-195936-0.
30. See above (n 22) and accompanying text.
31. See e.g. Case C-241/11, *European Commission v. Czech Republic*, EU:C:2013:423, para. 42–43.
32. Case C-304/02, Commission of the European Communities v. French Republic (Undersized fish II), para. 91.

details the criteria for imposing penalties and highlights in multiple paragraphs the gravity of the infringement (see also sections 4.C and 4.D), the ECJ is silent as to the precise calculation method used to arrive at the sums of the penalties.

The problem is not new. The lack of clear calculation method in the ECJ's case law, when penalties are adjudicated based on 'fairness', has been problematized in scholarship.[33] It may be further pondered whether the effects of laconic reasoning are exacerbated when the level of penalties is higher. In practice, the higher the penalties, the more likely it is that the Member State concerned will wish to know the reason for them. On this point, while an exact arithmetic justification is not required by the Treaties, the ECJ will nonetheless do well to pay close attention to the consistency of penalties going forward, to ensure that comparable cases will receive equal treatment and that, in this regard, the judgments are adequately reasoned.

C. Sanctioning 'deliberate' infringements

Thirdly, it bears highlighting that the ECJ refers to Hungary's infringement as 'deliberate'.[34] This is unusual insofar as Member States are, in the normal course of affairs, expected to respect basic principles of the rule of law. Thus, even if the Commission may hold an interpretation of EU law different from that of the Member State in question, the latter is not lightly accused of *deliberately* breaching that law. In prior case law, references to deliberate breaches of EU law are not entirely unprecedented, however.

For example, the ECJ has previously held that Italy's 'deliberate refusal' to observe certain agricultural regulations constituted a 'conspicuous' failure to fulfil its obligations.[35] Similarly, it has considered that the United Kingdom 'markedly failed' to fulfil its obligations deriving from its then-EEC membership when it 'deliberately' refused to implement on its territory provisions in a regulation requiring the installation and use of certain recording equipment in vehicles engaged in road transport.[36]

Further, in a case concerning the recovery of penalty payments imposed on Poland as part of the interim measures in the 'Turów Mine' case, the General Court also observed that it could not accept that Poland could 'deliberately' fail to comply with the penalty payments at issue simply because the main action had afterwards settled.[37] Finally, when the Supreme Court of the United Kingdom considered that EU law did not apply to the UK's obligation under the ICSID Convention to enforce an intra-EU arbitral award, the ECJ held that the court had adopted an erroneous interpretation of EU law and thereby 'deliberately' excluded the application of EU law in its entirety from the scope of its assessment.[38]

Despite these sporadic earlier pronouncements, the characterization of Member States' infringements as 'deliberate' remains, understandably, rare. That Hungary's infringement was labelled

33. See A. Kornezov, 'Imposing the Right Amount of Sanctions under Article 260(2) TFEU: Fairness v. Predictability, or How to "Bridge the Gaps"', 20 *Colum J Eur L* (2014), p. 307, 324.
34. Enforcement Judgment, para. 107 and 113.
35. Case 39/72 *Commission v. Italy (Premiums for slaughtering cows)*, EU:C:1973:13, para. 25.
36. Case 128/78 *Commission v. United Kingdom (Tachographs)*, EU:C:1979:32, para. 13.
37. See Joined Cases T-200/22 and T-314/22 *Poland v. Commission*, EU:T:2024:329, para. 48. See also P. Pohjankoski, 'Safeguarding EU Law's Authority: The General Court Affirms the Commission's Decisions to Recover Penalty Payments from Member States by Offsetting (T-200/22 and T-314/22, Poland v Commission)', EU Law Live (11 June 2024), https://eulawlive.com/op-ed-safeguarding-eu-laws-authority-the-general-court-affirms-the-commissions-decisions-to-recover-penalty-payments-from-member-states-by-offsetting-t-200-22-and-t-314-2/.
38. Case C-516/22 *Commission v. United Kingdom (Judgment of the Supreme Court)*, EU:C:2024:231, para. 85.

as such helps understand the rationale behind the magnitude of the financial penalties at hand. The deliberate character of an infringement logically affects its gravity and, hence, the penalties imposed.

D. Instrumentalization of national courts

Fourthly, Hungary's claim that the Hungarian Constitutional Court effectively required it to maintain in force the national rules infringing EU law constitutes yet another twist in these proceedings. In submitting this claim as a defence for its noncompliance, Hungary essentially framed the situation as a primacy conflict between the national and EU legal orders and between two courts, the Constitutional Court and the ECJ.

However, this claim appears somewhat disingenuous. On the one hand, it is noteworthy that the petition before the Constitutional Court was filed by the Hungarian government itself *after* the ECJ had delivered the 2020 Judgment.[39] It seems, then, that the government may have attempted to instrumentalize the Constitutional Court and to co-opt it to support its noncompliance with the ECJ's ruling.[40]

On the other hand, the Constitutional Court did not fully accept the government's invitation and appears, on the contrary, to have tried to steer clear of an open conflict with the ECJ. It is true that the ruling held that, under the Constitution, the government had an obligation to prevent 'a process beyond the control of the State, which may lead to, or result in, a forced change in the traditional social environment of man' contrary to 'the right to identity of persons living in the territory of Hungary'.[41] However, it simultaneously underlined that the reasoning was premised on a hypothetical situation where the EU had not effectively exercised a shared competence, noting that it 'could not…examine whether in the specific case the exercise of joint competence was in fact incomplete' and that 'the abstract constitutional interpretation [could] not be aimed at reviewing the judgment of the CJEU, nor [did it]…include the examination of the primacy of EU law'.[42]

Taking into account the actual ruling of the Constitutional Court, the government's argument before the ECJ that Hungarian Constitution required maintaining in force the national provisions infringing EU law (an argument of course troubling per se) appears contrived.

E. The broader context: Migrant pushbacks

Fifthly, and finally, the Enforcement Judgment raises questions as to its broader implications for sanctioning infringements of EU law regarding border control measures and migrant pushbacks. The case at hand should be appraised against the well-documented tension between Member

39. The case was filed on 26 February 2021.
40. For a similar strategy employed by Poland, see Cases C-204/21 *Commission v. Poland (Independence and private life of judges)*, EU:C:2023:442; T-830/22 and T-156/23 *Poland v. Commission*, EU:T:2025:131, and T-1033/23 *Poland v. Commission*, EU:T:2025:129. See also P. Pohjankoski, 'Guaranteeing Primacy of EU Law via Offsetting, Again: General Court Upholds the Commission's Recovery of EUR 320 million in Interim-Measure Penalties (T-830/22 & T-156/23, Poland v Commission; T-1033/23, Poland v Commission)", EU Law Live, 20 March 2025, https://eulawlive.com/op-ed-guaranteeing-primacy-of-eu-law-via-offsetting-again-general-court-upholds-the-commissions-recovery-of-eur-320-million-in-interim-measure-penalties-t-830-22-t-156-23-pola/.
41. See Decision 32/2021. (XII. 20.) AB, para. 51–52 (obligation to prevent such a process), cf. para. 53 et seq. (obligations towards persons seeking international protection).
42. See the summary of the judgment on the Constitutional Court's website as well as the full text cited in n 7 above.

States' international protection obligations and the trends of 'outsourcing' or 'offshoring' border control beyond their territory.[43] When viewed thus, the question arises what lessons, if any, can be drawn from the Enforcement Judgment for other situations in the area of border control which may, in time, be found to constitute breaches of EU asylum and immigration laws.

As regards the Hungarian situation, it should be highlighted that the infringement established in the 2020 Judgment was particularly far-reaching in that it essentially blocked persons seeking international protection from accessing the procedure on Hungarian territory, leading to chaotic conditions at the transit zones adjacent to the Hungarian border. As justification, Hungary relied in essence on the great number of incomers, which the ECJ, however, refused to consider a valid ground for the national measures in question.

Nevertheless, other Member States besides Hungary maintain highly restrictive border regimes, even border closures, resulting in migrant pushbacks.[44] The obvious implication of the Enforcement Judgment is that the Commission must, in the name of the equality of Member States, oversee that EU laws are respected and enforced throughout the Union. However, not all situations are alike. In particular, some Member States have justified their border measures with reference to 'instrumentalized migration', referring to the *en masse* deployment of asylum seekers by a foreign power, namely Russia, on the external borders of the Schengen area as a form of hybrid warfare.[45] The possible justification of such measures will come be assessed also in light of the new Crisis and Force Majeure Regulation 2024/1359 as well as the recent amendments to the Schengen Border Code, adopted as part of the EU's major legislative reform of 2024, the Pact on Migration and Asylum.[46]

A detailed appraisal of such national measures is beyond the scope of the present case note. However, even as one bears in mind the different contexts and that the EU is to afford respect to Member States' legitimate security concerns, the Enforcement Judgment appears a relevant benchmark also in this regard. It reaffirms the case law under which Article 6 of the Procedures Directive obliges the Member States to ensure 'effective, easy and rapid access to the international protection procedure', an obligation which is described as indispensable for the entire functioning of EU asylum law, including Article 18 of the Charter.[47] In thus characterizing that obligation,

43. For these terms, see T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011), p. 15–16. On asylum seekers' rights under EU law, including the territorial scope of application thereof, see Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP, 2017), esp. 181 ff. On the evolving notion of border in international law, see A. Kesby, 'The Shifting and Multiple Border and International Law', 27 *OJLS* (2007), p. 101.
44. For the trend regarding border closures, see e.g. 'EU Countries Tighten Border Checks Amid Security and Migration Fears', *Radio France Internationale* (12 September 2024), www.rfi.fr/en/international/20240912-eu-countries-tighten-border-checks-amid-security-and-migration-fears (noting 'intensified' border controls in Germany, Austria, Denmark, France, Italy, Norway, Slovenia, Sweden and Finland). On pushbacks in the ECJ case law, see Case C-392/22 *X v. Staatssecretaris van Justitie en Veiligheid*, EU:C:2024:195.
45. On this phenomenon, see e.g. P. Pohjankoski, 'A Borderline Case: When National Security and the Right to Asylum Conflict', *Verfassungsblog* (1 December 2023), https://verfassungsblog.de/a-borderline-case/, DOI: 10.59704/3ab1c58db4f8b755.
46. See particularly Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, [2024] OJ L 22 May, as well as Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, [2024] OJ L 20 June. See also, European Commission, 'Pact on Migration and Asylum', https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en.
47. Enforcement Judgment para. 64–65 and 105–108.

and the corresponding right to make an application for international protection, the ECJ, once again, enshrines the latter as a kind of 'right to have rights', which, it appears, might be difficult to enact a blanket derogation from, even in a context where the security challenges are markedly different.[48]

5. Conclusion

The Enforcement Judgment is a milestone for the EU's federal execution powers. That the ECJ is willing to impose financial penalties with teeth is essential for the EU to live up to its ambition to 'defend' the value of the rule of law.[49] One of the most distinguishing features of EU law from public international law is its enforceability against Member States, both via national courts and at the Union level. Financial sanctions have come of age in the past decade, as the challenges of Member State noncompliance have become ever more pressing. This is true particularly in areas with heightened sovereignty concerns, such as migration, judicial independence, or the use of natural resources in the context of environmental projects. The infringement procedure guarantees due process for the Member State concerned, while at the same time allowing, as the case under analysis exemplifies, the EU to impose coercive sanctions to uphold its laws.

Considering that private operators have for long incurred substantial fines for breaches of EU competition law, it seems intuitively sound that public actors, such as Member States, may also be subjected to financial sanctions with teeth. The rule of law only subsists if EU law can be effectively enforced. This means that Member States should not be able to unilaterally decide when their self-labelled fundamental interests take priority over the EU's common rules. In this, the ECJ has got it right when it held, in the Enforcement Judgment, that the deliberate evasion of a whole EU policy violates the principle of equality of Member States before EU law and puts in question the solidarity, including the fair sharing of financial burdens, which must underpin the Union. The ECJ has opted for letting the money talk; hopefully that message is heard loud and clear.

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48. On that Arendtian concept, see e.g. A. Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press, 2012).
49. See Case C-156/21 *Hungary v. Parliament and Council*, EU:C:2022:97, para. 127 (referring to 'the European Union as a common legal order…[which] must be able to defend [the rule of law], within the limits of its powers as laid down by the Treaties').