The Possibility of Using Article 72 TFEU as a Conflict-of-Law Rule

Hungary Seeking Derogation from EU Asylum Law*

*Ágnes Töttős***

Abstract

The purpose of this article is to examine how the CJEU circumscribed the room for maneuver of Member States for safeguarding their internal security and whether the use of and reference to Article 72 TFEU changed over the past years. The starting point of the analysis is the Hungarian asylum infringement case: the article looks back at earlier case-law and identifies how the reference to Article 72 TFEU shifted from considering it an implementation clause to the attempts at using it as a conflict-of-law rule. Although the article finds that the CJEU reduced the scope of possibly using Article 72 TFEU as a conflict-of-law rule and practically excludes its application by the setting high standards for this unique form of application, the article examines some extreme situations from 2020 where it could be validly referred to.

Keywords: Article 72 TFEU, internal security, conflict of law, Common European Asylum System, relocation decisions.

1. Introduction

Article 72 TFEU sets out the important and indisputable rule in the Area of Freedom, Security and Justice (AFSJ) that harmonization in this area shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. According to Craig and de Búrca the proposition in Article 72 TFEU

> "has political resonance and is not without substance but does not reflect reality. The AFSJ Title is an area of shared competence. This necessarily means that Member State responsibilities for law and order will be

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** Ágnes Töttős: senior government counselor, Government Office of the Prime Minister, Budapest.

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> circumscribed by EU measures. The nature and degree of this circumscription will perforce depend on the particular measure adopted by the EU."[1]

The purpose of this article is to research *how the CJEU circumscribed the room for maneuver of Member States for safeguarding their internal security and whether the use and reference to Article 72 TFEU changed over the past years*. The starting point of the analysis is the most recent case where this Treaty provision was referred to, namely the Hungarian asylum infringement case in which the CJEU declared that Hungary failed to fulfil its obligations in respect of several provisions of EU asylum and migration acquis.[2] Following an introduction to the most recent conclusions of the CJEU, the article looks back at earlier case-law and identifies how the reference to Article 72 TFEU shifted from considering it an implementation clause to the attempts at using it as a conflict-of-law rule. Although the term *conflict of laws* is generally used in the context of private international law, I shall use this term to refer to situations when an EU law provision gives priority to Member State competence over measures enacted by the EU legislature or decision-maker. Having this special nature, Article 72 TFEU was used as an argument in the referred asylum cases in particular by Poland and Hungary and was also referred to as a conflict-of law rule by both the Advocate General and the CJEU.[3]

As the possibility of use of Article 72 TFEU in a different context emerged, it is interesting to examine how the CJEU reacted to the possible disapplication of EU law in extreme situations and how it aimed at fortifying the obligation of implementing EU law even in situations posing threat to internal security. Apart from discussing the CJEU's conclusions, the article also points out that the CJEU could have taken into account further developments that could have resulted in a different evaluation of the situations where conflict of laws was raised. Although the article arrives at the conclusion that the CJEU reduced the scope of possibly using Article 72 TFEU as a conflict-of-law rule and practically excludes its application by setting high standards for this form of unique application, the article examines some extreme situations from 2020 in which it could be validly referred to.

2. The Hungarian Infringement Procedure

In the infringement procedure *C-808/18* the CJEU declared that Hungary had failed to fulfil its obligations under Articles 5, 6(1), 12(1), and 13(1) of Directive

1 Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials, 6th Edition*, Oxford University Press, Oxford, 2015, p. 976.

2 Judgment of 17 December 2020, *Case C-808/18, European Commission v Hungary*, ECLI:EU:C:2020:1029.

3 *See* Opinion of Advocate General Sharpston delivered on 31 October 2019, *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*, ECLI:EU:C:2019:917, para. 212. *See also* Judgment of 2 April 2020, *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*, ECLI:EU:C:2020:257, para. 137.

2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive or RD),[4] under Articles 6, 24(3), 43, and 46(5) of 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 (Asylum Procedures Directive or APD),[5] and under Articles 8, 9 and 11 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Conditions Directive or RCD).[6]

The critical conclusions of the CJEU identified four aspects of Hungary's asylum system's non-compliance with EU law. *(i)* Firstly, in providing that applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access, in its territory, the international protection procedure, may be made only in the transit zones of Röszke and Tompa, while adopting a consistent and generalized administrative practice drastically limiting the number of applicants authorized to enter those transit zones daily. *(ii)* Secondly, in establishing a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa, without observing the guarantees provided for in Article 24(3) and Article 43 of the Asylum Procedures Directive and Articles 8, 9 and 11 of the Reception Conditions Directive. *(iii)* Thirdly, in allowing the removal of all third-country nationals staying illegally in its territory, with the exception of those who are suspected of having committed a criminal offence, without observing the procedures and safeguards laid down in Article 5, Article 6(1), Article 12(1) and Article 13(1) of the Return Directive. *(iv)* Finally, in making the exercise by applicants for international protection who fall within the scope of Article 46(5) of APD of their right to remain in its territory subject to conditions contrary to EU law.

2.1. System of Systematic Detention

The CJEU did not accept the reasoning of Hungary that general rules of the Asylum Procedures Directive should apply to the transit zones and not to border procedures as the entirety of the procedure for the examination of asylum applications was conducted there. Furthermore, the placement in transit zones

4 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive).

5 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 (Asylum Procedures Directive).

6 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Reception Conditions Directive).

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was not considered as detention by Hungary since it was open at the Serbian side.[7] Hungary also claimed that special needs of the applicants are also taken into account.[8] Finally, Hungary also referred to Article 72 TFEU as a provision authorizing it to declare a crisis situation caused by mass immigration and to consequently apply derogating procedural rules in such situations, since the applicable secondary law provisions, namely the Asylum Procedures Directive, have proven insufficient for adequately managing the situation prevailing since the 2015 crisis.[9]

The CJEU dedicated a separate section to examining the legal nature of the placement in the transit zone and in its conclusions reiterated the findings of its judgment of 14 May 2020 in the *joined C-924/19 and C-925/19 PPU* preliminary ruling cases.[10] The CJEU then stated that

> "the detention of an applicant for international protection, within the meaning of that provision, is an autonomous concept of EU law understood as any coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter."[11]

Given the circumstances (length, security tools, space, contacts, *etc*.) of the placement in the Hungarian transit zones the CJEU found that *the placing of applicants for international protection in the transit zones of Röszke and Tompa is no different from a detention regime applied in unlawful manner*, which actually led to the immediate closure of the transit zones by the Hungarian authorities.[12]

In the infringement procedure, the CJEU went further than simply confirming its earlier conclusion on the legal nature of the transit zones, for it also examined the compatibility of this detention with the relevant rules of the APD and the RCD. In its assessment, the CJEU found the *de facto* detention in the transit zone is incompatible with EU law in four aspects.[13] *(i)* First of all, by not accepting the Hungarian argument that the procedures in the transit zones are not border procedures, but regular asylum procedures,[14] the CJEU examined its

7 Judgment of 17 December 2020, *Case C-808/18, Commission v Hungary*, ECLI:EU:C:2020:1029, paras. 138-139.

8 Id. para. 140.

9 Id. para. 141.

10 Judgment of 14 May 2020, *Joined Cases C-924/19 PPU and C-925/19 PPU, Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, ECLI:EU:C:2020:367.

11 Id. para. 159.

12 *See* at https://hu.euronews.com/2020/05/21/mar-az-ejjel-elszallitottak-a-tranzitzonakbol-a-menedekkeroket.

13 The fifth ground contended by the Commission, namely that Hungary had infringed Article 2(h) of the Reception Conditions Directive by not transposing the definition of 'detention' properly, was not demonstrated sufficiently in order for the CJEU to accept the Commission's position. *See Case C-808/18, Commission v Hungary*, paras. 210-211.

14 Id. para. 180.

compatibility with border procedures set out in Article 43 of APD. The CJEU found that since the procedures entail the entirety of the examination of the applications and throughout the procedure the applicants are kept in the transit zones, this system of detention does not comply with the conditions of the border procedure and therefore the detention is unjustified on the basis of point (c) of the first subparagraph of Article 8(3) of RCD that allows detention to be carried out during the border procedure.[15] *(ii)* Secondly, incompatibility with EU rules was also declared because Hungary infringed Article 24(3) of RCD by not providing adequate support for applicants in need of special procedural guarantees, as it only exempted certain limited categories[16] and those not exempted did not undergo a case-by-case examination by national authorities to ascertain whether they need special procedural guarantees.[17] *(iii)* Thirdly, the CJEU also found that Hungary infringed Article 11(2) of RCD by requiring that all minors above age 14 be placed in the transit zones, thus, not applying detention as a measure of last resort.[18] *(iv)* Fourthly, Hungary also infringed Article 9 of RCD on the grounds that the detention of applicants in the transit zones were not ordered in writing and did not enable the applicants to ascertain the factual and legal grounds of the detention.[19]

2.2. Analysis of the Use of Article 72 TFEU in Case C-808/18

In the judgment, the CJEU dedicated a separate section to examining the possible use of Article 72 TFEU. The examination was carried out when deciding the compatibility of placement in the transit zones with requirements laid down in APD and RCD, but only after the Court found the *de facto* detention in the transit zone incompatible with EU law in four aspects. The CJEU was therefore trying to answer whether the non-compliance could be justified with reference to Article 72 TFEU, as Hungary claimed that

> "Article 72 authorizes Member States to derogate from the EU rules adopted, in accordance with Article 78 TFEU, in the field of asylum, subsidiary protection and temporary protection, where compliance with those rules precludes Member States from adequately managing an emergency situation characterized by arrivals of large numbers of applicants for international protection. It follows, more specifically, in the present case, that the national rules governing the procedures conducted in the transit zones of Röszke and Tompa can derogate from Article 24(3) and Article 43 of Directive 2013/32. "[20]

15 Id. paras. 181-186.

16 Only unaccompanied minors under the age of 14 and those who already held a residence permit in Hungarian territory or who were subject to another detention measure or a measure restricting personal liberty were exempted.

17 *Case C-808/18, Commission v Hungary*, paras. 187-199.

18 Id. paras. 200-203.

19 Id. paras. 204-209.

20 Id. para. 213.

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While the CJEU acknowledges that it is for Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it also restricts the application of derogations in two ways. *(i)* On the one hand, the CJEU is of the opinion that *such exceptions could only be applied to TFEU Articles that expressly allow derogations* applicable in situations which may affect law and order.[21]

> "It cannot be inferred that the FEU Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of European Union law and its uniform application."[22]

(ii) On the other hand, the court also emphasizes that *the derogation provided for in Article 72 TFEU must be interpreted strictly*.

> "The scope of the requirements relating to the maintenance of law and order, or national security cannot therefore be determined unilaterally by each Member State, without any oversight by the institutions of the European Union. It is accordingly for the Member State which seeks to take advantage of Article 72 TFEU to prove that it is necessary to have recourse to that derogation in order to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security."[23]

As the wording of Article 72 TFEU refers to derogations to be allowed with regard to Title V, the CJEU does not dispute (when examining the strict and justified nature of the Hungarian derogation) that all provisions under the Title on the AFSJ, including those based on Article 78 regarding the Common European Asylum Policy, may be subject to derogation. Nevertheless, the CJEU has several concerns as regards the wide Hungarian interpretation of the derogation and comes to the conclusion that *Hungary invoked the risk of threats to public order and internal security of mass arrivals in a general manner*.[24] In its elaboration, the CJEU questions the necessity of such major derogations and states that although Hungary referred to a significant number of offences committed in 2018 linked to illegal migration, it did not specify the impact of these offences on the one hand, and how the derogation was required given such offences, on the other.[25]

It becomes clearly visible in this part of the judgment that the concept of illegal entry and stay could have different interpretations in different areas of EU

21 Articles 36, 45, 52, 65, 72, 346 and 347 TFEU.
22 *Case C-808/18, Commission v Hungary*, para. 214.
23 Id. para. 216.
24 Id. para. 217.
25 Id. para. 218.

law[26] and while Hungary considers entries to be illegal based solely on the Schengen *acquis*, the CJEU views it strictly from the perspective of international protection by stating that those arriving as applicants for international protection cannot be regarded as entering or staying illegally.[27] This divergence of legal interpretations also contributed to the conclusions regarding the lack of connection between the evidence provided and the necessity that, according to the CJEU should have been demonstrated.

Even after the CJEU concluded that Hungary's demonstration was not enough for invoking Article 72, the CJEU seems to set out another requirement for the application of derogation, namely the lack of due consideration of the security aspects mentioned in Article 72 TFEU by the European legislators. The CJEU states that the fact that RCD allows for detention and, in case of a significant increase in the number of applicants, both APD and RCD provide for a partial derogation, prove that EU legislature was also careful to take into account extraordinary situations. At any rate, it raises major questions as regards the competences left for the Member States.

Although Article 72 TFEU states that "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security", according to the reasoning of the Commission and the CJEU, if the EU law adopted by EU institutions covers the same aspects that Member States would remain responsible for, this should be considered as EU law already providing the maintenance of law and order and the safeguarding of internal security as the CJEU refers to derogations expressly allowed by secondary EU law as provisions serving the same purpose as Article 72 TFEU. This argument, however, raises several concerns. *Article 72 TFEU expressly refers to the exercise of the responsibilities of the Member States* and not the EU. The competence of the Member States is also supported by settled case-law[28] according to which Member States essentially retain the freedom to determine the requirements of public policy and internal security in accordance with their national needs, which can vary from one Member State to another and from one era to another. Should the CJEU's view be followed in the future, it would practically mean that *Member States could no longer decide upon further derogations in accordance with Article 72*

26 *See e.g.* Benedita Menezes Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law*, Hart Publishing, Oxford, 2018, p. 85.

27 *Case C-808/18, Commission v Hungary*, para. 219.

28 The reasoning was developed by Advocate General Mayras in his Opinion in *van Duyn*, according to which 'Member States have sole power, given the exceptions expressed in certain Community provisions […], to take measures for the safeguarding of public security within their territory and to decide the circumstances under which that security may be endangered', so that the concept of public security 'remains, at least for the present, national, and this conforms with reality inasmuch as the requirements of public security vary, in time and in space, from one State to another.' Opinion of Advocate General Mayras delivered on 13 November 1974, *Case C-41/74, Van Duyn*, ECLI:EU:C:123, p. 1357. *See also e.g.* Judgment of 10 July 2008, *Case C-33/07, Jipa*, ECLI:EU:C:2008:396, para. 23; Judgment of 13 January 2012, *Case C-430/10, Gaydarov*, ECLI:EU:C:2011:749, para. 32; Judgment of 11 June 2015, *Case C-554/13, Zh. and O.*, ECLI:EU:C:2015:377, para. 48.

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TFEU thereby limiting Member States or even taking away competence expressly provided to them by Article 72 TFEU.

3. The Different Uses of Article 72 TFEU

3.1. Article 72 TFEU as an Implementation Clause

In earlier cases, the use of Article 72 TFEU focused on the adequate implementation of EU law. On the one hand, the CJEU examined whether Member States act within the margin of discretion provided by secondary law when taking into consideration their national needs in order to maintain law and order. In *Case C-601/15*[29] the CJEU examined whether the detention measure applied in the case of an asylum-seeker in the main proceedings could fall within the grounds for detention mentioned in point (e) of the first subparagraph of Article 8(3) of RCD.[30] The opinion of the Advocate General[31] examining the proportionate nature of the measure applied in the case declared that although the provision at issue does permit interference with the right to liberty and security guaranteed by Article 6 of the Charter of Fundamental Rights, that limitation is justified if it

> "appears necessary in order to allow the Member States, in accordance with the principles referred to in Article 4(2) TEU and Article 72 TFEU, to combat threats to their national security or their public order effectively."[32]

Consequently, when ordering detention based on EU asylum law Member States are allowed to take into account their national security within the discretion that EU law provides as long as the principle of proportionality is kept.

Even in the area of legal migration this room for maneuver was confirmed in *Case C-544/15*.[33] The Advocate General in that case admitted that even though the exact meaning of Article 72 TFEU is not completely clear at first sight, it does point to a difference between public policy and security in free movement law and in immigration law. Nevertheless, both the Advocate General and the CJEU came to the conclusion that the margin of discretion of the German authorities in the case was enough for them to lawfully establish that an Iranian national, previously gaining a degree at a university supported by the Iranian Government and wishing to carry out a research in the field of IT-security, could pose a threat to the Member State's external or internal security.[34]

29 Judgment of 15 February 2016, *Case C-601/15 PPU, N.*, ECLI:EU:C:2016:84.

30 According to point (e) of the first subparagraph of Article 8(3) of RCD an applicant may be detained when protection of national security or public order so requires.

31 View of Advocate General Sharpston delivered on 26 January 2016, *Case C-601/15 PPU, N.*, ECLI:EU:C:2016:85.

32 Id. para. 137.

33 Judgment of 4 April 2017, *Case C-544/15, Fahimian*, ECLI:EU:C:2017:255.

34 Opinion of Advocate General Szpunar delivered on 29 November 2016, *Case C-544/15, Fahimian*, ECLI:EU:C:2016:908, para. 80. *See also Case C-544/15, Fahimian*, para. 50.

As regards the implementation of Schengen *acquis*, the proportionality principle limits Member States in two aspects. *(i)* Firstly, as regards the temporary reintroduction of border control at the internal borders, Member States are limited by the specific provisions of the Schengen Borders Code (SBC)[35] both in terms of legal basis and duration. They, nevertheless, have leeway when deciding what constitutes an 'exceptional situation', in the framework of which the principle of proportionality should still be respected. *(ii)* Secondly, the implementation of Schengen *acquis* also has an influence on areas under national law. In *Adil*[36] the CJEU stated that

> "Article 21(a) of Regulation No 562/2006 provides that the abolition of border control at internal borders is not to affect the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that is also to apply in border areas."[37]

However, it should be noted that even in this case the limitation of police powers was determined with a view not to undermine the efficient implementation of EU law prohibiting the unlawful reintroduction of border control or measures equivalent in nature at internal borders.

3.2. Article 72 TFEU as a Conflict-of-Law Rule: the Relocation Cases

A reference to Article 72 TFEU appeared in a different context when the EU and its Member States faced an exceptional influx of asylum-seekers and the EU reacted to it using a special legal basis for the very first time. Article 78(3) TFEU sets out that

> "in the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned."

Two Council decisions[38] (relocation decisions) on Member States relocating asylum-seekers from Greece and Italy were adopted in line with this provision, the second decision setting out compulsory relocation quotas, the annulment of which was requested by the Slovak Republic and Hungary supported by Poland.

35 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

36 Judgment of 19 July 2012, *Case C-278/12 PPU, Adil*, ECLI:EU:C:2012:508.

37 Id. para. 53.

38 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

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3.2.1. The First Relocation Case

In its judgment[39] the CJEU rejected Poland's argument

> "that the contested decision is contrary to the principle of proportionality since it does not allow the Member States to ensure the effective exercise of their responsibilities with regard to the maintenance of law and order and the safeguarding of internal security as required under Article 72 TFEU. The Republic of Poland submits that it is particularly serious given that the contested decision will give rise to significant 'secondary' movements, caused by applicants leaving their host Member State before the latter has been able to rule definitively upon their application for international protection."[40]

The CJEU's reason for rejecting this argument was that Recital 32 of the contested decision states, *inter alia*, that national security and public order should be taken into consideration throughout the relocation procedure, until the transfer of the applicant is implemented. Furthermore, Article 5(7) provides that Member States retain the right to refuse to relocate an applicant only where there are reasonable grounds for regarding him or her as a danger to their national security or public order.[41] The CJEU therefore refers to the content of secondary law as already providing adequate discretion for Member States to exercise their responsibilities set out in Article 72 TFEU.

Nevertheless, the CJEU could not completely exclude that such explicit retention of right to refuse to relocate would be effective enough in case Member States were required to check large numbers of persons within a short period of time. However, even in such extreme cases outlined by Poland, the CJEU is of the view that

> "such practical difficulties are not inherent in the mechanism and must, should they arise, be resolved in the spirit of cooperation and mutual trust between the authorities of the Member States that are beneficiaries of relocation and those of the Member States of relocation. That spirit of cooperation and mutual trust must prevail when the relocation procedure provided for in Article 5 of the contested decision is implemented."[42]

Consequently, even if the specifically provided check would not provide adequate opportunities for Member States to exercise their responsibilities set out in Article 72 TFEU, they should still try to find a practical solution while implementing EU law rather than not implementing it at all.[43]

39 Judgment of 6 September 2017, *Joined Cases C-643/15 and C-647/15, Slovakia v Council and Hungary v Council*, ECLI:EU:C:2017:631.
40 Id. para. 306.
41 Id. paras. 307-308.
42 Id. para. 309.
43 Opinion of Advocate General Bot delivered on 26 July 2017, *Joined Cases C-643/15 and C-647/15, Slovakia v Council and Hungary v Council*, ECLI:EU:C:2017:618, paras. 315-317.

3.2.2. The Second Relocation Case

By the end of the two-year implementation period most Member States did not or did not completely implement the obligations arising from the two Council Decisions on relocation. The European Commission started infringement procedures against Poland, the Czech Republic and Hungary[44] in which the three Member States put forward a series of arguments which they claim vindicates them for having disapplied Decisions 2015/1523 and 2015/1601. The arguments, *(i)* first, relate to the responsibilities of Member States with regard to the maintenance of law and order and the safeguarding of internal security, arguments derived by the Republic of Poland and Hungary from Article 72 TFEU read in conjunction with Article 4(2) TEU and, *(ii)* secondly, are gleaned by the Czech Republic from the malfunctioning and alleged ineffectiveness of the relocation mechanism provided for under those decisions. These infringement cases raise important questions of EU law, including whether and under what conditions a Member State may rely on Article 72 TFEU to disapply decisions adopted on the basis of Article 78(3) TFEU, the binding nature of which is not disputed.[45] Consequently, the CJEU examined the nature and scope of application of Article 72 TFEU from a broader perspective.

Poland and Hungary referred to the drawbacks of the practical implementation of relocations by other Member States that were later also highlighted by the European Court of Auditors in its special report.[46] The two Member States take the view that, according to their assessment of the risks posed by the possible relocation on their territory of dangerous and extremist persons who may carry out violent acts or acts of a terrorist nature, and the relocation mechanism as it was applied by the Greek and Italian authorities did not enable them to fully guarantee the maintenance of law and order and the safeguarding of internal security. In this connection, they also refer to the many problems encountered in the application of the relocation mechanism as far as it concerns, in particular, establishing with sufficient certainty the identity and origin of applicants for international protection who may be relocated. They claimed that these problems were aggravated by the lack of cooperation on the side of the Greek and Italian authorities in the relocation procedure, in particular, in light of the refusal of those authorities to allow liaison officers from the Member States of relocation to conduct interviews with the applicants concerned before their transfer.[47] Such practical concerns were also highlighted later by the European Court of Auditors, explaining that the relocation decisions had to be adopted quickly in September 2015, before procedures had been established or the necessary structures were in place (to register, transport and accommodate relocation candidates) and it was therefore not clear how to proceed, especially as

44 *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*.

45 Also noted by the Advocate General in para. 105 of her Opinion.

46 *Asylum, Relocation and Return of Migrants: Time to Step Up Action to Address Disparities between Objectives and Results*, European Court of Auditors, Special Report No 24/2019.

47 *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*, paras. 135-136.

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regards performing security checks, and key stakeholders did not agree upon operating protocols[48] until later.[49]

Based on the reasons above, Poland submitted that

> "a Member State can invoke Article 72 in order not to implement an act adopted under Title V of the Treaty each time it considers that there is a risk, even a potential risk, for the maintenance of law and order and the safeguarding of internal security for which it bears responsibility. In that regard, a Member State has a very wide margin of discretion and must only show the plausibility of a risk for the maintenance of law and order and the safeguarding of internal security in order to be able to rely on Article 72 TFEU.'[50]

The Advocate General and the Court used slightly different arguments when rejecting the above-mentioned arguments of Poland and Hungary. AG Sharpston argued that

> "Article 72 TFEU is therefore not – as Poland and Hungary contend – a *conflict of laws rule* that gives priority to Member State competence over measures enacted by the EU legislature or decision-maker; rather, it is a *rule of co-existence*. The competence to act in the specified area remains with the Member State (it has not been transferred to the European Union). Nevertheless, the actions taken must respect the overarching principles that the Member State signed up to when it became a Member State and any relevant rules contained in the Treaties or in EU secondary legislation."[51]

This proposition was supported by two examples given by the Advocate general, namely the *Factortame* litigation and Member States' legislation related to direct taxation. In both examples AG Sharpston pointed to the fact that even in areas of law where the competence to legislate is vested in the Member States, such legislative powers retained must yet still be exercised in consistence with EU law.[52] In this case, it is the Relocation Decisions as well as the entire framework of the Common European Asylum System that prevents Member States from applying Article 72 TFEU as a *carte blanche*.

In its assessment the CJEU reiterated its statement made in the first relocation case, namely, that the Treaty does not contain an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of EU law as the recognition of the existence of such may impair the binding nature of EU law and its uniform application. Furthermore, it

48 In the summer of 2016 in Greece and at the end of the same year in Italy.

49 European Court of Auditors, Special Report No 24/2019, p. 25.

50 *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*, para. 137.

51 AG Opinion, *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*, para. 212.

52 Id. paras. 213-218.

once again highlighted that the derogation provided for in Article 72 TFEU must be interpreted strictly, and it is for the Member State which seeks to take advantage of Article 72 TFEU to prove that it is necessary to have recourse to that derogation in order to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security.[53] Here, the CJEU referred to its settled case-law regarding derogations in other areas of EU law, more specifically the derogation provided for in Articles 346 and 347 TFEU related to the functioning of the internal market being affected by certain measures of the Member States.[54]

It then went on to examine the relationship between the discrepancies of the relocation mechanism and the complete disapplication of the relocation decisions. The CJEU first repeated that the relocation decisions allow the Member States to adequately take into account their responsibilities related to ensuring internal security. Nevertheless, the CJEU points out that the wording of the relocation decisions authorized the competent authorities of the Member State of relocation to rely on *serious reasons or reasonable grounds* relating to the maintenance of their national security or public order *only following a case-by-case investigation of the danger actually or potentially represented by the applicant* for international protection. It follows that the decisions precluded a Member State from peremptorily invoking Article 72 TFEU in that procedure for the sole purposes of general prevention and without establishing any direct relationship with a particular case, in order to justify suspending the implementation of, or even a ceasing to implement its obligations under the relocation decisions.[55] The CJEU highlights that the help of EU agencies was available and additional security interviews could be requested in order to carry out a thorough analysis of each individual case.[56]

Consequently, the CJEU concludes that

> "the mechanism provided for in Article 5(4) and (7) of each of those decisions, including in its specific application as it developed in practice during the periods of application of those decisions, left the Member States of relocation genuine opportunities for protecting their interests relating to public order and internal security in the examination of the individual situation of each applicant for international protection whose relocation was proposed, without prejudicing the objective of those decisions to ensure the effective and swift relocation of a significant number of applicants clearly in

53 *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*, paras. 143-144 and 147.

54 *See*, to that effect, Judgment of 15 December 2009, *Case C-461/05, Commission v Denmark*, ECLI:EU:C:2009:783, para. 52; Judgment of 4 March 2010, *Case C-38/06, Commission v Portugal*, ECLI:EU:C:2010:108, para. 63.

55 *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*, para. 160; AG Opinion, *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*, para. 223.

56 *Joined Cases C-715/17, 718/17 and 719/17, Commission v Poland, Commission v Hungary, Commission v Czech Republic*, para. 166.

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> need of international protection in order to alleviate the considerable pressure on the Greek and Italian asylum systems."[57]

It is interesting to compare this theoretical statement with what the European Court of Auditors actually found examining the situation first hand:

> "The majority of rejections were justified on public order or national security grounds, in accordance with the Relocation Decisions. However, the explanations given were often generic, without detailed justification of individual cases. The number of rejections was higher for Greece than for Italy owing to the different security profiles of eligible migrants. Greece channeled rejected candidates to the national asylum system, whereas Italy offered them for relocation to another Member State."[58]

It therefore gives the impression that what the way the CJEU approaches the use of the public security clause is a somewhat illusory and in practice even relocating Member States used their discretionary power deviating from the requirements set by the CJEU. Consequently, it rightfully raises the question whether lawful implementation along the required principles could actually have been carried out at all, or is there more in what Poland and Hungary claim regarding the impossibility of enforcing Member State rights related to internal security during the relocation procedures?

4. Conclusions

4.1. The Scope of Interpretation of Article 72 TFEU

Article 72 TFEU reproduces Article 64(1) TEC and Article 33 TEU and now applies to Title V in its entirety.[59] According to Steve Peers, Article 64(1) TEC was not a limitation on EC competence, but rather confirmed that implementation of measures adopted pursuant to previous Title IV "is left to the Member States' authorities, particularly as regards coercive measures" and that *e.g.* Frontex "must therefore continue to be limited to supporting actions of nationals authorities."[60] This interpretation of the present Article 72 TFEU as an implementation rule was also confirmed by earlier EU case-law.

Nevertheless, the relocation cases before the CJEU shed light to a possibly wider scope and interpretation of Article 72 TFEU, read together with Article 4(2) TEU. To varying degrees, the Member States not willing to apply or not applying the relocation decisions adopted in 2015, sought to rely on Article 4(2) TEU read

57 Id. para. 171.

58 European Court of Auditors, Special Report No 24/2019, p. 25.

59 Article 72 TFEU is complemented by Article 276 TFEU, which stipulates that the CJEU has no jurisdiction to review the validity or proportionality of operations carried out by Member States' law enforcement services or the responsibilities exercised by them with regard to the maintenance of law and order and the safeguarding of internal security.

60 Steve Peers, *EU Justice and Home Affairs Law*, Oxford University Press, Oxford, 2006, p. 114.

in conjunction with Article 72 TFEU, claiming that these entitled them to disapply the relocation decisions. It is assumed that they did it "to ensure social and cultural cohesion, as well as to avoid potential ethnic and religious conflicts."[61] This use of Article 72 TFEU confirmed Kadelbach's view[62] that the clause is an extension of the identity clause set out in Article 4(2) TEU that embodies two obligations of the EU, the duties to respect national identities and to respect the essential functions of the Member States.

Although the CJEU decisions set out that *the Treaty does not contain an inherent general exception* excluding all measures taken for reasons of law and order or public security from the EU law, by defining specific requirements for the possible use of Article 72 TFEU in conflict of laws situations, it indirectly acknowledged that there is more to this provision than simply being an implementation clause. By examining the reasoning in the relocation cases as well as the infringement case against Hungary, the CJEU actually confirms that Member States have the right to derogate from the requirements of EU law to maintain law and order and protect internal security even if it, with the same momentum, narrows this type of application of Article 72 TFEU by setting certain principles as requirements for such use.

The main principle emphasized by the CJEU is the necessity of disapplying valid EU law. When examining the different sets of proofs submitted by the Member States the CJEU seemed to disregard situations of mass migration and required even more extreme situations to appear with no other options for the Member States but to disregard EU law. At any rate *neither the relocation decisions, nor the limitations of the asylum border procedure could be disregarded by Member States in case of mass influx of migrants and asylum-seekers*.

When evaluating whether there would be a compelling reason for the application of a possible conflict-of-law situation, the CJEU required the taking into account of existing elements of secondary law that already provide some room for maneuver for Member States to protect their internal security. Consequently, the principle of gradation applies, according to which the CJEU expects Member States to first use all measures available within the sphere of EU law to handle challenging situations and to maintain law and order. Thus, the application of Article 72 TFEU as a conflict-of-law rule is only possible in case of their ineffectiveness.

Considering the conclusions above, certain concerns regarding the CJEU's assessment in in *Case C-808/18* may be raised. Firstly, it was clear that the diverging interpretation of what constitutes illegal entry and stay played a major role in the CJEU not finding the number of examples presented by Hungary to be relevant enough to prove the necessity of disapplying EU law. While asylum-

61 Alessandra Silveira, 'We Are All in the Same boat! On the Legal Principle of Solidarity and Its Legal Implications in the Recent CJEU Case Law', *Officalblogunio*, 7 April 2020, at https://officialblogofunio.com/2020/04/07/we-are-all-in-the-same-boat-on-the-legal-principle-of-solidarity-and-its-legal-implications-in-the-recent-cjeu-case-law/.

62 Stefan Kadelbach, *The Law of the European Union and National Security Exceptions of the Member States*, 2018, at www.just.ee/sites/www.just.ee/files/prof._dr._stefan_kadelbach._eesti_vabariigi_pohiseaduse_ja_riigikaitseseaduse_kooskola_analuus.pdf, p. 23.

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seekers have the right to remain until a specific point of the procedure irrespective of the legal nature of their entry to the country, this should not necessarily be considered equivalent to legal stay. Even if one could argue with this, given that only less than one-third of the applicants[63] are recognized as eligible for international protection, at least after the end of the asylum procedure ending without recognition it should be declared that such entries and stays could not be justified by seeking asylum, and should therefore be considered illegal retrospectively. In case such change in interpretation happens, the CJEU may come to a different conclusion regarding the link between the proof presented by Hungary and the necessity of severe actions.

Another concern follows from the fact that the CJEU *declares the present EU acquis and certain elements of secondary legislation to be appropriate for handing the mass influx of migrants*. It came to this conclusion even though the Commission itself implied the ineffectual nature of the presently valid asylum *acquis* by submitting a number of reform proposals in 2016[64] and then another set of ideas and legislative proposals in 2020.[65] Remarkably, even the EU Commission itself, in its so-called "New Pact on Migration and Asylum"[66] (a bundle of proposals published in September 2020 to reform the current system) copied at least some of Hungary's ideas. For instance, it suggests the introduction of a new screening procedure[67] and a special border procedure.[68] This would mean that border zones like those in Röszke and Tompa will actually have to be established by many Member States.[69],[70] This, at least indirectly refutes the CJEU's declaration that the effective provisions of the Common European Asylum System provide adequate tools for Member States to cope with present challenges of asylum and

63 In January the EU+ recognition rate was 32 % in February 2021, matching the EU+ recognition rate for 2020 overall. In these rates, decisions that granted refugee status and subsidiary protection are considered as positive decisions, while decisions granting national forms of protection are not. *See* at www.easo.europa.eu/latest-asylum-trends.

64 Ágnes Töttős, 'How to Interpret the European Migration Crisis Response with the Help of Science', *in* Zoltán Hautzinger (ed.), *Dynamics and Social Impact of Migration*, Dialóg Campus, Budapest, 2019, pp. 69-81.

65 *See* at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706.

66 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final.

67 COM(2020) 612 final from the Commission of 23 September 2020 on the 'Proposal for a Regulation of the European Parliament and the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817'.

68 COM(2020) 611 final from the Commission of the 23 September 2020 on the 'Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU'.

69 Francesco Maiani, 'A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact', *EU Immigration and Asylum Law and Policy*, 20 October 2020, at https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/.

70 Sarah Progin-Theuerkauf, 'Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary?', *European Papers*, Vol. 6, Issue 1, 2021.

migration, especially when it comes to maintaining law and order and protecting internal security.

4.2. Future Possible Application of Article 72 TFEU

4.2.1. Conflict-of-Law Rules' Relevance in Schengen Acquis

Stefan Kadelbach refers to the possibility that Article 72 TFEU may provide a justification to introduce internal border controls in exceptional cases even if the requirements of the Schengen Borders Code for a suspension of free movement are not met, provided that the circumstances are of exceptional urgency and the measures remain proportionate and temporary.[71] As there are several internal border sections on which Member States have been upholding reinstated border controls for several years, the question duly arises, whether in these cases it is the conflict-of-law rule nature of Article 72 TFEU that is applied, and why the Commission has not challenged these along the line of the principles set out by the CJEU.

As a result of strategic litigation, the *joined cases C-368/20 NW v Landespolizeidirektion Steiermark*[72] *and C-369/20 NW v Bezirkshauptmannschaft Leibnitz*[73] raise exactly these questions in preliminary ruling procedures before the CJEU.[74] Here, the main legal question before the CJEU is whether the reintroduction of border controls at the internal borders can last for over two years. The answer is very much dependent on whether this limit applies only to a prolonged threat of the same nature or also to the cumulative reintroduction of new measures based on new threats. The cases, nevertheless, once again raise the possible application of Article 72 TFEU, and this time as a conflict-of-law rule even in the realm of Schengen *acquis*. Member States participating in the case, namely Austria, Denmark, France and Germany, generally argue that, within the context of the migration crisis, the current circumstances exceeded the framework of the Schengen Borders Code, and systemic problems in the management of external borders can no longer be resolved through common EU measures applied within a period of two years.[75]

This regulatory gap in EU secondary law therefore justifies a recourse to primary law, although the views of participating Member States differed to a certain extent. Germany argued that the extension of border controls beyond the two-year limit can be grounded directly in primary law, provided that it is necessary and proportionate in light of public safety and order. Meanwhile, other Member States considered the direct applicability of primary law only subordinately, favoring instead an extensive interpretation of the SBC, consistent with the

71 Kadelbach 2018, p. 19.

72 *Case C-368/20, Landespolizeidirektion Steiermark*, request for a preliminary ruling, 5 August 2020.

73 *Case C-369/20, Bezirkshauptmannschaft Leibnitz*, request for a preliminary ruling, 5 August 2020.

74 The joined cases are currently pending before the Grand Chamber of the CJEU, with the Opinion of Advocate General Saugmandsgaard Øe scheduled for 30 September 2021.

75 Pola Cebulak & Marta Morvillo, 'The Guardian is Absent: Legality of Border Controls within Schengen before the European Court of Justice', *Verfassungsblog*, 25 June 2021, at https://verfassungsblog.de/the-guardian-is-absent/.

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Treaties.[76] Consequently, it seems that Germany is leaning more towards declaring the conflict-of-law rule nature of Article 72 TFEU, while Austria, Denmark and France rather rely on use it as an interpretation clause.

Not surprisingly, the Commission argues that the absence of secondary law provisions governing border controls exceeding two years is a conscious decision of the EU legislator to limit derogations from free movement to a strictly defined period.[77] Hence, the Member States' responsibilities are already sufficiently taken into account by providing the possibility for derogation but limiting it to two years. Thus, while the Commission does not exclude relying on the national security exception, nevertheless emphasizes that this should be regarded as an *extrema ratio* that requires a higher threshold, similarly to the emergency clause in internal market law (Article 347 TFEU), which is not met by migration control exigencies. Furthermore, Member States cannot unilaterally announce their derogations, but instead must fulfil a necessity requirement subject to judicial review at the EU level.

However, emphasizing strict conditionality does not sound too convincing when voiced the Commission as it failed to require Member States applying excessive internal border controls both to justify the extension and to limit them to two years. On the one hand, it tacitly accepted these vaguely justified and seemingly endless internal border controls, thereby substantiating their application beyond the rules of the SBC, making them seem like "the new normal".[78] The Commission argues that it chose a political rather a legal route and instead of issuing an opinion or a letter of formal notice, it prepared a legislative proposal in 2017 to revise the SBC,[79] not wanting to interfere with the political debates in the Council and Parliament.[80] While in the field of asylum an even more extensive reform and negotiation process has been in process since 2016, which was referred to by Hungary in its asylum infringement case, neither the Commission, nor the CJEU took this substantially into account.

4.2.2. Challenges Brought by the Year 2020

Year 2020 brought two further situations in which the justified use of the conflict-of-law type application of Article 72 TFEU may arise. These are *Turkey's use of migratory pressure for political purposes* in early 2020 and the *global health crisis caused by COVID-19*.

76 Id.

77 Id.

78 Marie De Somer *et al*., 'Schengen under Pressure: Differentiation or Disintegration?', *EU IDEA Policy Paper*, No. 7, September 2020, p. 3.

79 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders, COM(2017) 0571 final.

80 The negotiations have reached a stalemate and as a result, the Commission set out a new Schengen Strategy in its Communication from the Commission to the European Parliament and the Council, 'A Strategy Towards a Fully Functioning and Resilient Schengen Area' on 2 June 2021.

The EU Ministers of Home Affairs met on 4 March 2020, together with the Ministers of the Schengen Associated Countries, for an extraordinary Council meeting to discuss the situation at the EU's external borders with Turkey. In its statement, the Council expressed[81] its solidarity with Greece, Bulgaria and Cyprus and other Member States, which may be similarly affected, including efforts to manage EU's external borders. While the Council acknowledged the increased migratory burden and risks Turkey is facing on its territory and the substantial efforts it has made in hosting 3.7 million migrants and refugees, it strongly rejected Turkey's use of migratory pressure for political purposes as it found the situation at EU's external borders was unacceptable. The EU and its Member States remained determined to effectively protect EU external borders and not to tolerate illegal crossings and human smuggling, since migrants should not be encouraged to endanger their lives by attempting illegal crossings by land or sea. This extreme situation also raised the question whether in the context of such hybrid threats a derogation from existing EU *acquis* could be justified based on the maintenance of law and order and the protection of internal security, for even the Ministers declared that mass illegal migration and migrants themselves were used by Turkey for political purposes.

Not long after this incident another serious threat: the threat to public health appeared as COVID-19 also shook Member States in the spring of 2020. It was obvious that both external and internal border crossings contribute to the spread of the new virus. Even in such a situation the Commission in its Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement[82] failed to recognize that a force majeure situation such as the pandemic could justify derogations beyond those specifically set out in secondary legislation. Consequently, the Commission's Guidance did not allow the suspension of welcoming asylum-seekers and the first procedural step of making an application. It merely referred for instance to the explicit derogation set out in Article 6(5) of the APD that allows Member States to extend the time limit for the registration of applications to ten working days where simultaneous applications by a large number of third-country nationals or stateless persons make it very difficult in practice to respect these time limits.[83]

Based on these two major shocks in 2020 we can conclude that *further derogations in major crisis situations and force majeure situations would be necessary*. The Commission seems to agree with this view, for it proposed a new set of rules in its crisis regulation proposal launched in September 2020.[84] If even the Commission, the initiator of infringement procedures admits that the present set of EU asylum rules are ineffectual in handling the present challenges threatening

81 *See* at www.consilium.europa.eu/en/press/press-releases/2020/03/04/statement-on-the-situation-at-the-eus-external-borders/.

82 Communication from the Commission, *COVID-19: Guidance on the Implementation of Relevant EU Provisions in the Area of Asylum and Return Procedures and on Resettlement*, Brussels, 16 April 2020, C(2020) 2516 final.

83 Id. p. 4.

84 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final.

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public security and public health, and if the reforms of the Common European Asylum System can only be adopted as a result of a lengthy legislative procedure, the application of Article 72 TFEU as a conflict-of-law rule could gain justification for the period of these transitional years of reform negotiations. Nevertheless, it seems that not even these unprecedented times of COVID-19 can justify the restriction of entry of asylum-seekers as the European Commission launched another infringement procedure against Hungary on 30 October 2020[85] for requiring a statement of intent for the purpose of lodging an asylum application to be submitted at the Embassy of Hungary in Belgrade or in Kyiv and the approval of the asylum authority before entry could be provided.[86]

4.3. Further Implications of the Implementation of the Judgment in Case C-808/18 With Regard to Constitutional Autonomy

Kadelbach also points to the fact that

> "national identity and its emanations into the constitutional structures and essential functions of a state, as legal concepts, presuppose constitutional autonomy so that it is to a considerable extent up to domestic actors and particularly the interpreters of domestic law to whom the task is assigned to define which elements belong to the "fundamental structures" of their respective States. They have retained a margin of discretion in that respect."[87]

Along these lines the constitutional courts of various Member States have claimed the power to declare EU law inapplicable within their respective jurisdictions if they find that such law is either *ultra vires* or that it is in conflict with the core of the Member State's constitutional law.

In February 2021 Hungary's Minister of Justice asked the Constitutional Court for an interpretation of Article E(2) and Section XIV(4) of the Fundamental Law of Hungary.[88] In her request[89] the Minister refers to the judgment of the CJEU in *Case C-808/18*: given that the effectiveness of the EU rules on return is not guaranteed, the implementation of the CJEU judgment may result in non-Hungarian citizens staying in Hungary illegally. Their identity is sometimes unknown, and they remain in Hungary for an indefinite period, thus *de facto*

85 European Commission, *October Infringement Package: Key Decision*, 30 October 2020, at https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687.

86 On 26 May 2020, the government issued Government Decree 233/2020. (V. 26.) on the rules of the asylum procedure during the state of danger declared for the prevention of human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens. It also introduced a new asylum system, the so called 'embassy procedure'. This new system was later included in the Transitional Act, that entered into force on 18 June 2020. The system was first in place until 31 December 2020, with the possibility of extension. The system was extended and is currently in force until 30 June 2021.

87 Kadelbach 2018, pp. 27-28.

88 Case registration number X/00477/2021 (pending).

89 *See* (in Hungarian) at http://public.mkab.hu/dev/dontesek.nsf/0/09e9e8d16d403300c1258695004aef0a/$FILE/X_477_0_2021_ind%C3%ADtv%C3%A1ny_anonim.pdf.

becoming part of the country's population. According to the Minister of Justice, as long as effective return is not guaranteed by the EU, compliance with the judgment will lead to population change, which directly affects Hungary's sovereignty enshrined in the Fundamental Law, its historical constitutional identity and its inalienable right to determine its population. In the context of the constitutional problem presented, it is essential that the Constitutional Court interpret Article E(2) and Article XIV(4) of the Fundamental Law to decide whether these provisions mean that Hungary may implement an obligation of the EU which, in the absence of effective European regulation, may lead to foreigner staying illegally in Hungary, de facto becoming a part of the country's population.

The Minister's request also refers to the ruling of the German Federal Constitutional Court of 5 May 2020 with regard to the European Central Bank's Public Sector Asset Purchase Programme (PSPP)[90] that raised *fundamental constitutional questions about the relationship between national law and EU law and between national courts and the EU institutions*. More than 1,700 German citizens filed complaints before the German court alleging the PSPP violated several provisions in the EU's treaties and the German court referred several questions to the CJEU for a preliminary ruling. While in 2018 the CJEU ruled[91] that the PSPP neither exceeded the ECB's mandate nor violated the prohibition of monetary financing, the German Constitutional Court ruled in favor of the complainants. It stated that the German Government and *Bundestag* had violated their rights under Germany's Basic Law by failing to take steps to challenge the fact that the ECB, in its decisions on the adoption and implementation of the PSPP, neither assessed nor substantiated that the measures provided for in those decisions satisfied the principle of proportionality. Consequently, the ECB exceeded its competences. It also stated that the CJEU's review as to whether those decisions satisfied that principle is not comprehensible; to this extent, the judgment was rendered *ultra vires*. For that reason, the German Constitutional Court concluded it was not bound by the CJEU's ruling and must conduct its own review. In turn, the European Commission opened an infringement procedure against Germany over this controversial ruling of the Constitutional Court as it directly challenged the autonomy and primacy of EU law. In the formal notice sent on 9 June 2021 the Commission argues that Germany violated fundamental principles of EU law, in particular the principles of the autonomy, primacy, effectiveness and uniform application of Union law.[92]

Given the developments regarding the relationship between the CJEU and Constitutional Courts, Hungary's Minister of Justice also requests to see if the conclusion of the German Constitutional Court (namely, that the CJEU's 2018 ruling resulted in a structurally significant shift in the system of competences to the detriment of the Member States) could have relevance for the implementation of the CJEU judgment in the Hungarian asylum infringement case.

90 2 BvR 859/15; 2 BvR 980/16; 2 BvR 2006/15; 2 BvR 1651/15.

91 Judgment of 11 December 2018, *Case C-493/17, Weiss and others*, ECLI:EU:C:2018:1000.

92 *See* at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743.

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