DOCTORAL (Ph.D.) DISSERTATION

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BETWEEN PARTICULARISM AND LOYALTY: A 'SMALL STATE' ANALYSIS OF HUNGARIAN MEMBERSHIP IN THE EU

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NYILATKOZAT

Alulírott, Czina Veronika (név), büntetőjogi felelősségem tudatában kijelentem, hogy a Debreceni Egyetem Marton Géza Állam- és Jogtudományi Doktori Iskolában a doktori fokozat megszerzése céljából benyújtott, Between Particularism and Loyalty: a 'small state' analysis of Hungarian membership in the EU című értekezésem saját önálló munkám, a benne található, másoktól származó gondolatok és adatok eredeti lelőhelyét a hivatkozásokban (lábjegyzetekben), az irodalomjegyzékben, illetve a felhasznált források között hiánytalanul feltüntettem.

Kijelentem, hogy a benyújtott értekezéssel azonos tartalmú értekezést más egyetemen nem nyújtottam be tudományos fokozat megszerzése céljából.

Tudomásul veszem, hogy amennyiben részben vagy egészben sajátomként mutatom be más szellemi alkotását, vagy az értekezésben hamis, esetleg hamisított adatokat használok, és ezzel a doktori ügyben eljáró testületet vagy személyt megtévesztem vagy tévedésben tartom, a megítélt doktori fokozat visszavonható, a jogerős visszavonó határozatot az egyetem nyilvánosságra hozza.

Budapest, 2020. 04. 10.

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aláírás

SUPERVISOR'S RECOMMENDATION

Budapest, 31. 07. 2020

The dissertation prepared by the candidate undertakes the task of analysing the process of Hungary's accession to the European Union and Hungary's subsequent behaviour as a Member State of the European Union from the dual perspective of the political intergovernmentalism and the normative supranationalism of membership in the EU. Based on the circumstances of Hungary as a State, the candidate applied the specific analytical framework of so-called small State studies to secure robustness and depth in carrying out the proposed politico-legal analysis of Hungary's membership in the EU.

The dissertation selected State interest as the central concept of its analysis. Its research hypothesis sets out, on the one hand, that the politics of administrations in Hungary towards the EEC and later the European Union – first as a partner, then an associate and a candidate State, and finally as a Member State – has been influenced primarily and predominantly by the interests formulated and pursued the successive governments. These interests were often volatile, contradictory, and somewhat narrow in their scope; nevertheless, they informed and influenced political and policy negotiations, legal developments, as well as political and policy conflicts between Hungary and the EU and its other Member States. On the other, the dissertation's hypothesis recognises that the other factor which determined and which continues to determine Hungary's Europe-politics is the normativity of membership in the EU, and before of candidacy to EU membership. The normative leverage exercised by the EU in the pre-accession years and the normative supranationalism of the obligations of EU Member States have had an evident influence on Hungary's membership in general political as well as in specific policy matters.

The candidate's work is original, and it advances the state of the art in the politico-legal analysis of the membership of States in the European Union. The dissertation produced novel results in the analysis in domestic scholarship of Hungary's accession and membership in the EU, and it contributed significantly to the international scholarship in the specific discipline of small State studies.

Márton Varju (Ph.D.) (habil.), supervisor of the candidate

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Table of Contents

List of abbreviations

AA	Association Agreement
ALDE	Alliance of Liberals and Democrats of Europe
CC	Constitutional Court
CEAS	Common European Asylum System
CEE	Central Eastern European
CEU	Central European University
CJEU	Court of Justice of the European Union
EC	European Commission/European Communities
EEC	European Economic Community
ECHR	European Court of Human Rights
EFSF	European Fiscal Stability Facility
EP	European Parliament
EPP	European People's Party
ESM	European Stability Mechanism
EURODAC	EUROpean DActylographic Comparison
EU	European Union
Fidesz	Alliance of Young Democrats (Fiatal Demokraták Szövetsége)
FKGP	Independent Smallholder Party (Független Kisgazda Párt)
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GDR	German Democratic Republic
HSL	Hungarian Status Law
HUF	Hungarian Forints
IIP	Individual Investor Program
ILEC	Involuntary Loss of European Citizenship
IR	International Relations
LIG	Liberal Intergovernmentalism
MEP	Members of the European Parliament
MS	Member State

MSzP	Hungarian Socialist Party (Magyar Szocialista Párt)
NGO	Non-governmental Organization
OSCE	Organization for Security and Co-operation in Europe
PHARE	Poland Hungary Assistance for the Reconstruction of the Economy
SME	Small and Medium Entreprise
SzDSz	Alliance of Free Democrats
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
QMV	Qualified Majority Voting
VAT	Value Added Tax
V4	Visegrad Group or Visegrad 4 (Hungary, Slovakia, Czech Republic, Poland)

I. Introduction

1. Presenting the premises

Hungary, a Member State of the European Union since 2004, has been in the European, and sometimes international, spotlight since 2010, when after a turbulent period of political divisions, the center-right Fidesz party came to power led by Prime Minister Viktor Orbán. The new government enacted some domestic changes that drew attention from the international political arena because they were seen to put a menace on the rule of law or even liberal democracy in general. The acts of the new government were undoubtedly framed as serving national preferences, in contrast to European ones, and protecting national sovereignty. These intentions became prominent attributes of Hungary's policy towards the EU. Hungary got into many conflicts with EU institutions, some of which were false (and appeared only on a rhetorical level), while others were quite serious and resulted in repercussions against the country. Although the changes introduced by the Hungarian government were primarily directed at the national level, some of them caught the EU's attention because of their potential effect on the functioning of the EU as a whole. Moreover, later on, Hungary started to attempt influencing EU-wide policies as well. *Hungary's policy towards the EU can be divided into interest-driven, rational Member State behavior, which can be controlled by EU law, while other government actions can be considered more symbolic and rogue that fall outside the scope of EU normativity. In the latter case, the Union does not really have an effective tool to address them.* This thesis will try to demonstrate and explain both categories of Member State action through the Hungarian example.

The zenith of the conflict between the Hungarian government and Brussels was reached during the refugee crisis of 2015/2016, when the Central Eastern European state became the self-proclaimed proponent of aggressively stopping illegal migration to the EU. Even though the failure of the EU in handling the refugee crisis and the collapse of the Dublin-system was clear, the Hungarian way of handling the crisis did not help the cause either, because instead of trying to participate in the collective quest for a solution, Hungary unilaterally introduced certain measures to stop immigrants at the border. The refugee crisis gave an opportunity for Hungary to become the leading voice for an intergovernmental European Union protecting 'Christian values' instead of a federal, liberal EU that would endanger, in the eyes of the Hungarian government, the roots of European history and culture by welcoming refugees. This outspoken behavior openly focused on national interests and disregarded common European solutions. This was a somewhat new strategy from the part of Hungary, as previous Hungarian

governments exhibited mostly cooperative, even conformist attitudes towards the EU. However, it will also be shown in this thesis that traces of interest-maximization and concentrating on the national interest can already be found in the 1990s, the early stages of Hungary's cooperation with the European Union.

Enforcing national preferences articulated by the governing elite became the main purpose of Hungary's EU policy since the 2010s. This tendency could be labelled as particularism. *Particularism, from the perspective of this thesis, refers to a specific kind of behavior or strategy, which a Member State pursues, often at the expense of EU goals or EU law, based only on its own interests.*[1] Particularism reveals that there are two different, or even opposing, perspectives when analyzing Member State policies towards the EU. On the one hand, EU membership has a political dimension, where Member States try to coordinate policy-making through national preferences, and at the end of the day their possibilities are endless due to the inherent features of (inter)national political bargaining. On the other hand, there is the legal dimension, which regulates all Member State behavior. All countries that have joined the EU gave up their sovereignty to a certain extent, without having been forced to do so, thus they pledged their loyalty to the European Union and created a legal framework that binds all of them. Thus, there is a normative dimension in the EU that is supposed to exercise control over Member State actions. *This thesis will use the theory of national preference formation – and one interpretation of it, liberal intergovernmentalism – and focus on small state studies to present the political dimension of membership. Moreover, as demonstration of the normative dimension, it will concentrate on the constitutional principle of loyalty that is supposed to create a community of sincere cooperation among Member States of the EU.*

2. The scope and units of analysis

2.1 Preference formation of Member States – liberal intergovernmentalism

As this research will demonstrate, Hungary is driven by its domestic interests and national preferences when it defines its own policy towards the EU. These domestic preferences are shaped by elites and other domestic political actors. Among the different European integration theories, liberal intergovernmentalism (LIG) is most adequate for accounting for this kind of state behavior. Formulated by Andrew Moravcsik, the theory postulates that national preferences are complex. Because they reflect the features of the given Member State and are

[1] I define strategy in my research as the domestic and foreign behavior of a country aiming at transmitting its values and beliefs to a broad international arena with the possible result of exerting its national interest and having an impact on the policy-making of the international scene.

determined domestically, these preferences are not, as neo-functionalists like to assume, shaped by EU membership.[2] Moreover, Moravcsik argues that the institutions of the European Communities (now EU) actually strengthen the power of the national governments because they increase the efficiency of their interstate bargaining (with legitimacy and credibility) and they also strengthen the autonomy of national political leaders.[3] This is the essence of rational-choice institutionalism, which argues that Member States adopt particular institutions "in order to increase the credibility of their mutual commitments."[4] This also implies that the EU Treaties and other important agreements were not driven by a spill-over effect, as the neo-functionalist claim has it. Instead, they come about through a "gradual process of preference convergence among the most powerful Member States."[5] This is the so-called 'rationalist framework' of international cooperation,[6] which, in the current European Union context, could be translated to the European practice of giving opportunities for Member State governments to represent their national interests in ways that otherwise would not be possible. This is the starting point of this thesis. The reason why liberal intergovernmentalism serves as a theoretical framework for this analysis is that this theory puts an emphasis on the national interests created at the domestic political level rather than only on the European level of policy-making. However, liberal intergovernmentalism alone would not be suitable to explain Hungary's national preference formation in the EU, which necessitates some engagement with another theoretical framework closely related to LIG.

2.2 Hungary as a small state

This other theoretical framework is the field of small state theories. The thesis largely builds on the already existing research on small Member States in the EU, which can help identify the basic strategic features of small state behavior. These studies create an indispensable basis of this thesis because they draw up several patterns of Member State strategies that will facilitate the analysis of the case studies. In the 1990s, scholarly attention was directed towards the examination of small states and their influence in the EU. With the accession of thirteen new countries since 2004, this branch of studies became even more relevant.

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[2] Mark A. Pollack, "Theorizing EU Policy-Making," in *Policy-Making in the European Union*, 6th ed, The New European Union Series (Oxford ; New York: Oxford University Press, 2010), 20.
[3] Andrew Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach," *JCMS: Journal of Common Market Studies* 31, no. 4 (1993): 507.
[4] Pollack, "Theorizing EU Policy-Making," 20.
[5] Pollack, 20.
[6] Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, New York: Cornell University, 1998), 18–20.

These states proved to be worth examining because they are likely to have common features different than those of the large states. Therefore, their behavior is expected to be likewise different.[7] Diana Panke argues that small EU Member States face "structural disadvantages in uploading their national policies to the EU level due to less bargaining power and less of the financial and administrative resources necessary for building up policy expertise and exerting influence via arguing."[8] The disadvantages of the small ones, according to Panke, can be for example, the fact that these states joined the EU recently. They also include the lack of political power, the insufficient resources to develop policy expertise, their lack of expertise and proficiency to operate as policy forerunners.[9] The existence of this structural disadvantage can be seen as the central tenet of research focusing on small states. The main researchers of the topic, such as Peter V. Jakobsen,[10] Diana Panke,[11] Jonas Tallberg[12] and Baldur Thorhallsson,[13] outline strategies for small Member States and circumstances under which they can exercise influence despite these disadvantages in the EU. These are, for example, taking advantage of being an old Member State, possessing policy expertise, having good economic and administrative capacities, using institutional channels (e.g. the EU Presidency or 'friendship' with the Commission) and creating coalitions or partnerships etc. Each of these possible strategies will be further elaborated in the next chapter.

A distinct type of small state behavior was identified by some researchers of the field in the late 1990s and early 2000s (P. Joenniemi[14] and D. Arter[15]), namely the smart state strategy. Smart states are able to "exploit the weakness of small states as resource for influence"[16] by having well-developed preferences, being able to present their initiatives as interests of the whole EU,

[7] Baldur Thorhallsson, *The Role of Small States in the European Union* (Aldershot, Hants, England ; Burlington, Vt: Ashgate, 2000), 1.
[8] Diana Panke, "The Influence of Small States in the EU: Structural Disadvantages and Counterstrategies" (UCD Dublin European Institute Working Paper 08-3 May 2008), 1.
[9] Panke, 2.
[10] Peter Viggo Jakobsen, "Small States, Big Influence: The Overlooked Nordic Influence on the Civilian ESDP," *Journal of Common Market Studies* 47, no. 1 (2009): 87.
[11] Panke, "The Influence of Small States in the EU: Structural Disadvantages and Counterstrategies," 1.
[12] Jonas Tallberg, "The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations," *JCMS: Journal of Common Market Studies* 42, no. 5 (2004): 999.
[13] Baldur Thorhallsson, "The Size of States in the European Union: Theoretical and Conceptual Perspectives," *Journal of European Integration* 28, no. 1 (March 2006): 7, https://doi.org/10.1080/07036330500480490.
[14] Pertti Joenniemi, "From Small to Smart: Reflections on the Concept of Small States.," *Irish Studies in International Affairs*, no. 9 (1998): 61-62.
[15] David Arter, "Small State Influence within the EU: The Case of Finland's Northern Dimension Initiative.," *JCMS: Journal of Common Market Studies* 38, no. 5 (2000): 677–697.
[16] Caroline Howard Grøn and Anders Wivel, "Maximizing Influence in the European Union after the Lisbon Treaty: From Small State Policy to Smart State Strategy," *Journal of European Integration* 33, no. 5 (September 2011): 530, https://doi.org/10.1080/07036337.2010.546846.

and being able to mediate.[17] Caroline Howard Grøn and Anders Wivel did extensive research on the concept and argue that the recent developments in the EU introduced by the Lisbon Treaty, for instance the increase in the role of the European Parliament or the creation of the post of European Council President, undermine the traditional small state approach to European integration.[18] This is why the authors identified the characteristics of an ideal smart strategy that small states should employ in order to accommodate and "take advantage of the new institutional environment."[19] They created three variations of ideal smart state strategies: the state as a lobbyist, the state as a self-interested mediator and the state as a norm entrepreneur. The refugee crisis, in Hungary's case, shows how Hungary stepped out of its comfort zone by starting to act as a norm advocate and project its own normative convictions in order to change the migration policy of the EU.

Although this thesis examines Hungary as a small state within the EU, it is not evident that Hungary actually belongs to the category of small countries, therefore, it is necessary to define what qualifies as 'small' in the current research. Authors dealing with EU Member States usually choose an absolute definition. The four most prominent criteria in defining size are population, territory, GDP and military capacity.[20] Most scholars see size as a complex, multidimensional phenomenon that can be defined in many different ways objectively or subjectively (to be discussed in the next chapter). This thesis relies on a rather objective definition of the concept of smallness. Diana Panke took the allocation of votes among the states in qualified majority voting in the Council, and defined as small those with fewer votes than the EU-average.[21] Based on this categorization, she identified nineteen small states, whose number grew to twenty since then, with the accession of Croatia in 2013.

This research will adopt Panke's understanding of 'small', because the distribution of votes in the Council already reflects the size and population of the Member States, so it is a clear and comprehensive categorization. This thesis argues that, although since the introduction of the double majority system in 2014, the system of weighted votes is no longer applied in the EU, Panke's categorization still can be used. The old qualified majority voting system is still a good

[17] Grøn and Wivel, 529.
[18] Grøn and Wivel, 527.
[19] Grøn and Wivel, 529.
[20] Thorhallsson, "The Size of States in the European Union," March 2006, 7.
[21] Diana Panke, "Small States in the European Union: Structural Disadvantages in EU Policy-Making and Counter-Strategies," *Journal of European Public Policy* 17, no. 6 (September 2010): 799, https://doi.org/10.1080/13501763.2010.486980.

basis for differentiating between small and large EU members as it gives the basis of a clear and comprehensive categorization that already reflects size and population. Based on these terms, Hungary can be identified as a small Member State of the EU. From the perspective of this thesis, smallness is significant, because the articulation of national preferences for smaller countries might be different from the rest of EU Member States.

This thesis will add to the state of the art by broadening the context in which small Member State behavior is examined. Small state studies pay too much attention to objective characteristics, instead of focusing on more subjective circumstances under which these countries form their preferences. Moreover, a rule-abiding behavior is assumed from the examined actors instead of analyzing rule-breaker or non-conventional behavior as well. Last but not least, researchers dealing with small states usually focus on how these states can influence EU policy-making, but they fail to recognize that shaping EU policies starts at the domestic level and Member State actions formed on their basis might have a huge impact on the functioning of the EU as a whole. Trying to take advantage of these slight shortcomings of the discipline of small state theories, this research will not examine the Hungarian behavior strictly in the EU institutional environment. Instead, this thesis will determine the Hungarian small state strategy based on the examination of bottom-up processes. I argue that focusing on the domestic political level can be valuable determinants of a country's strategy. The national level of policy-making is the one that defines the most important relevant national preferences of the government, it reveals the driving forces behind the national interest, and it encompasses the rhetoric of a government towards its citizens about the EU, or the political dialogue between the EU and a Member State.

2.3 Normative dimension of membership

Although, on a daily basis, Member State policy-making within the EU is driven by domestic interests and cost-benefit calculations, the functioning of the European Union and the behavior of its Member States is regulated on several levels. There is a normative aspect of EU membership, under which state behavior is regulated and constrained. Besides the law developed in specific common policy areas, there are general constitutional principles and values that should be observed by the Member States under Articles 2-4 TEU. These principles are freedom, democracy, equality, rule of law, pluralism, non-discrimination, tolerance, justice, mutual trust, solidarity (Article 2 and 3 TEU) and loyalty (or sincere cooperation as framed in Article 4(3) TEU). These foundational principles are responsible for coordinating European

integration and the behavior of Member States with the purpose of creating an inner cohesion and achieving the common, long-term goals of the European Union. They outline a certain type of behavioral pattern to which all Member States 'subscribed' when they joined the EU. However, as the Hungarian example will demonstrate, the everyday practice of European and national policy-making shows that these principles do not always prevail in the political reality, and that in some situations Member States disregard them and choose to conduct an autonomous, or, in other words, particularist behavior.

Article 1(1) TEU states that Member States establish among themselves the European Union "on which the Member States confer competences to attain objectives they have in common."[22] This sentence alone is a basic intergovernmentalist statement. However, Article 3(3) TEU establishes that "… (the Union) shall promote economic, social, and territorial cohesion, and solidarity among Member States."[23] This is a very broad commitment, which adds a little bit of normative dimension to the above-mentioned statement of Article 1(1). It is the principle of loyalty that fills these abstract commitments with meaning and creates concrete obligations. The loyalty principle is laid down in Article 4(3) TEU: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." This principle basically regulates how Member States have the obligation to assist each other in carrying out tasks that are outlined to them in the treaties. This is an obligation expressed in law, therefore it establishes a sense of loyalty or sincere cooperation, which should prevent Member States from acting in violation of common EU interests and goals.

The principle of loyalty can be considered as the constitutional ramification of the collective nature of the EU: acting according to it should be self-evident in any kind of political or economic union because it reinforces the success of the collective system. Therefore, a Member State behavior which seems rational and reasonable from the perspective of European integration theories, such as liberal intergovernmentalism, might not be desirable from the point of view of EU law and constitutional principles. Demonstrating this dual framework surrounding Member State actions – that of political reality or rational choices versus constitutional principles – is one of the main aims of this thesis. This duality raises the question of whether conducting a particular Member State behavior and strategy is justifiable or not

[22] "Consolidated Version of the Treaty on European Union" (Official Journal of the European Union, October 26, 2012), 326/16, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN.
[23] "Consolidated Version of the Treaty on European Union," 326/17.

when at the same time there is a normative frame bounding the countries to act in a coordinated way.

Against this backdrop, the present thesis proposes that the constitutional principles described above *suggest avoiding particularism because not only particularist Member State behavior undermines the Union interests, but it also jeopardizes the interests of other Member States, and even the interests of the rogue Member State.* This means that when a Member State is acting according to the national interest focusing on national preferences, and its actions are going against common EU policies or violate EU law, they may jeopardize achieving those goals or preferences that the state set out for itself in the first place. Moreover, unilateral actions might have unforeseen consequences on the long run, which is also detrimental not only for the EU, but for the country in question as well.

3. The research question

The thesis examines, through the example of Hungarian EU politics and policy-making, the relationship between the constitutional principles of the EU and particularist Member State behavior focusing on national preferences, which relationship is determined by the coexistence (and overlap) of different national an EU commitments. Moreover, it is also characterized by the duality of the political and the legal level of Member State interactions within the EU. Despite the alleged commitment to solidarity that binds the countries through the Treaties, the history of European integration has shown that in principle, Member States often act according to their own interests in a way that goes against the interests of the Union and of other EU members. In the analysis, I seek to answer the following question: *how can the Hungarian promotion of national preferences, which manifests in an autonomous, particularist, behavior, be evaluated from the perspective of the normative dimension of EU membership, in particular the principle of loyalty.* This thesis assumes that the principle of loyalty, outside the scope of the CFSP, is currently not promoted by EU institutions enough because mostly the Court of Justice of the European Union (CJEU) uses it as a point of reference which is not enough. The principle should be legally enforceable, and the EU should find its means to make it so, even if it means introducing certain sanctioning mechanisms. Moreover, Member States themselves should be more aware of this principle and the purpose it serves within the EU. Last but not least, the EU itself should expand its tools to monitor the violation of the principle of loyalty (similarly to Article 7).

Against the backdrop of this puzzle, the thesis examines the materialization of the constitutional principles through the example of Hungary and its policy towards the EU and the promotion of national interests as a small Member State in the EU. The thesis dissects the case of Hungary by analyzing the country's EU policy since the beginning of their partnership, more precisely its strategic possibilities and actions to successfully influence European policy outcomes and achieve its own policy priorities. *I argue that since the 2010s, Hungary has adopted more defined national preferences and, on that basis, a particularist EU policy as a Member State in the EU that differs from its previously pursued strategy. However, it will also be shown that the roots of this strategy have already been present in Hungary's political maneuvering towards the EU in the 1990s.*

Since 2010, Hungary has been in the center of political attention as it began to embrace a markedly more self-centered and autonomous behavior in the EU. This strategy is more conscious about Member State opportunities and not afraid of taking up legal and political conflicts with the EU by claiming more room for maneuvering and freedom to act individually. There has been an apparent change in the Hungarian attitude and strategy towards the European Union. This change is clearly visible if we compare the current foreign policy strategy of Hungary to that of the 1990s, on the one hand, when a determined commitment towards European values and the trans-Atlantic relationship was present,[24] and to that of the 2000's, on the other, when the main goal was to accommodate to EU membership as smoothly as possible.[25] In the official foreign policy strategy adopted in 2011 a much bigger emphasis was put on achieving the county's national and economic interests than in previous documents. Moreover, the document mentions Hungary's sovereignty and territorial integrity as the most important national values of the country's foreign policy.[26] To sum up, state actions and strategies within the international environment are driven by their economic interests. In the Hungarian case, this interest-maximizing strategy has been present from the offset of its official relations with the European Communities. It is nevertheless only since 2010 that the Hungarian government has become openly more hostile towards the EU.

[24] János Terényi, "1989-2009: Húsz Év a Magyar Külpolitikában," Website of the Hungarian Ministry of Foreign Affairs, January 2009, http://www.mfa.gov.hu/kulkepviselet/DE/hu/20_eves_jubileum/terenyi.htm.
[25] "Magyarország Külkapcsolati Stratégiája" (Hungarian Ministry of Ministry of Foreign Affairs, April 21, 2008), 2, http://www.kulugyminiszterium.hu/kum/hu/bal/Kulpolitikank/kulkapcsolati_strategia/hu.
[26] "Magyar Külpolitika Az Uniós Elnökség Után" (Hungarian Ministry of Ministry of Foreign Affairs, 2011), 4, http://www.kulugyminiszterium.hu/kum/hu/bal/Kulpolitikank/kulkapcsolati_strategia/hu.

On a normative level, a general legal compliance with the agreed commitments was present from the part of Hungary throughout its EU membership regardless of the alternations in governments. However, the year 2010 marked a change in the political communication towards and about Brussels and the EU policy of the country. The determined defense and promotion of national preferences have led to several conflicts with the EU already in the first years of the functioning of the new political leadership in Hungary. The most visible aspect of the new Hungarian policy towards the EU was the determined defense of national positions in the EU. This appeared in many different forms such as in the conflict with the EU over the country's comprehensive constitutional and legal reforms. The new government was empowered by the Hungarian electorate to enact fundamental, even drastic changes to the country's constitution and legislation as a whole. Many of these changes had generated heated debates in Europe and were considered to endanger the principle of checks and balances and even the democratic values of the EU e.g. the reduction of the retirement age of judges, appointing a new media-supervising authority, or simply the fact of amending the Fundamental Law (previously called Constitution) quite frequently within a short period of time. These acts resulted in a tense relationship and adversarial discussions with Brussels.[27] The problem with such measures is that EU law cannot prevent 'potentially irreversible changes' induced by these measures, because enforcement might come too late for the affected parties and might not be able to control future operations of the affected markets.[28]

There were two marked areas of conflict in the past years between Hungary and the EU. *The thesis will focus on Hungarian particularism from the point of view of the government's standing point towards foreigners, divided into two segments: the refugee crisis and citizenship policy*. These two case studies show a stark contrast in Hungary's hostile strategy towards asylum seekers fleeing from conflict areas and the permissive, 'integratory' strategy of Hungarian citizenship policy. Firstly, the country's conflict with the EU reached its peak in 2015/2016 in the form of the country's reaction to the migration crisis that struck Europe since then. Hungary represented a hostile rhetoric toward the refugees fleeing to Europe from

[27] For accounts of the debate between Hungary and EU officials see for example "Viviane Reding's Letter to Tibor Navracsics" (European Commission, December 12, 2011), http://ec.europa.eu/commission_2010-2014/reding/pdf/news/20120109_1_en.pdf; or Rui Tavares, "Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI))" (European Parliament, June 24, 2013), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0229+0+DOC+PDF+V0//EN.

[28] Márton Varju and Mónika Papp, "The Crisis, National Economic Particularism and EU Law: What Can We Learn from the Hungarian Case?"" 53, no. 6 (2016): 1647.

warzones and unsafe territories of the world. Moreover, the country outright rejected the EU's quota plan,[29] which was directed at solving an otherwise unsustainable situation.

By doing so, Hungary contradicted its own commitments to the normative dimensions of EU membership, namely some parts of the EU Treaties and 'the spirit of the EU'. However, whether this failure to observe certain EU rules and values resulted in violating the constitutional principle of loyalty is a question that needs deeper inquiry. The migration crisis also serves this thesis in showing how Hungary as a small Member State of the EU could act as a norm entrepreneur and project its own ideas to the European political sphere. From this point of view, an important argument of the thesis is that while in the first years of its leadership, the Hungarian governing party' actions were mainly directed towards the domestic audience, the refugee crisis provided an opportunity for Hungary to act as a norm entrepreneur. Norm entrepreneurship is a frequently used small state strategy during which the country tries to convince others of its normative convictions and influence the international arena around them. However, this case study will also reveal that elements of symbolic, rogue policy-making can be also detected in Hungary's policy in the refugee crisis.

The other specific policy where Hungary's attitude towards foreigners can be measured is an area of symbolic influence for Hungary due to its history: citizenship. In this policy area, the strategies some countries, including Hungary, are following can easily be considered particularist and is evidently aimed at promoting national preferences. Some Member States have introduced dual citizenship or facilitated naturalization, which are not illegitimate in the EU, but can raise many questions regarding basic principles of EU integration and have a huge risk of misuse. Moreover, many countries, including Hungary, are or were selling settlement bonds that can be purchased by individuals, which is a highly questionable form of providing residence to people. This is the unquestionable promotion of national preferences, which in this case served the purpose of increasing the number of Hungarian citizens around the globe alongside economic reasons. The conscious changes in citizenship policy, for example, clearly indicate an autonomous behavior in this policy area. Moreover, the Hungarian particularism in the area of citizenship is clearly violating other Member States' interests, which goes against certain principles of the EU. The EU is a collective regime built on objective commitments from the part of Member States, commitments that are bound together by the normative

[29] "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" (Council of the European Union, September 22, 2015), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1601&from=EN.

dimension of membership and manifested in the principle of loyalty (as expressed in Article 4(3) TEU). The Hungarian example demonstrates that giving out EU citizenship so easily as Hungary does might be detrimental, on the one hand, to the Union's citizenship policy and, on the other hand, to the constitutional principle in question because of the underlying risk of misuse and the previously mentioned downward spiral of unilateralism. Even though citizenship policy is a Member State competence and the EU has not much normative leverage in this area, the Member States' citizenship policies can also have direct and indirect effects on the EU's labor market, which makes this topic not only sensitive but also economically important. These two case studies will show how Hungary applied a mixed strategy of interest-driven, rational policy-making based on national preferences and symbolic, rogue Member State behavior.

4. Methodology

In order to examine the relationship between the political reality and the normative dimension of membership in the EU represented by the core legal principle of loyalty, the thesis will analyze the example of Hungary and its EU strategy since the 2004 accession. In order to do this, we will also contrast the period before 2010, including the country's accession process, and the period after 2010. The aim of this research is to draw conclusions from the behavior of a small state about the phenomenon of promoting national preferences in the EU and its legitimacy in a political arena where loyalty is bound to prevail. The thesis uses the method of testing a mainstream analytical framework – the theory of liberal intergovernmentalist national preference formation – in the case of a small Member State.

Starting from the main assumption of the thesis, *that according to the treaties, there is a discrepancy between the political and normative dimensions of membership within the EU,* the research contributes to the field using a deductive approach. It does so through testing an existing theory and examining evidence of Hungary's EU policy in two case studies: Hungary's strategy during the refugee crisis and the country's stance on the question of citizenship. Based on the empirical observations on the case of Hungary, it tries to add to the theoretical discourse on small states by possibly identifying a certain type of EU-influencing small state strategy.

The method of the research is policy analysis, including processing academic literature and gathering professional insights from significant researchers and policy-makers who work directly in this field. Primary documents such as government publications, reports, official letters and recommendations from the European institutions are analyzed, and interviews with

experts and policy-makers also have been conducted.[30] The method of processing these sources will be content analysis.

5. Outline of chapters

Chapter II presents one branch of the theoretical background by conducting a literature review on the most important aspects of national preference formation, mainly liberal intergovernmentalism. This includes briefly presenting the most relevant theories on the behavior of states in international settings. The literature on the preference formation of Member States is analyzed, the notion of the national interest is also briefly covered through examining the views of the most significant scholars dealing with the concept, and last but not least the so-called 'small state theories', meaning major researchers examining the behavior and strategies of small states in the EU, are also presented.

Chapter III focuses on the normative framework by examining the constitutional principle in question: loyalty. In contrast to the theories presented in the previous chapter, which explain the rational, interest-articulating strategies of EU Member States, this chapter focuses on the normative dimensions of Member State action. It briefly presents the most important constitutional principles of the EU such as solidarity, mutual trust and loyalty. It analyzes the obligations loyalty allegedly imposes on Member States, as well as the nature of this obligation and whether mutual respect can only be understood as a principle or it should also be treated as a binding norm that should drive Member State policies and should be enforced by the EU somehow.

The fourth chapter analyzes the political reality against the backdrop of the theories presented in the second chapter. It focuses on Hungary's relationship with the EU since the beginning of the 1990s, including the accession period and what kind of strategy the governments of Hungary conducted until 2010. This chapter will discover that despite being a good student during the integration process, some realist, interest-based elements can already be discovered in Hungary's strategy towards Brussels.

The fifth chapter also examines the Hungarian policy-making in the EU, but it does not focus on the history of the country with the EU, but specifically on the period since 2010. It focuses on Hungary as a small Member State that conducts an unconventional strategy when pushing

[30] All interviews were conducted in confidentiality, and the names of interviewees are withheld by mutual agreement.

its national interest through the EU. It analyzes the most recent conflicts between Budapest and Brussels, and the ways the EU reacted to them. Against the political reality, it also discusses what tools the EU applies to handle rogue Member State behavior and explains Hungary's EU policy reflecting on the theoretical background of the thesis.

Chapter VI goes even deeper in the analysis of the Hungarian case by focusing on the Member State's strategic behavior towards foreigners from a certain aspect. Hungary's policy-making during the migration crisis will be presented by examining the migratory framework of the EU and the impacts it had on the Hungarian laws regulating migration. Moreover, it will analyze the most important events of the 2015-2016 refugee crisis, the way Hungary handled the crisis and it will also present what it meant from the perspective of Hungary's EU policy.

Chapter VII, as the second case study, also presents Hungary's strategic behavior towards foreigners, but from a different perspective. Hungary's citizenship policy is presented from the 1990s within the framework of the European citizenship regulations. The most important steps and changes in the law regulating this area are examined and contrasted with the rules and regulations outlined and expected by the EU in the question of citizenship.

The concluding chapter draws a pattern based on the theoretical background and the practice that we saw in the case of Hungary and comes up with conclusions about conducting a small Member State behavior and exerting national preferences in line or in contrast with the normative legal principles of the treaties.

II. Theoretical background

1. Introduction – the reasons behind the choice of literature

This thesis analyzes Hungary from the perspective of liberal intergovernmentalism and in particular, small state studies. These two theoretical frames provide a background for analyzing Hungary and its policy-maneuvering within the European Union with a special focus on the extent to which it complies with the principle of loyalty as outlined in TEU. As Hungary's (like all other Member States') main goal is interest-maximization and exerting national preferences within the EU, both liberal intergovernmentalism and small state theories help finding answers to why a small EU country acts as it does in different policy areas and how its policy-making is shaped by domestic and European constraints.

It should be noted, however, that even though liberal intergovernmentalism provides a significant theoretical basis for the dissertation, it has its limits in the case of Hungary. The political developments of the last decade eliminated, or at least constrained, several actors of the national level of policy-making in Hungary, such as civil organizations. As a result, since the late 2010s, national preference formation in Hungary does not work the way Moravcsik imagined it, for example, the use of the term 'liberal' in Hungary's case might raise a few questions and might be inadequate. National preferences in Hungary are created in a somewhat constrained political structure that does not entirely match the pattern drawn up by Moravcsik. Therefore, small state theories, as a specific branch of literature explaining national preference formation, need to be added to the analysis, as they complement the explanation that LIG gives on Hungarian preference formation in the EU.

The thesis argues that *Hungary's EU policy can be explained starting from liberal intergovernmentalism, which highlights that the main motivation of Hungary's EU membership and the driver of its policies towards the EU is national preference formation*. However, it must not be forgotten that *national preferences are not the sole determinants of EU membership and that its normative dimension cannot be neglected either*. The next chapter will explain that besides raw economic interests and the preferences of power elites and societal actors, a country's behavior within the EU must also be driven by normative concerns. When joining the EU, Member States subscribed to certain constitutional values and principles as well, which might not be legally enforceable, but they still have to be followed. First, however, this chapter

will introduce the national preference formation of states and the behavior of small states within the EU and in international settings.

2. National preferences and EU membership

The national preference formation of states, more precisely EU Member States, is a significant theoretical angle from which the Hungarian EU policy and how it relates to the constitutional values of the EU should be examined. When analyzing a country's policy-making and strategic behavior in the European Union, the literature focusing on preference formation is indispensable to assess because it describes the motives and methods along which the strategic preferences of the states are created under certain circumstances. These features of preference formation help the researcher explain why governments and other policy-makers opt for a certain type of behavior over another, thus they facilitate defining what we mean by Member State 'strategies.' The literature on preference formation is, in fact, the dominant mid-level theory of explaining state behavior. In addition, examining preference formation is also useful in relation to small state studies because one can easily agree with the assumption that as small states possess different capacities and features than the large ones in the EU, their preference formation tactics might also be different. Some small state features outlined in the literature review, such as vulnerability, the lack of resources or possessing structural disadvantages are significant factors that might also determine the preference formation process of these states. Moreover, some of the conditions identified by small state studies, under which small states can successfully pursue their interests in the EU (such as policy expertise, coalitions, institutional and administrative capacities or the behavior of the political elites) might also overlap with the factors explaining preference formation. Last but not least, for some researchers, size itself is seen as an explanatory factor for the preference formation of EU Member States.[31] Thus, small state studies can be considered to be complementary to liberal intergovernmentalism and add interesting aspects to the core discipline of analyzing state preferences.

Besides acknowledging the benefits of overviewing the literature dealing with preference formation, a few reservations should be made at the beginning of this sub-chapter. The

[31] Nathaniel Copsey and Tim Haughton, "The Choices for Europe: National Preferences in New and Old Member States," *JCMS: Journal of Common Market Studies* 47, no. 2 (2009): 263–286; Tim Haughton and Darina Malová, "Open for Business: Slovakia as a New Member State," *International Issues & Slovak Foreign Policy Affairs* 16, no. 2 (2007): 3–22; Ramūnas Vilpišauskas, "National Preferences and Bargaining of the New Member States since the Enlargement of the EU: The Baltic States - Still Policy Takers?," *Lithuanian Foreign Policy Review*, no. 25 (2011): 9–32.

expression 'preference formation' covers a very broad conceptual area used in several threads of social sciences (e.g. economy, psychology). This thesis uses the concept as it is applied in political science. Nevertheless, within the discipline of political science itself, there are also different forms of preference formation analyzed: a certain area of research focuses on the political preference formation and framing of individuals (e.g. Druckman[32], Etzioni[33]), while others put an emphasis on the preferences of institutions, such as the European Commission (EC) or the CJEU.[34] Moreover, preference formation is also closely related to the concept of Europeanization and the different methods of bargaining, such as agenda-setting or framing. Staying in line with the purpose of the current research, this thesis will concentrate on the preference formation from the perspective of the membership of states in the EU. This thesis will not analyze, however, the different negotiation and bargaining techniques used in the EU institutional setting, nor the operation of national institutions of preference formation.

2.1 The reasons behind examining preference formation and defining the concept

In the case of Hungary as a small Member State, examining preference formation gives promising results. In his studies written about the preference formation of 'new Member States,'[35] Tim Haughton argues that the shaping of European preferences from the perspective of these Member States is worth examining, because scholarly literature mainly focused on the preference formation of Western European countries even though the 'new ones' brought their own sets of preferences with them in the EU. Moreover, the process of national preference formation gives an insight into the dynamics of domestic politics which might be of a specific character in the case of post-communist Member States (so, a majority of the 'new' EU Member States). Last but not least, this area of research feeds into larger debates about the nature of the EU and also about the usefulness of different explanatory theoretical frameworks. I share Haughton's claim in this regard, therefore the thesis, besides other theoretical aspects, also builds on the literature on national preference formation.

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[32] James N. Druckman, "Political Preference Formation: Competition, Deliberation, and the (Ir)Relevance of Framing Effects," *The American Political Science Review* 98, no. 4 (November 2004): 671–686.
[33] Amitai Etzioni, "Crossing the Rubicon: Including Preference Formation in Theories of Choice Behavior," *Challenge* 57, no. 2 (March 1, 2014): 65–79, https://doi.org/10.2753/0577-5132570205.
[34] Simon Hug, "Endogenous Preferences and Delegation in the European Union," in *Paper Prepared for Presentation at the Annual Meeting of the American Political Science Association Boston* (August 28 - September 1, 2002): 1-36.
[35] Tim Haughton, "Preference Formation in the New EU Member States: The Cases of Slovenia, Slovakia and the Czech Republic: Full Research Report," *ESRC End of Award Report, RES-000-22-2786* Swindon: ESRC (2009): 15-25; Tim Haughton, "Vulnerabilities, Accession Hangovers and the Presidency Role: Explaining New EU Member States' Choices for Europe," *Center for European Studies Central and Eastern Europe Working Paper Series*, no. 68 (February 2010): 1-41.

Etzioni (2014) defines preferences as the "ranking of possible choices prior to any consideration of resource constraints."[36] This is a definition widely used among economists. Andrew Moravcsik, on the other hand, sees preferences as "an ordered and weighted set of values placed on future substantive outcomes … that might result from international political interaction."[37] Some parts of this definition are broadly accepted by political scientists, however, there is an intense debate going on about what those values and interactions are that determine preferences.

The central tenet of the research focusing on preference formation provides different explanations or features affecting the preference formation of states. In this regard, liberal intergovernmentalism (LIG) can be considered to be the dominant theory in the studies of national preference formation. Andrew Moravcsik, in his study *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*,[38] provides an exhaustive analysis on how the domestic level matters in states' attempts to promote national interest and influence. Moravcsik highlights that the "first and most important stage of the liberal intergovernmentalist framework is the formation of underlying state preferences, that is, the substantive objectives ('states of the world') that motivate states to adopt policies and strategies."[39] For liberal intergovernmentalists, state behavior reflects the rational actions of governments constrained at home by domestic societal pressures and abroad by their strategic environment. Domestic economic lobbying organizations are crucial to the process of national preference formation and they help explain Member State positions.

Moravcsik argues that neo-functionalism cannot explain the tendencies of European integration, because the most important agreements were not driven by a spill-over effect, but by a convergence of preferences among the most powerful Member States. Thus, a liberal theory of how economic interdependence influences national interests, and an intergovernmentalist theory of international negotiations, was needed, out of which liberal intergovernmentalism was born. This theory argues that the primary determinants of national preferences are the costs and benefits of economic interdependence. The state goals are defined domestically, and the national interest emerges through domestic political conflicts. As the roots of liberal intergovernmentalism lie in liberal theories, one of its main claims is that state-society relations have a great influence on shaping national preferences. The national governments have

[36] Etzioni, "Crossing the Rubicon," 66.
[37] Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, 24.
[38] Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach."
[39] Andrew Moravcsik, "Preferences, Power and Institutions in 21st Century Europe," *JCMS: Journal of Common Market Studies* 56, no. 7 (November 2018): 1648–1674, https://doi.org/10.1111/jcms.12804.

to take into consideration the societal pressure, which emerges from powerful groups of the society. The personal commitments and ideologies of the leading politicians also have a defining role in national preference formation. The pluralist interests appearing among societal actors are constantly competing with each other, and those actors that triumph over others have the privilege to define the preferences that the government will, at the end, pursue in the international political arena.[40]

Moreover, this theory puts an emphasis on the issue-specific interests of states. By arguing that these interests are broader than just economic or material concerns, the theory claims that national preferences include non-material factors as well.[41] However, economic preferences are also highly relevant in the interest-articulation of states within the EU, instead of being driven only be geopolitical interests or ideologies.[42] The main assumptions of liberal intergovernmentalism about the European Communities are that intergovernmental cooperation in the European Communities is voluntary, the bargaining environment is relatively rich in information, and the transaction costs of intergovernmental bargaining are low. Consequently, relative power matters the most in a community like the EU. This environment is favorable mainly for the large, self-sufficient countries, who can wield the most influence, while the small, poorer countries might support strong supranational powers because they are less likely to be able to exert influence on their own. Nevertheless, this thesis will show that Hungary's self-centered, interest-maximizing EU policy that disregards EU principles within the EU fits into the model of cost-benefit calculations, rational choice and a foreign policy shaped by domestic political conflicts. As a result, it can be understood through the lens of liberal intergovernmentalism. This thesis uses these liberal intergovernmentalist observations as starting points, but also takes into consideration that not all aspects of LIG are applicable to Hungary.

Finally, it must also be highlighted that liberal intergovernmentalism argues that the EU institutions actually strengthen the power of national governments because they increase the efficiency of their interstate bargaining, and they also strengthen the autonomy of the national political leaders. This can be seen as a two-level game that enhances the initiative and autonomy of national political leaders. However, Member States only delegate their national sovereignty

[40] Mareike Kleine and Mark Pollack, "Liberal Intergovernmentalism and Its Critics," *JCMS: Journal of Common Market Studies* 56, no. 7 (November 2018): 1495, https://doi.org/10.1111/jcms.12803.
[41] Moravcsik, "Preferences, Power and Institutions in 21 st-Century Europe," 1651.
[42] Kleine and Pollack, "Liberal Intergovernmentalism and Its Critics," 1493.

to the EU to the minimum extent necessary, in order "to make their mutual commitments credible."[43][44] This thesis builds, to a large extent, on the main arguments of liberal intergovernmentalism because it examines Hungary's policy-making based on a bottom-up analysis, focusing primarily on the domestic political field, thus the first stage of European integration according to Moravcsik's distribution. As liberal intergovernmentalism argues, the national level is as important in assessing a country's policy-making and preference formation as its interactions with foreign institutions and partner countries. On this basis, it is a valid choice to examine membership as a matter of the politics and strategies of national governments. It is justified also from the perspective of the limitations placed by national governments on themselves in order to make EU integration work, such as the self-imposed restraint of the loyalty principle.

2.2 The critics of liberal intergovernmentalism

The thesis is not affected by the challenges and criticisms to liberal intergovernmentalism. Liberal intergovernmentalism is often criticized for overlooking the institutional arrangements of domestic policy,[45] or even the role of supranational institutions,[46] and for failing to capture the complexity of preference formation.[47] Although liberal intergovernmentalism is seen to be useful in explaining some parts of European integration, such as the process of EU accession of a Member State or decision-making in the enlarged EU, its explanation for the process of preference formation according to the logic of interaction between the interest groups and policy makers is not convincing enough.[48] Especially in the case of small and middle EU members, which are dependent in terms of trade and economic relations on the larger countries, some 'more nuanced lenses' are needed for analyzing their preference formation and bargaining behavior. For most of the scholars criticizing liberal intergovernmentalism, national preference

[43] Kleine and Pollack, 1493.
[44] LIG divides European integration into three phases: the aggregation of domestic interests into national preferences for integration, distributive bargaining among EU governments pursuing these preferences, and the design of institutions to secure and implement collective bargains. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, 24.
[45] Dionyssis G Dimitrakopoulos and Hussein Kassim, "Deciding the Future of the European Union: Preference Formation and Treaty Reform1," *Comparative European Politics* 2, no. 3 (December 2004): 241–260, https://doi.org/10.1057/palgrave.cep.6110042; Carlos Closa, "The Formation of Domestic Preferences on the EU Constitution in Spain," *Comparative European Politics* 2, no. 3 (December 2004): 320–338, https://doi.org/10.1057/palgrave.cep.6110041.
[46] Emma C. Verhoeff and Arne Niemann, "National Preferences and the European Union Presidency: The Case of German Energy Policy Towards Russia," *JCMS: Journal of Common Market Studies* 49, no. 6 (November 2011): 1271–1293, https://doi.org/10.1111/j.1468-5965.2011.02198.x.
[47] Dimitrakopoulos and Kassim, "Deciding the Future of the European Union," 255.
[48] Vilpišauskas, "National Preferences and Bargaining of the New Member States since the Enlargement of the EU: The Baltic States - Still Policy Takers?"

formation is seen as reactive and driven by the EU agenda.[49] A prominent challenger to the ideas of Moravcsik is new intergovernmentalism. Though it agrees with the central role national governments play in European integration, it argues that leaders seek consensus and try to persuade each other in the European Council instead of aggressively clashing with one another over their respective national interests.[50]

Closa,[51] for instance, rejects the claim of liberal intergovernmentalism that national governments aggregate the preferences formed in civil society through a pluralist process, and argues that the institutional environment in which the preferences are shaped may actually act as feeder of these preferences or as a source for them. His article concludes that the most significant explanatory variables behind Spain's preference formation are the ideology of the party in government and the structure of Spain's executive. Jabko also prefers an institutionalist explanation and claims that the traditional model of the state as a unitary actor has limited relevance in the context of EU institutional reform debates. He also argues that "state preferences cannot be understood in isolation from the international and domestic institutional environment in which they are formed."[52] Some researchers do not reject liberal intergovernmentalism outright, instead they argue for the need of complementing it with other views as well. Bursens,[53] for instance, sees institutionalism as a useful complement to liberal intergovernmentalism in understanding national preference formation because the examination of the institutional environment adds useful insights to the preference formation of governments based on cost-benefit calculations.

Rational choice institutionalism, or sociological institutionalism,[54] reveals further shortcomings of liberal intergovernmentalism. When analyzing the institution of the Council Presidency, Verhoeff and Neimann argued that rational choice institutionalism focuses on cost-benefit calculations in fulfilling national interests, while sociological institutionalism emphasizes the importance of norms and claims that the acting President is unlikely to pursue national interests

[49] Vilpišauskas.
[50] Kleine and Pollack, "Liberal Intergovernmentalism and Its Critics," 1499.
[51] Closa, "The Formation of Domestic Preferences on the EU Constitution in Spain."
[52] Nicolas Jabko, "The Importance of Being Nice: An Institutionalist Analysis of French Preferences on the Future of Europe," *Comparative European Politics* 2, no. 3 (December 2004): 282, https://doi.org/10.1057/palgrave.cep.6110036.
[53] Peter Bursens, "Enduring Federal Consensus: An Institutionalist Account of Belgian Preferences Regarding the Future of Europe," *Comparative European Politics* 2, no. 3 (December 2004): 339–357, https://doi.org/10.1057/palgrave.cep.6110040.
[54] Verhoeff and Niemann, "National Preferences and the European Union Presidency."

where these are different from the EU mainstream.[55] Slapin also chooses institutionalism over intergovernmentalism in his analysis of intergovernmental conferences, and argues that "institutionalism contrasts with intergovernmentalism because it suggests that small states can affect IGC outcomes through veto power."[56] Eugénia Da Conceição-Heldt introduces the debate in the new institutionalist literature about the nature of preferences:[57]while sociological and historical institutionalists take preferences to be endogenous, rational institutionalism assumes that they are exogenous [58]

Another theory, which should be included in this short review on Member State preferences and strategies, is constructivism. Constructivist approaches in IR, and in European integration as well, define institutions to include not only formal, but informal norms, and these rules and norms are expected to constitute actors' preferences.[59] This means that actor preferences are not exogenously fixed, as in rationalist models, but instead are endogenous to institutions, which also implies that identities are shaped by the social environment. Consequently, constructivist scholars suggest that EU institutions shape the behavior, preferences and identities of not only individuals but also Member State governments.[60] Constructivists argue that European social norms regulate behavior and they also define the interests and identities of actors.[61] The significance of norms is also emphasized by a certain thread of small state theories that will be presented in detail later. Postfunctionalists also question the liberal intergovernmentalist model of preference formation because LIG sees economic integration

[55] Verhoeff and Niemann.
[56] Jonathan B. Slapin, "Bargaining Power at Europe's Intergovernmental Conferences: Testing Institutional and Intergovernmental Theories," *International Organization* 62, no. 01 (January 2008): 132, https://doi.org/10.1017/S0020818308080053.
[57] EugéNia Da Conceição-Heldt, "Taking Actors' Preferences and the Institutional Setting Seriously: The EU Common Fisheries Policy," *Journal of Public Policy* 26, no. 03 (December 2006): 279-299, https://doi.org/10.1017/S0143814X06000572.
[58]Institutionalist theories also have their critiques. Hug, for example, makes the remark that none of the institutionalist approaches to the EU can give an account of the "endogenous preferences" which appear through the interdependence of intergovernmental and supranational actors. Da Conceição-Heldt rejects both the liberal intergovernmentalist and the institutional approaches. She argues that neither the liberal intergovernmentalist assumption, which says that national preferences determine EU bargaining processes, nor the new institutionalism theory, which assumes that the institutional settings determine the bargaining outcomes, are able to capture the reality right. She states that "bargaining outcomes in the EU are the result of the preferences of the member states, and the preferences of the Commission added to the institutional setting." See: Hug, "Endogenous Preferences and Delegation in the European Union." and Da Conceição-Heldt, "Taking Actors' Preferences and the Institutional Setting Seriously," 295.
[59] Pollack, „Theorizing EU Policy-Making", 24.
[60] Thomas Christiansen, Knud Erik Jorgensen, and Antje Wiener, „The Social Construction of Europe", *Journal of European Public Policy* 6, no. 4 (January 1999): 529, https://doi.org/10.1080/135017699343450.
[61] Kleine and Pollack, "Liberal Intergovernmentalism and Its Critics," 1497.

and the distribution of gains as not the sole motive of political mobilization, and it does not touch upon matters of identity that are of crucial importance.[62]

2.2 Factors explaining national preference formation

In framing our analysis, we must take into account that national preference formation is heterogeneous and context-dependent. Copsey and Haughton have refurbished Moravcsik's theory and created a synthetic framework to examine the nature of preference formation in the new Member States of the EU. [63] They did so because they claim that "there is no silver bullet" that provides an explanation for the preference formation of all countries and all policy areas.[64] Some of the factors are more fixed, while others are more volatile, so it must be recognized that preference formation has a temporal dimension. Another popular thread of analyzing preference formation is based on the geographical features of the examined country or its embeddedness in the political community. Several papers are analyzing specific countries and their preference formation in the EU, e.g. Germany,[65] Belgium,[66] Italy,[67] France,[68] Slovakia[69] etc.

Research on the difference between the preference formation strategies of 'old' versus 'new' EU Member States also gained momentum, especially after the big enlargement of 2004. This aspect is also related to size, as almost all the 'new' Member States of the EU are small (except for Poland), so there is a significant overlap in the characteristics of 'new' and small EU Member States. In this respect, liberal intergovernmentalism is often condemned for not being able to explain the national preference formation of 'new' countries, especially those of Central Eastern Europe, because it does not consider their inherent vulnerabilities and underdeveloped structures of political representation. Rybář argues that the preference formation of these Member States is often *ad hoc* and lacks relevant discussion with societal actors (as liberal intergovernmentalism would suggest).[70] He makes the case for a pluralistic framework of

[62] Kleine and Pollack, 1497.
[63] Copsey and Haughton, "The Choices for Europe: National Preferences in New and Old Member States."
[64] Copsey and Haughton, 269.
[65] G. Alons, "European External Trade Policy: The Role of Ideas in German Preference Formation," *Journal of Contemporary European Research* 9, no. 4 (2013): 501–520.
[66] Bursens, "Enduring Federal Consensus."
[67] David Hine, "Explaining Italian Preferences at the Constitutional Convention," *Comparative European Politics* 2, no. 3 (December 2004): 302–319, https://doi.org/10.1057/palgrave.cep.6110037.
[68] Jabko, "The Importance of Being Nice."
[69] Haughton and Malová, "Open for Business: Slovakia as a New Member State."
[70] Marek Rybář, "Domestic Politics and National Preferences in the European Union," in *From Listening to Action? New Member States in the European Union*, ed. Darina Malová (Slovakia: Devin Printing House, 2010), 33–56.

preference formation, which suggests that it is "the relative power position (…) of various influential actors (…) that accounts for preferences of the new Member States in the EU."[71]

As previously mentioned, Copsey and Haughton also think that there is a difference between the preference formation techniques of 'old' and 'new' Member States, this is why they have created their special framework that accounts for the preference formation of the new ones.[72] Their framework explaining the preference formation of new EU Member States consists of the following variables: unique historical experiences, size, dependency, ideology and powerful societal groups. The situation of these countries is different because they are weaker and more vulnerable than their counterparts. Their vulnerability consists of two elements: economic dependency and the country's perceived place in the world.[73] *This thesis will show that these observations are valid in the case of Hungary as well. because the unique political and economic situation the country found itself at the beginning of the 1990splayed a great role in defining its relationship to the West, namely its enthusiasm to join the EU and become a member of the European club.*

The literature on preference formation gives the reader the impression that some researchers prefer to focus on the domestic political field,[74] while others are more keen on discovering the EU-level of policy making.[75] To put it in a nutshell, the most important determining factors of national preference formation outlined by scholars are: history, dependency on the EU, size, ideology and societal groups;[76] material and rational interests;[77] vulnerability and weakness;[78] party positions;[79] the consistency of domestic efforts and European demands;[80] the degree of

[71] Rybář, 40.
[72] Copsey and Haughton, "The Choices for Europe: National Preferences in New and Old Member States."
[73] Haughton, "Vulnerabilities, Accession Hangovers and the Presidency Role: Explaining New EU Member States' Choices for Europe." 3.
[74] Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach"; Copsey and Haughton, "The Choices for Europe: National Preferences in New and Old Member States"; Haughton, "Vulnerabilities, Accession Hangovers and the Presidency Role: Explaining New EU Member States' Choices for Europe."
[75] Mark Aspinwall, "Government Preferences on European Integration: An Empirical Test of Five Theories," *British Journal of Political Science* 37, no. 01 (January 2007): 89-114., https://doi.org/10.1017/S0007123407000051; Slapin, "Bargaining Power at Europe's Intergovernmental Conferences."
[76] Copsey and Haughton, "The Choices for Europe: National Preferences in New and Old Member States."
[77] Alons, "European External Trade Policy: The Role of Ideas in German Preference Formation."
[78] Haughton, "Vulnerabilities, Accession Hangovers and the Presidency Role: Explaining New EU Member States' Choices for Europe."
[79] Vilpišauskas, "National Preferences and Bargaining of the New Member States since the Enlargement of the EU: The Baltic States - Still Policy Takers?"
[80] Vilpišauskas.

foreign ownership in a state's financial sector;[81] economic interdependence, powerful leaders and societal actors;[82] ideologies;[83] alliances[84] and identity[85] Accordingly, this thesis will demonstrate that *national preference formation does not depend only on the EU agenda but it is shaped by the political interests of the national governments and the relevant actors/societal groups in the domestic political field.*

3. Small state studies

Hungary is a small Member State in the EU. Since its accession to the European bloc, Hungary has always been seen as a small Member State within the EU, even if it is not among the smallest countries. It has been considered small both from the point of view of its international partners, as well as from the perception of its political elite and citizens. After 2010, Hungary started to apply those strategies that small state studies identify as successful influence exerting tactics for small countries. Since the government change of 2010, the Hungarian government's focus on keeping the country's sovereignty and pursuing national interests, sometimes ahead of its common European interests and obligations, indicate that the government does not see its country as insignificant. Instead, its ambition is to promote national preferences on an EU level, which is a typical small state behavior. This segment of the thesis introduces and reveals the most important characteristics of the small state literature which will help better understand the Hungarian behavior.

Generally, small state studies offer a framework for analysis within the discipline of IR/European studies that gives the researcher valuable insight into the behavior of states. Nevertheless, some researchers are doubtful about this argument and ask whether the concept of smallness is a useful analytical tool at all.[86] Others claim that small state studies are relevant only to the extent that they allow us to understand the behavior of states in international politics.[87] In my view, if only the latter statement is true, then the researcher already gains a lot

[81] Aneta Spendzharova, "Is More 'Brussels' the Solution? New European Union Member States' Preferences about the European Financial Architecture," *JCMS: Journal of Common Market Studies* 50, no. 2 (March 2012): 315–334, https://doi.org/10.1111/j.1468-5965.2011.02208.x.
[82] Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach."
[83] Aspinwall, "Government Preferences on European Integration"; Closa, "The Formation of Domestic Preferences on the EU Constitution in Spain."
[84] Jabko, "The Importance of Being Nice"; Hine, "Explaining Italian Preferences at the Constitutional Convention."
[85] Liesbet Hooghe and Gary Marks, "A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus," *British Journal of Political Science* 39, no. 01 (January 2009): 1-13, https://doi.org/10.1017/S0007123408000409.
[86] Peter R. Baehr, "Small States: A Tool for Analysis," *World Politics* 27, no. 3 (April 1975): 456–466.
[87] Maximilian Conrad, "A Small-States Perspective on the European Citizens' Initiative," *Veftímaritið Stjórnmál Og Stjórnsýsla* 9, no. 2 (December 18, 2013): 301-322, https://doi.org/10.13177/irpa.a.2013.9.2.3.

from turning towards small state studies because they provide a useful analytical tool or conceptual framework for analyzing certain types of country behavior and strategies both individually in the international arena and in international organizations. Although small state studies are frequently criticized due to the broadness of the category of 'small' and the diverse nature of states that belong to the group, I argue that they are a good starting point for analysis because the small state concept can facilitate understanding the behavior of the examined state.[88] This is especially true in the case of the European Union. Although small Member States outnumber the large ones, the latter group is generally believed to be the engine of policy-making, leaving the small ones at the margins of theoretical and empirical attention in terms of their role in EU governance.

3.1 The development of small state studies

The study of small states is not a new discipline in IR scholarship: it stretches back to the 18th -19th century when European, mainly German speaking, scholars were interested in small states.[89] In the second half of the 19th century, nation-states took over the political arena and became the focus of research. After the First World War, the political landscape of Europe has changed, and the foreign policy of small states provided an interesting subject of analysis.[90] After the Second World War the positions of small states in the new world order attracted some discussions,[91] but the Cold War period was mainly characterized by research on large countries dominating the international political arena. The academic interest in small states in the post-war period focused on the definition of small states, analyzing their diplomacy[92] and security issues,[93] and their role in international organizations, mainly from a realist perspective.[94] To a certain extent, small states were also examined from the perspective of their power status and relations within the European or world economic order.[95] The 1980s brought a standstill in the analysis of the small states given that, in this period, they were mainly examined from the point

[88] Haluk B. Gerger, "Small States: A Tool for Analysis," *The Turkish Yearbook of International Relations* 15 (1975): 108–118.
[89] Iver B. Neumann and Sieglinde Gstöhl, "Lilliputians in Gulliver's World? Small States in International Relations," *Centre for Small State Studies Working Paper*, University of Iceland, May 2004, 7.
[90] Neumann and Gstöhl, 7.
[91] Neumann and Gstöhl, 8.
[92] Annette Baker Fox, *The Power of Small States: Diplomacy in World War II* (Chicago: Chicago University Press, 1959).
[93] Robert O. Keohane, "Lilliputians' Dilemmas: Small States in International Relations." *International Organization* 23, no. 2 (1969): 291–310; Robert L. Rothstein, *Alliances and Small Powers* (New York, London: Columbia University Press, 1968).
[94] Neumann and Gstöhl, "Lilliputians in Gulliver's World? Small States in International Relations," 8.
[95] Raimo Vayrynen, "The Position of Small Powers in the West European Network of Economic Relations," *European Journal of Political Research*, no. 2 (1974): 143–178.

of view of their economic capacity and interdependence as well as their development. This decade was characterized by the division between neorealist and neoliberal institutionalist views on small states in international relations. In the 1980s and 1990s, comparative research on small states was not well developed yet. However, the 1990s brought the revival of small state studies, as the constant deepening of the European integration introduced both the comparative approach and a special discussion about small EU Member States into the academic research on small states.[96] The role of small states in European integration and the problem of small versus large countries in the European Communities gained more and more scholarly attention. The popularity and productivity of small state studies escalated in the 1990s with the accession of Finland, Sweden and Austria, and then culminated in the period before and after the big enlargement of 2004.

3.2 The main arguments of small state studies

Small state studies are such an extensive analytical framework that we can distinguish different categories within them. The first distinction lies between works about small states in international relations in general,[97] and small states in the EU.[98] Another type of distinction can be made based on the areas these studies cover: most of them focus on a certain policy area of small states, out of which foreign and security policy are the most extensively covered topics,[99] while others examine the strategies of small states specifically in negotiations or institutional decision-making processes.[100] Lately, some new aspects of analysis appeared in small state

[96] Laurent Goetschel, ed., *Small States Inside and Outside the European Union: Interests and Policies* (Boston: Kluwer Academic Publishers, 1998); Baldur Thorhallsson, *The Role of Small States in the European Union* (Aldershot, Hants, England ; Burlington, Vt: Ashgate, 2000).

[97] Peter J. Katzenstein, *The Culture of National Security* (Columbia University Press, 1996); Rothstein, *Alliances and Small Powers*; Keohane, "Lilliputians' Dilemmas: Small States in International Relations"; Gerger, "Small States: A Tool for Analysis"; Erich Reiter and Heinz Gärtner, *Small States and Alliences* (New York: Physica-Verlag, 2001).

[98] Annika Björkdahl, "Norm Advocacy: A Small State Strategy to Influence the EU," *Journal of European Public Policy* 15, no. 1 (January 2008): 135–154, https://doi.org/10.1080/13501760701702272; Thorhallsson, *The Role of Small States in the European Union*, 2000; Diana Panke, "Small States in the European Union: Structural Disadvantages in EU Policy-Making and Counter-Strategies," *Journal of European Public Policy* 17, no. 6 (September 2010): 799–817, https://doi.org/10.1080/13501763.2010.486980; Clive Archer and Neill Nugent, "Introduction: Does the Size of Member States Matter in the European Union?," *Journal of European Integration* 28, no. 1 (March 2006): 3–6, https://doi.org/10.1080/07036330500480466.

[99] Laurent Goetschel, "Introduction to Special Issue: Bound to Be Peaceful? The Changing Approach of Western European Small States to Peace," *Swiss Political Science Review* 19, no. 3 (September 2013): 259–278, https://doi.org/10.1111/spsr.12047; Gerger, "Small States: A Tool for Analysis"; Carmen Gebhard, "Is Small Still Beautiful? The Case of Austria," *Swiss Political Science Review* 19, no. 3 (September 2013): 279–297, https://doi.org/10.1111/spsr.12042; Giorgi Gvalia et al., "Thinking Outside the Bloc: Explaining the Foreign Policies of Small States," *Security Studies* 22, no. 1 (January 2013): 98–131, https://doi.org/10.1080/09636412.2013.757463.

[100] Diana Panke, "Small States in EU Negotiations: Political Dwarfs or Power-Brokers?," *Cooperation and Conflict* 46, no. 2 (June 1, 2011): 123–143, https://doi.org/10.1177/0010836711406346; Diana Panke, "Small

studies due to the dynamic changes in world politics. Such a new and popular scope of analysis in the past few years has been surrounding the states' reactions to the economic crisis,[101] or, more recently, Scotland, and the possibility of its secession from the UK.[102] Articles belonging to the latter category mainly focus on how Scotland could cope with independence and what kind of small state strategies it may adopt.

Researchers dealing with small states argue that these countries are worth examining because they are likely to have commonalities, which are different from those of the large states, therefore it can be expected that their behavior will be different as well.[103] Authors usually identify the main characteristics of small countries that put them in a special, usually more difficult, situation in the international arena than their peers. These characteristics are, for example, vulnerability,[104] openness,[105] and the lack of resources.[106] One of the most prominent researchers of small EU Member States, Diana Panke, derives all her arguments from the presumption that small EU Member States face structural disadvantages in exerting influence in EU policy-making.[107] The main components of the small ones' disadvantage, thus their most important characteristics, are their lack of political power, the insufficient resources to develop policy expertise, the fact that they joined the EU recently and their lack of expertise and proficiency to operate as policy forerunners.[108] The existence of this structural disadvantage is the central tenet of research focusing on small states and it determines the common thread in most small state studies: scholars researching this topic usually try to discover how these

States in Multilateral Negotiations. What Have We Learned?," *Cambridge Review of International Affairs* 25, no. 3 (September 2012): 387–398, https://doi.org/10.1080/09557571.2012.710589.

[101] Amy Verdun, "Small States and the Global Economic Crisis: An Assessment," *European Political Science* 12, no. 3 (September 2013): 276–293.

[102] M. Keating and M. Harvey, "The Political Economy of Small European States: And Lessons for Scotland," *National Institute Economic Review* 227, no. 1 (February 1, 2014): R54–R66, https://doi.org/10.1177/002795011422700107; Alyson J.K. Bailes, Baldur Thorhallsson, and Rachael Lorna Johnstone, "Scotland as an Independent Small State: Where Would It Seek Shelter?," *Veftímaritið Stjórnmál Og Stjórnsýsla* 9, no. 1 (June 15, 2013): 1-20, https://doi.org/10.13177/irpa.a.2013.9.1.1.

[103] Thorhallsson, *The Role of Small States in the European Union*, 2000.

[104] Alyson J.K. Bailes and Baldur Thorhallsson, "Instrumentalizing the European Union in Small State Strategies," *Journal of European Integration* 35, no. 2 (February 2013): 99–115, https://doi.org/10.1080/07036337.2012.689828.

[105] Peter J. Katzenstein, "Small States and Small States Revisited," *New Political Economy* 8, no. 1 (March 2003): 9–30, https://doi.org/10.1080/1356346032000078705.

[106] Diana Panke, "Being Small in a Big Union: Punching above Their Weights? How Small States Prevailed in the Vodka and the Pesticides Cases," *Cambridge Review of International Affairs* 25, no. 3 (September 2012): 329–344, https://doi.org/10.1080/09557571.2012.710579.

[107] Panke, "The Influence of Small States in the EU: Structural Disadvantages and Counterstrategies," May 2008.

[108] Thorhallsson, *The Role of Small States in the European Union*, 2000; Panke, "Small States in EU Negotiations"; Diana Panke, "Dwarfs in International Negotiations: How Small States Make Their Voices Heard," *Cambridge Review of International Affairs* 25, no. 3 (September 2012): 313–328, https://doi.org/10.1080/09557571.2012.710590.

countries can maneuver in their narrow or broad spheres of interest and how they can successfully influence international (or European) policy making or promote their own interests.

There are certain conditions under which small states can successfully pursue their objectives in the EU. The main researchers of the topic outline strategies for small Member States and circumstances under which they can exercise influence despite these disadvantages in the EU. These are, for example, being an old Member State,[109] possessing policy expertise,[110] having good economic, institutional and administrative capacities,[111] creating coalitions or partnerships,[112] and having a unified national position,[113] etc. Many researchers consider institutional aspects, such as holding important positions in the EU (e.g. the Council Presidency),[114] having close ties with the European Commission,[115] or applying the

[109] Panke, "Small States in the European Union," September 2010.
[110] Tania Börzel, "Pace-Setting, Foot-Dragging and Fence-Sitting: Member State Responses to Europeanisation," *JCMS: Journal of Common Market Studies* 40, no. 2 (2002): 193–214; Nicole Deitelhoff and Linda Wallbott, "Beyond Soft Balancing: Small States and Coalition-Building in the ICC and Climate Negotiations," *Cambridge Review of International Affairs* 25, no. 3 (September 2012): 345–366, https://doi.org/10.1080/09557571.2012.710580; Panke, "Small States in the European Union," September 2010; Peter Viggo Jakobsen, "Small States, Big Influence: The Overlooked Nordic Influence on the Civilian ESDP," *JCMS: Journal of Common Market Studies* 47, no. 1 (2009): 81–102.
[111] John L. Campbell and John A. Hall, "National Identity and the Political Economy of Small States," *Review of International Political Economy* 16, no. 4 (October 22, 2009): 547–572, https://doi.org/10.1080/09692290802620378; Ivo Maes and Amy Verdun, "Small States and the Creation of EMU: Belgium and the Netherlands, Pace-Setters and Gate-Keepers," *JCMS: Journal of Common Market Studies* 43, no. 2 (June 2005): 327–348, https://doi.org/10.1111/j.0021-9886.2005.00558.x; Annica Kronsell, "Can Small States Influence EU Norms?: Insights From Sweden's Participation in the Field of Environmental Politics," *Scandinavian Studies*, no. 74 (2002): 287–304.
[112] Paul Meerts, "Negotiating in the European Union: Comparing Perceptions of EU Negotiators in Small Member States," *Group Decision and Negotiation*, no. 6 (1997): 463–482; Anders Wivel, "Small EU Member States after Enlargement: A New Context of Foreign Policy-Making?," *Paper Prepared for the Panel 'Small States and the ESDP' ISA, 46th Annual Convention, Hawaii* (May 3, 2005): 1-18; Börzel, "Pace-Setting, Foot-Dragging and Fence-Sitting: Member State Responses to Europeanisation"; Simone Bunse and Kalypso Nicolaïdis, "Large Versus Small States: Anti-Hegemony and The Politics of Shared Leadership," in *The Oxford Handbook of the European Union*, ed. Erik Jones, Anand Menon, and Stephen Weatherhill (Oxford University Press, 2012), https://doi.org/10.1093/oxfordhb/9780199546282.013.0018.
[113] Kronsell, "Can Small States Influence EU Norms?: Insights From Sweden's Participation in the Field of Environmental Politics."
[114] Kurt Richard Luther, "Small and New, but Nonetheless Competent: Austria and the EU Presidency," *JCMS: Journal of Common Market Studies* 37, no. Annual Review (October 1999): 65–67; Baldur Thorhallsson and Anders Wivel, "Small States in the European Union: What Do We Know and What Would We Like to Know?," *Cambridge Review of International Affairs* 19, no. 4 (December 2006): 651–668, https://doi.org/10.1080/09557570601003502; Björkdahl, "Norm Advocacy," January 2008; David Král, Irena Brinar, and Josefin Almer, "Position of Small Countries towards Institutional Reform – From Tyranny of the Small to Directoire of the Big?," *EPIN Joint Working Paper*, no 6 (November 2003): 1-22.; Jonas Tallberg, "The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations," *JCMS: Journal of Common Market Studies* 42, no. 5 (2004): 999–1022; Ole Elgström, "Dull but Successful – the Swedish Presidency," *JCMS: Journal of Common Market Studies* 40, no. Annual Review (2002): 45–48.
[115] Simone Bunse et al., *Is the Commission the Small Member States' Best Friend?* (Stockholm: Swedish Institute for European Policy Studies (SIEPS), 2005); Grøn and Wivel, "Maximizing Influence in the European Union after the Lisbon Treaty."

'Community method' in decision-making,[116] to be important. The political elites can also play a huge part in defining the strategies of small states.[117] Gvalia et al. argue that focusing on elite ideas, identities and preferences facilitate the understanding of the foreign policy behavior of small states.[118] In my view, this argument can be valid in the case of other policy areas and in the domestic policy of a state as well.

A distinct type of small state behavior discovered in the 1990s-2000s within small state studies is the smart state strategy.[119] Scholars argue that smart states are able to "exploit the weakness of small states as resource for influence" by having well-developed preferences, being able to present their initiatives as interests of the whole EU, and being able to mediate.[120] The concept has been further developed by Caroline Howard Grøn and Anders Wivel who argue that the recent developments in the EU introduced by the Lisbon Treaty undermine the traditional small state approach to European integration.[121] Therefore, the authors identified the characteristics of an ideal smart strategy that small states should apply in order to accommodate and "take advantage of the new institutional environment." They created three variations of ideal smart state strategies: the state as a lobbyist, the state as a self-interested mediator and the state as a norm entrepreneur. Norm entrepreneurship or norm advocacy can be considered to be a constructivist understanding of how small states can act within the EU. Gunta Pastore also examined the recent behavior of small states, focusing mainly on the youngest EU Member States.[122] She found that these countries moved closer towards a small state smart strategy that includes a compromise-seeking behavior, persuasive deliberation, lobbying and using coalitions. The case studies of this thesis will prove that norm entrepreneurship is a strategy Hungary started to apply after 2015, during the refugee crisis, and it helped Prime Minister

[116] Viljar Veebel, "The EU Institutional Reform Model and the Preferences of the Small Member States," *Managing Global Transitions* 12, no. 2 (2014): 161–177; Teija Tiilikainen, "Finland — An EU Member with a Small State Identity," *Journal of European Integration* 28, no. 1 (March 2006): 73–87, https://doi.org/10.1080/07036330500480599; Michael Reiterer, "National Democracies and Transnational Structures: The Point of View of the EU given the Resistance of Small States," *The Challenge of Campaigning in Tomorrow's Europe EAPC Conference 2009*, no. 05/08/2009 (2009): 1-17.
[117] Campbell and Hall, "National Identity and the Political Economy of Small States."
[118] Gvalia et al., "Thinking Outside the Bloc."
[119] Arter, "Small State Influence within the EU: The Case of Finland's Northern Dimension Initiative."; Joenniemi, "From Small to Smart: Reflections on the Concept of Small States."
[120] Grøn and Wivel, "Maximizing Influence in the European Union after the Lisbon Treaty."
[121] Grøn and Wivel.
[122] Gunta Pastore, "Small New Member States in the EU Foreign Policy: Toward 'Small State Smart Strategy,'" *Baltic Journal of Political Science*, no. 2 (December 2013): 67-84.

Orbán to become an advocate for national sovereignty and the self-proclaimed 'protector of the EU' from "the migrant invasion."[123]

These lines of thought show that the main perception about small states is that they have a disadvantage compared to the other Member States. However, some scholars claim that the EU provides so many compensational possibilities for small states that they actually have an advantage in EU policy-making nowadays.[124] This argument about the balancing tools that the EU provides for small states is true, but these tools do not put small states in a more favorable situation than the large ones in EU policy-making.

3.3 Definitions of size

The general starting point of researchers working on small states is the definition of what qualifies as 'small' in their understanding. Due to empirical difficulties, there is no single definition to small states. In fact, there are many different definitions of the concept, which makes it useful for the researcher to distinguish some categories. According to Lehtonen, we can talk about quantitative, qualitative and mixed approaches towards smallness.[125] Quantitative definitions are those that take concrete, measurable criteria into account when defining smallness. We could also call this an absolute or objective approach. Katzenstein identified as small those states that are either small in their size or are situated in the European periphery.[126] The most prominent objective criteria in defining size usually are population, territory, GDP and military capacity.[127] Although these objective definitions seem simple enough, some more complex indicators can be generated from them. Diana Panke, for example, when grouping EU Member States according to size, took the allocation of votes among the states in qualified majority voting in the Council, and defined as small those with fewer votes than the EU-average.[128]

[123] "Prime Minister Viktor Orbán's Speech at a Conference Held in Memory of Helmut Kohl," Website of the Hungarian Government, June 16, 2018, https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-a-conference-held-in-memory-of-helmut-kohl.
[124] Reiterer, "National Democracies and Transnational Structures: The Point of View of the EU given the Resistance of Small States"; Bunse et al., *Is the Commission the Small Member States' Best Friend?*
[125] Tiia Lehtonen, "Small States - Big Negotiations Decision-Making Rules and Small State Influence in EU Treaty Negotiations," *European Policy Institute, Florence*, March 2009.
[126] Peter J. Katzenstein, *Tamed Power. Germany in Europe* (Ithaca: Cornell University Press, 1997).
[127] Baldur Thorhallsson, "The Size of States in the European Union: Theoretical and Conceptual Perspectives," *Journal of European Integration* 28, no. 1 (March 2006): 7–31, https://doi.org/10.1080/07036330500480490.
[128] Panke, "Small States in the European Union," September 2010.

The qualitative category of definitions includes those that define the size of states "in relation to their wider environment."[129] These more subjective or relative definitions often argue that size is not an objectively measurable fact but a social construction.[130] Robert Keohane, for instance, defines size based on the perception of the countries' leaders about the role of their state in the international system.[131] Robert Rothstein argues that the small countries are those that cannot exercise their political will or protect their interests and security, while Steinmetz and Wivel define as small the weaker part in an asymmetric relationship.[132] Thorhallsson mentions the perception of the environment and the state itself as the determining factors of smallness.[133]

The third, mixed approach is based on the combination of objective and subjective factors, which we could also call the multilateral dimension of size. Thorhallson differentiates between six categories of size (fixed size, sovereignty size, political size, economic size, perceptual size and preference size),[134] and argues that the researcher has to decide which category they focus on, but it is always better to combine the different criteria, take perceptual and objective aspects into consideration, and not to look at only one aspect. Moreover, he emphasizes the importance of domestic and international actors' assessment of the state's action capacity and internal and external vulnerability.[135] Choosing the definition of smallness also depends on the scope and purpose of the research we are conducting. Even though Panke has an absolute definition of smallness in the European Union, when examining the capacities of small states in international negotiations, in one of her articles she defines as small those states that "have less than average relevant capacities in a given negotiation setting."[136] This also shows that the definition of size depends on the specific condition it is examined in: a Member State may be weak in one relation, but simultaneously powerful in another.[137]

In my research I rely on Panke's understanding of smallness, determined by the votes Member States used to possess in the Council. Based on the allocation of votes among the states in

[129] Lehtonen, "Small States - Big Negotiations Decision-Making Rules and Small State Influence in EU Treaty Negotiations."
[130] Thorhallsson, "The Size of States in the European Union," March 2006; Neumann and Gstöhl, "Lilliputians in Gulliver's World? Small States in International Relations."
[131] Keohane, "Lilliputians' Dilemmas: Small States in International Relations."
[132] Robert Steinmetz and Anders Wivel, *Small States in Europe: Challenges and Opportunities* (Farnham, England ; Burlington, Vt: Ashgate Pub. Company, 2010).
[133] Thorhallsson, "The Size of States in the European Union," March 2006.
[134] Thorhallsson, 14.
[135] Thorhallsson, 28.
[136] Panke, "Dwarfs in International Negotiations," 315.
[137] Wivel, "Small EU Member States after Enlargement: A New Context of Foreign Policy-Making?," 4.

qualified majority voting in the Council, those Member States were considered small that had fewer votes than the EU-average (12,5).[138] Taking this categorization into account, currently there are twenty small Member States in the EU, and the remaining seven (Germany, France, Italy, Spain, Poland, Romania and the Netherlands) are considered large. Even though the system of weighted votes is no longer applied in the EU because the double majority' system was introduced in 2014, which builds on the 'one vote/Member State' principle, I argue that the old QMV system is still a good basis for differentiating between small and large EU members for several reasons. This research will adopt this approach to smallness because the old distribution of votes in the Council already reflected the size and population of the Member States, making it a clear and comprehensive categorization. Based on these terms, Hungary can be identified as a small Member State of the EU. I argue that this definition of smallness is not only useful for analyzing decision-making or negotiation tactics, but also for examining general country behavior because it adequately grasps the power-distribution within the Member States.

The question might arise here: why is the category of medium sized Member States usually missing from studies related to the size of Member States? In the case of analyzing state behavior in the international arena, distinguishing between large, medium, small and even microstates is a valid requirement. However, the case is different when the scope of research is restricted to the European Union. Some authors use the category of medium-size Member States,[139] and others distinguish even more categories,[140] while there are scholars who argue that EU Member States can be divided into either two (large and small) or three (large, medium and small) categories, depending on the context of the research.[141] Nevertheless, I do not find the introduction of a third category of size useful when analyzing Member State strategies in the EU. I agree with Conrad who argues that the dividing line between small-medium and medium-large Member States in the EU would be too blurry to make a clear division.[142] Moreover, in terms of power and influence in the Union, the biggest dividing line stretches

[138] Panke, "Small States in the European Union," September 2010, 799.
[139] Keating and Harvey, "The Political Economy of Small European States"; Paul Sutton, "The Concept of Small States in the International Political Economy," *The Round Table* 100, no. 413 (April 2011): 141–153, https://doi.org/10.1080/00358533.2011.565625; Verdun, "Small States and the Global Economic Crisis: An Assessment."
[140] Martin Westlake, "The Council," in *Reforming the European Union from Maastricht to Amsterdam*, ed. Philip Lynch et al. (London: Pearson Education, 2000): 9-31.
[141] Paul Schure and Amy Verdun, "Legislative Bargaining in the European Union: The Divide between Large and Small Member States," *European Union Politics* 9, no. 4 (December 1, 2008): 459–486, https://doi.org/10.1177/1465116508095146.
[142] Conrad, "A Small-States Perspective on the European Citizens' Initiative."

between the big ones, and the 'others', so introducing a third category would not influence the course of this analysis.

3.4 Critics and suggestions for small state studies

Even authors deeply engaged in small state studies have some critical remarks on their own discipline. Bailes and Thorhallsson, for instance, criticize the discipline for not paying enough attention to new threats that can make the coping strategies of small states as difficult as hard threats. Such risks include: human and animal epidemics, cyber security, infrastructure breakdowns, natural disasters etc.[143] They call for a new security paradigm within small states, where the 'soft' security of small states is also analyzed. Crandall also emphasizes the importance of soft security issues because small states within the EU have to face them on a daily basis and they pose a great threat to national identity.[144]

Another criticism facing small state studies is that they are simply not relevant because they expect small and large states to act differently, which is not the case in the political reality.[145] In a way Lamoroux has a point, because the analysis of small states is usually based on a comparison with the large ones. However, I cannot fully agree with his statement, firstly because in objective and subjective terms as well, small and large states, especially within the EU, are indeed different. This does not mean that they always act differently, but they do not possess the same capacities, so their strategy making must also be somewhat different. Secondly, the main point of small state studies is not arguing that they act differently than the large ones but presenting their most suitable strategies they use in order to thrive in the international environment and explaining their behavior.

Nevertheless, this thesis adds to the literature of small state studies in several ways. Although some researchers focus on other possible categorizations within the group of small states, such as old and new,[146] or, more importantly, Eastern and Western countries,[147] in my view there is still potential in analyzing the differences between central small EU members and small countries on the periphery because their possibilities and resources are completely different

[143] Bailes and Thorhallsson, "Instrumentalizing the European Union in Small State Strategies."
[144] Matthew Crandall, "Soft Security Threats and Small States: The Case of Estonia," *Defence Studies* 14, no. 1 (January 2, 2014): 30–55, https://doi.org/10.1080/14702436.2014.890334.
[145] Jeremy W. Lamoreaux, "Acting Small in a Large State's World: Russia and the Baltic States," *European Security* 23, no. 4 (October 2, 2014): 565–582, https://doi.org/10.1080/09662839.2014.948862.
[146] Christian Lequesne, "Old Versus New," in *The Oxford Handbook of the European Union* (Oxford University Press, 2012), https://doi.org/10.1093/oxfordhb/9780199546282.013.0019.
[147] Verdun, "Small States and the Global Economic Crisis: An Assessment."

from each other. Moreover, small state studies in general pay too much attention to objective characteristics, such as the size or the administrative capacities of a state, instead of looking at more subjective circumstances of states, like political capacities or constraints. What is even more important is that they assume a rule-abiding behavior from the examined actors that stays within the EU's constitutional and political settlements instead of analyzing rule-breaker or non-conventional behavior as well. They fail to address the discrepancy that lies between the normative convictions a Member State has to follow within the EU and the political reality of maneuvering and trying to achieve national preferences. This is the gap in the literature that this thesis tries to fill. Moreover, researchers focus too much on how these states can influence EU policy-making, and they neglect the overall behavior and general actions of these Member States at the domestic level. This thesis will show that small states are not always abiding by the rules and can even violate EU law and principles in order to achieve their strategic goals.

4. Findings of the chapter

I argue that small state studies are a useful analytical tool and complementary to liberal intergovernmentalist observations on preference formation; therefore, I will analyze my case from their perspective, while also dedicating more attention to issues so far neglected by this literature. Moreover, I agree with Christian Lequesne who claimed that the relevant analytical unit in the EU should be the single Member State, so comparisons should not be made between groups of states, but individual Member States.[148] This is why the thesis examines Hungary's particularist behavior within the EU in light of its constitutional values and through the lenses of small state studies. Such an approach is expected to provide insight into the circumstances in which Hungary operates and the options it has in pursuing its national interest. My research, for instance, will reveal areas that are generally believed to need more focus in the discipline of small state studies, namely soft security threats of small states. This area will be discovered through examining the Hungarian government's interpretation of the migration crisis, and how this challenge affected the country's policy towards the EU. Moreover, this research can also contribute to the field of small state studies by showing that analyzing the domestic level and the national political arena of Member States with the purpose of coming to conclusions about their EU strategies can be as useful as analyzing their foreign policy. In addition, I intend to show in the thesis that *small state studies would benefit from putting the small-large dichotomy aside and analyzing small states without comparing them to the large ones, through evaluating*

[148] Lequesne, "Old Versus New."

their own preferences. In domestic politics, which is highly affecting the foreign policy of a country, being small or large does not count: what matters the most is the actions of the political elite in order to promote the national interest of the country. Extending the scope of examination to unconventional country behavior could also bring interesting conclusions to the surface.

There are two frameworks of analysis within small state studies that can be used to assess national preference formation and its variables in Hungary. The first is the vulnerability of the country, which is manifested both in its economic dependency (the degree of foreign ownership in the financial sector) and its perceived place in the world. Furthermore, in Hungary the role of politicians in defining the nature of national preference formation and the national identity of the state may also be crucial. Also, some elements of the Hungarian EU strategy formation can be explained by simple cost-benefit calculations, or economic interests, while others are an *ad hoc* policy-making driven by the intuitions of the politicians. This is what we will explore in detail in this thesis: the ways liberal intergovernmentalism can explain Hungary's strategy within the EU and the observations small state studies can add to this research. However, first another aspect of membership in the EU has to be analyzed: normativity that can be considered as a consequence of Member States' transfer of sovereignty to the EU. These are expressed in the constitutional principles governing the membership of states in the EU, in particular in loyalty.

III. Constitutional principles – the bases of EU normativity

1. Introduction

This chapter is going to break down the nature of the normative principles of the EU and discover what they entail for Member States regarding EU membership. These principles have multiple manifestations in the EU legal system, multiple requirements, and there are multiple ways of observing or violating them. Generally, from a legal perspective, they are responsible for establishing the unity of EU law.[149] In addition, as *they are specifically outlined in the Treaties, they create legal obligations and behavioral rules for the Member States, from which they cannot diverge and which are strictly binding*. The constitutional principles of EU law are also responsible for enabling the CJEU to fill normative gaps in the EU legislature, for helping the interpretation of national and EU law, and for creating a ground for judicial review.[150] While this thesis focuses on Hungary's behavior as an EU Member State in light of the principle of loyalty, other principles will also be mentioned as they constitute a fundamental basis of the normativity of EU law.

At this point, a distinction should be made between constitutional principles and general principles for the sake of clarification and defining the scope of analysis of this dissertation. The first layer of principles defining EU legal norms rests within constitutional principles as understood by von Bogdandy.[151] In addition, EU law has general principles that are defined in Article 6 TEU, such as fundamental rights, but also other rights stemming from the jurisprudence of the CJEU, such as legal certainty or the principle of good faith. The current research does not cover the latter group (general principles). It only focuses on constitutional principles and considers the principles analyzed (solidarity, mutual trust, loyalty etc.) to belong to the category of constitutional principles.

2. The normativity of EU law

This chapter will demonstrate that decision-making in Member States is not only driven by the convergence and divergence of intergovernmental political interests, but there is also a normative dimension of EU membership that Member States have to observe. The problem is rooted in the fact that there is still no agreement on the nature of the EU, and even though EU

[149] Armin von Bogdandy, "Founding Principles of EU Law A Theoretical and Doctrinal Sketch," *Revus*, no. 12 (2010): 35.
[150] Koen Lenaerts and José A. Gutiérrez-Fons, "The Constitutional Allocation of Powers and General Principles of EU Law," *Common Market Law Review*, no. 47 (2010): 1629.
[151] von Bogdandy, "Founding Principles of EU Law A Theoretical and Doctrinal Sketch."

integration has been driven by law,[152] the binding nature of some elements of law, such as norms, is questionable. Eriksen argues that the EU is a political body which respects the national identities of its Member States, but at the same time, in some areas, they are subjected to the jurisdiction of a common government.[153] When explaining the normativity of the EU, he finds that there are certain principles or values of the European project that could be defined as sources of normativity. Without these normative forces the EU would not have come to existence in the first place, and secondly, it would not be able to survive.[154] These so-called 'musts' of European integration only lead to certain action under specific conditions, such as in the case of non-compliance or free-riding, which enforce a certain pattern of behavior.[155]

Throughout the European integration process, "democratic nation states have pooled sovereignty without being 'forced' to do so, to an entity whose democratic vocation could make it a competitor in terms of loyalty."[156] Thus, we can define integration as a process "where actors shift their loyalties and activities towards a new center with the authoritative right to regulate interests and allocate resources."[157] The Member States of the EU have diverse interests and values that have to be coordinated throughout the process of integration, even if these actors are strategically pursuing national gains.[158] As the CJEU declared in *Costa v. ENEL*: "the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves."[159] This case established the foundations of the principle of supremacy or primacy of EU law,[160] which will be elaborated in the next sub-chapter.

Weiler points out that there is a divergence between the legal and political analysis of the EU. In order for this gap to be bridged, a distinction should be made between the interaction of Community and Member States in the input process of policy decision-making and the output of the same process (policy, norms, law).[161] These can be called 'decisional' and 'normative'

[152] Erik Oddvar Eriksen, *The Normativity of the European Union*, Palgrave Pivot (Basingstoke: Palgrave Macmillan, 2014), 5.
[153] Eriksen, 7.
[154] Eriksen, 8.
[155] Eriksen, 9.
[156] Eriksen, 26.
[157] Eriksen, 26.
[158] Eriksen, 27.
[159] Eriksen, 28.
[160] "Judgement of the Court in Case 6-64 Flaminio Costa v E.N.E.L." (Court of Justice of the European Union, July 15, 1964).
[161] Joseph Weiler, "Community, Member States and European Integration: Is the Law Relevant?," *JCMS: Journal of Common Market Studies* 21, no. 1 (September 1982): 40, https://doi.org/10.1111/j.1468-5965.1982.tb00638.x.

aspects of the Community-Member State relationship and create the core of the EU as an entity.[162]

2.1 The principle of direct effect and supremacy

The clearest manifestations of the normative dimension of membership in the EU are present in the founding jurisprudence of the Court of Justice of the European Union. One of the basic CJEU decisions, which have laid down the foundations of the nature of EU law and its main principles, is *van Gend en Loos*, delivered by the Court of Justice in 1963.[163] This case established the principle of direct effect in European law, which means that Community law enforces obligations on individuals regardless of the legislation of Member States, so EU law prevails independent of whether national law test exists in the related matter or not. This also means that parties can refer to EU law before national courts (in civil, administrative, and criminal procedures as well).[164]

First of all, this is the first case in which the Court refers to the spirit and nature of the Treaties.[165] This qualification implies that they are more than just agreements or legal texts imposing obligations on the contracting parties,[166] because they have created a "purpose-based association" and a coherent legal order.[167] Second, *van Gend en Loos also* highlights some distinct features of the EU legal order which creates both rights and obligations for its subjects.[168] Third, this decision of the Court also set down the conditions and boundaries of the direct effect of EU law: the condition of direct effect is that the given legal provision has to be clear, negative, unconditional, containing no reservations on the part of Member States, and it should not be dependent on any kind of national implementing measure.[169] In practice, this means that the normativity of EU membership defines and constrains the scope of those private

[162] Weiler, 41.
[163] "Judgement of the Court in Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration" (Court of Justice of the European Union, February 5, 1963).
[164] Ernő Várnay and Mónika Papp, *Az Európai Unió joga* (Budapest: CompLex Kiadó Kft., 2010), 298.
[165] Armin von Bogdandy and Jürgen Bast, eds., *Principles of European Constitutional Law*, 2nd rev. ed., reprinted (Oxford ; Portland, OR: Hart Pub, 2011), 15.
[166] "Judgement of the Court in Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration."
[167] D. Chalmers and L. Barroso, "What Van Gend En Loos Stands For," *International Journal of Constitutional Law* 12, no. 1 (January 1, 2014): 121, https://doi.org/10.1093/icon/mou003.
[168] Chalmers and Barroso, 108.
[169] Várnay and Papp, *Az Európai Unió joga*, 302.

interest violations that can be enforced by referring to EU membership as opposed to national preferences.

The precedence principle, or principle of supremacy, guarantees the superiority of European law over national laws. Though a fundamental principle of the EU, it is not inscribed, just like the principle of direct effect, in the Treaties. Instead, it has been enshrined by the CJEU. Supremacy means that a law stemming from the Treaties should be considered a strict obligation and cannot be overridden by domestic legal provisions.[170] In *Costa*, the Court established that "such an obligation becomes an integral part of the legal system of the Member States, and thus forms part of their own law, and directly concerns their nationals in whose favor it has created individual rights which national courts must protect."[171] On the one hand, the principle of direct effect ensures, with certain conditions, that EU law finds its way to national legal systems and the internal application of EU law. On the other hand, the principle of supremacy helps deciding which law prevails if there is a collision between EU level and national level legislation. Without the latter, the former would become meaningless. Thus, supremacy refers to obligations that Member States subscribed to on the political level, as well as direct effect, or the general principles of EU law. This means that these legal principles all serve the realization of national preferences (even if there are preferences that largely differ from EU goals).

This also entails that Member States have surrendered their sovereignty voluntarily and thus have pledged their loyalty to the EU as well. Deliberation together with law have an important role in solving the problem of collective action and non-compliance.[172] The relationships in the EU legal system are marked by parity and mutual recognition. Compliance from the part of the Member States with this autonomous legal level is presupposed and it depends on the characteristics of the system in place, the legal discourse, and the adjudicative norms.[173]

In recent years, the direct effect and the "general principles of EU law" have expanded the reach of the normativity of membership in the EU.[174] In *Mangold*, for instance, the Court declared

[170] Anthony Arnull and Derrick Wyatt, eds., *European Union Law*, 6th ed (Oxford ; Portland, OR: Hart Pub, 2011), 237.
[171] "Judgement of the Court in Case 6-64 Flaminio Costa v E.N.E.L." (Court of Justice of the European Union, July 15, 1964), Para. 7.
[172] Eriksen, *The Normativity of the European Union*, 30.
[173] Eriksen, 38.
[174] Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials*, Sixth edition (Oxford, United Kingdom ; New York, NY: Oxford University Press, 2015), 184.

that there was a general principle of non-discrimination on grounds of age in EU law.[175] Later, the Court reaffirmed the core of its *Mangold*-ruling in Kücükdeveci regarding the legal effects of general principles. The CJEU ruled that "the principle of non-discrimination will apply and require the setting aside of conflicting national law only when the case 'falls within the scope of EU law.'"[176] It should be noted here that in terms of direct effect, general principles refer to fundamental rights, as defined in Article 6(3) TEU,[177] so strictly speaking, loyalty does not belong to this category. However, it is not clear what other general principles of EU law may be considered by the Court to have direct effect. In *Römer*, for instance, the CJEU implied that the principle of non-discrimination on grounds of sexual orientation might be a general principle of EU law.[178] Another significant judicial shift in the interpretation of direct effect came with the idea that direct effect could even apply in areas where Member States possess discretion,[179] for example, citizenship policy. In the Court of Justice's reasoning, direct effect and supremacy "do not release Member States from their obligation to remove from their domestic legal order any provisions incompatible with Community law,"[180] because the maintenance of such provisions might create a state of uncertainty among persons concerned about the ways they can or cannot rely on Community law.[181]

2.2 The principle of non-discrimination

Article 4(3) TEU defines the principle of loyalty, which must be applied even in policy areas that belong to Member State competence, or in areas regulated by Member States in the absence of complete harmonization in the field. A good example for this is citizenship policy, which is a policy area belonging to Member State competence, but the principle of loyalty should be, as suggested by both academic literature and CJEU case law, observed in that policy area as well (see Chapter VII). The same applies in the case when Member States are entitled to choose

[175] Craig and De Búrca, 194.
[176] Craig and De Búrca, 195.
[177] Craig and De Búrca, 194.
[178] Craig and De Búrca, 195.
[179] Craig and De Búrca, 190.
[180] "Judgement of the Court in Case 104/86 Commission v Italy (Recovery of undue payment)" (Court of Justice of the European Union, March 24, 1998), Para. 12.
[181] Hungarian Academy of Sciences, Centre for Social Sciences, Lendület-HPOPs Research Group, "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU" (2015): 28, https://hpops.tk.mta.hu/uploads/files/TheLoyaltyPrinciple.pdf.

between various methods of implementation.[182] Besides the principle of loyalty, these cases include, for example, the principles of legal certainty and non-discrimination.[183]

The principle of non-discrimination requires the equal treatment of an individual or group regardless of their particular characteristics. It is used to "assess apparently neutral criteria that may produce effects which systematically disadvantage persons possessing those characteristics."[184] What makes non-discrimination interesting from the perspective of this thesis is the fact that it is understood and applied both as a principle and as law. After uncertainties arose regarding its applicability beyond common market objectives relating to employment and industrial relations, this uncertainty was remedied by the insertion of a new Article into the Treaty of Amsterdam, which outlined that "the Council may take appropriate action to combat discrimination …." The case of loyalty is similar in the sense that it can also be seen as a principle and law at the same time. All the cases mentioned above, which refer to loyalty when regulating Member State conduct, suggest that loyalty should be observed by Member States as a legal obligation.

3. Theoretical aspects - principles or values

When looking at the normativity of the EU the rules of behavior of the Member States are defined by constitutional values and principles. They seem to be distinct rules governing membership in the EU, but they might not be so in reality. Legal and political scholarship is divided on the meaning of values and principles and whether these concepts have overlapping aspects. Von Bogdandy defines founding principles as "those norms of primary law which, in view of the need to legitimize the exercise of any public authority, determine the general legitimatory foundations of the EU."[185] Although the concepts examined in this study are not referred to as 'founding' but 'constitutional' principles, this definition applies to them as well. This definition separates principles from values, the latter being the expression of "ethical convictions of EU citizens."[186] In this sense, EU membership is subject to observing values and principles, the nature and consequences of which are different. The Treaty of Lisbon is often

[182] "Judgement of the Court (Sixth Chamber) 20 June 2002 in-Case C-313/99 Mulligan and Others" (Court of Justice of the European Union, June 20, 2002).
[183] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 18.
[184] "Non-Discrimination Principle," Eurofound, May 4, 2011, https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/non-discrimination-principle.
[185] von Bogdandy, "Founding Principles of EU Law A Theoretical and Doctrinal Sketch," 36.
[186] von Bogdandy, 46.

condemned for presenting the funding principles as values and because the Treaty expresses uncertainties concerning the identification of European founding principles.[187]

Although the Treaties refer to values in Article 2, these values can be regarded as principles too, because they have legal consequences. Accordingly, they can influence the objectives of the EU and their abandonment can be sanctioned.[188] In particular, the EU now has a method for making Member States abide EU values and sanctioning those who violate Article 2 in the form of the Article 7 procedure or the so-called 'rule of law mechanism' conducted by the European Commission.[189]

Based on Habermas's view, the main difference between values and principles is that the former are teleological guidelines, expressing divided preferences and recommending normative guidelines to be followed. Meanwhile, principles are legal norms possessing a deontological character, thus they command a certain kind of behavior and create the basis of the legal order.[190] Thus, values are identity-creators whereas principles are the regulators of the politico-legal system. According to a different definition, values possess a more indeterminate configuration, whereas legal principles have a more defined structure which "makes them more suitable for the creation of legal rules through judicial adjudication."[191] I argue that in the context of Member State behavior regulation, there is no need to draw a clear distinction between the concepts of principle and value, because the principles examined in the next pages (loyalty, mutual trust and solidarity) can be considered to be both. On the one hand, they should be regarded as regulators of Member State political and legal behavior, but on the other they can be seen as teleological, identity-creating preferences or guidelines. Another significant question related to the definition of these guiding rules of European integration is whether these values have normative meaning as well. According to Ian Manners, the EU promotes a series of normative principles that are universally applicable and are generally acknowledged by other international organizations as well.[192]

[187] von Bogdandy, 50; Laurent Pech, "'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law," *European Constitutional Law Review* 6, no. 03 (October 2010): 366, https://doi.org/10.1017/S1574019610300034.
[188] Nóra Chronowski, "Szolidaritási Jogok Az Európai Unióban És Magyarorszagon," *Jura A Pécsi Tudományegyetem Állam- És Jogtudományi Karának Tudomanyos Lapja*, no. 2 (2011): 24.
[189] This procedure will be presented more in detail in connection with Hungary in Chapter 4.
[190] Chronowski, "Szolidaritási Jogok Az Európai Unióban És Magyarorszagon," 32, note 2.
[191] Pech, "'A Union Founded on the Rule of Law,'" 366.
[192] Ian Manners, "The Normative Ethics of the European Union," *International Affairs (Royal Institute of International Affairs 1944-)*, 84, no. 1 (January 2008): 46.

4. Defining EU constitutional principles

4.1 Loyalty

The loyalty principle is laid down in Article 4(3) TEU. This obligation establishes a sense of loyalty and mutual cooperation, which in principle should prevent Member States from acting autonomously, against the interest of the community. "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."[193] Marcus Klamert argues that "loyalty has developed to become a central principle to prevent and resolve conflicts in the EU, constituting the missing link between rules of competence and supremacy."[194] According to Klamert, this principle entails that unilateral Member State acts that would jeopardize the balance of obligations and rights between EU countries would undermine the mutual trust that the EU is built on.[195]

Loyalty in scholarly discussion is seen to be applied to protect a wide range of interests in the EU: Member States and institutions alike. Moreover, it creates mutual duties of sincere cooperation among the different actors.[196] Loyalty as defined by Article 4(3) TEU can be considered a general constitutional principle because it applies to the whole of the Union (except for the Common Foreign and Security Policy, as it will be discussed later).[197] Klamert claims that loyalty can be applied both along a vertical and horizontal vector. Its horizontal application creates obligations between Member states, while its vertical understanding refers to obligations between EU Member States and institutions.[198] In the CJEU's interpretation, Article 4(3) TEU should ensure that the EU fulfils its main task: organizing the relations between the Member States and between their peoples in a consistent way and respecting

[193] "Consolidated Version of the Treaty on European Union," 326/18.
[194] Marcus Klamert, *The Principle of Loyalty in EU Law*, First edition, Oxford Studies in European Law (Oxford, United Kingdom: Oxford University Press, 2014), 298.
[195] Klamert, 40.
[196] Klamert, 11.
[197] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 3.
[198] Klamert, *The Principle of Loyalty in EU Law*, 22–25.

solidarity. This principle is also linked to the rule of law as it regulates the relations between the Member States and the EU institutions under the EU's legal framework.[199]

This principle is very often referred to as good faith, or the "notion of sincere cooperation" and is closely related to the principle of solidarity.[200] Moreover, loyalty can also be defined as a specific ramification of the international law principle which outlines that treaties should be interpreted in good faith.[201] Klamert makes a distinction between loyalty and solidarity based on the argumentation that solidarity is non-binding and political, whereas loyalty is binding and should be understood in legal terms.[202]

Loyalty is not only a constitutional principle, but it also includes some of the most significant principles of EU law. Several fundamental rules of the EU legal system originate in Article 4(3) TEU, such as effective remedies for breach of EU law rules granted by national courts, the direct effects of directives, the doctrine of exclusive implied treaty-making powers of the EU and the legal duties imposed on the EU institutions to cooperate with each other, as well as with the relevant institutions of Member States.[203] The jurisprudence of the CJEU also adorns the principle of loyalty with roles of a 'legal umbrella' for concrete obligations addressed to different Member State authorities: parliaments, governments, courts and administrative authorities. Loyalty in this sense has substantive and procedural aspects as well. It can demand from the Member States the achievement of the substantive results laid down in a directive from Member States as well as require them to follow certain procedural elements. The latter aspect applies when Member States act independently under the scope of EU law either in the domestic or in the international policy arena.[204]

When it comes to Member States, the principle of loyalty has a 'freezing effect' considering their legislative and administrative discretion. This freezing effect refers to obligations of abstention and the pre-emption of certain Member State conduct. Member States, for instance, cannot regulate and administer completely autonomously their domestic policies in areas where

[199] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 3.
[200] Klamert, *The Principle of Loyalty in EU Law*, 31.
[201] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 3.
[202] Klamert, *The Principle of Loyalty in EU Law*, 35.
[203] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 4.
[204] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 4.

Union law applies.[205] Member State 'judicial authorities' especially have to meet the obligations incorporated in the principle of loyalty. National courts are obliged to participate in the EU judicial system in a way that they ensure the application and respect of EU law in the national legal systems. Moreover, they must cooperate with the EU institutions in the enforcement of EU law. National courts are also bound to give effect to EU obligations by applying and interpreting national law in a way that the effectiveness of EU law is ensured, and the necessary national remedies are provided in procedural circumstances. These remedies cannot, however, discriminate between claims made under domestic and EU law and should ensure the exercising of rights derived from EU law. All in all, when it comes to the obligations of national courts, the principle of loyalty needs to be interpreted together with the recognition of Member State autonomy and discretion in EU law.[206]

The principle of loyalty, especially if understood in connection with solidarity, thus expects cooperative behavior from Member States, which is meant to serve the interests of the EU as a whole. The principle of loyalty is also mentioned in Article 24(3) TEU, in connection with the EU's external policy: "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council and the High Representative shall ensure compliance with these principles." It is apparent from comparing Article 4(3) and 24(3) that the EU's ability to control obeying Article 24(3) is more straightforward, due to the fact that it refers to only one policy area, and also because the actors responsible for controlling the observation of this principle are specifically mentioned in the Treaty. In practice, Article 24(3) is invoked by Council decisions or EP resolutions because the CJEU has no jurisdiction in foreign and security policy, and Member States can be sanctioned if they fail to observe the principle of loyalty in foreign policy. In the case of Article 4(3), the procedure of making Member States observe the loyalty principle is less straightforward, as it is not laid down in the treaties. Therefore, it is up to the CJEU to determine when Member States breach this principle.

[205] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 5.
[206] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 5.

4.2 Mutual trust

Generally, the principle of mutual trust means that "one Member State can be confident that other Member States respect and ensure an equivalent level of certain common values," especially those enshrined in Article 2 TEU.[207] At the same time, a certain "degree of difference" is also permitted by this principle.[208] In practice, this means that "Member States may make different choices, but also that they must be able to trust each other because they share common values."[209] Accordingly, they should be able to presume that these values have been observed by other Member States. Although the principle of mutual trust is not mentioned explicitly in the Treaties, it has become an integral part of EU law in recent years. Although it has already appeared in the 1970s (*Bauhuis*), it became an important subject matter of the CJEU case law and the legal scholarly literature in the past few years.[210] In Opinion 2/13 on the Accession of the EU to the ECHR, the Court stressed that the principle of mutual trust between Member States is of essential importance in EU law from the perspective of creating an area without internal borders.[211] It is important to note that this principle does not have legal effects of its own, but it is applied together with secondary EU law and its measures.[212] Similarly to solidarity, it applies horizontally among Member States. Although the principle mainly appears in the context of the Area of Freedom, Security and Justice (and it gained special importance in cases related to the European Asylum System or the European Arrest Warrant),[213] it has the potential to stretch to other areas as well, such as the operation of the internal market.[214]

Prechal argues that the mutual trust principle is closely linked to several constitutional principles of the EU, such as proportionality, effectiveness, or the principle of loyal cooperation.[215] This is why she argues that although mutual trust guides the interpretation of secondary EU law for the time being, it may play a much more independent role in the future.[216] In fact, the principle of mutual trust can be considered to be part of a broader principle of

[207] Sacha Prechal, "Mutual Trust Before the Court of Justice of the European Union," *European Papers* 2, no. 1 (2017): 81, https://doi.org/10.15166/2499-8249/139.
[208] Prechal, 84.
[209] Koen Lenaerts and Wójcik, Anna, "Judges Should Be Fully Insulated from Any Sort of Pressure," *Verfassungsblog*, January 30, 2020, https://verfassungsblog.de/judges-should-be-fully-insulated-from-any-sort-of-pressure/.
[210] Prechal, "Mutual Trust Before the Court of Justice of the European Union," 78.
[211] "Opinion 2/13 of the Court (Full Court) of 18 December 2014," December 18, 2014, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002.
[212] Prechal, "Mutual Trust Before the Court of Justice of the European Union," 79.
[213] Prechal, 80.
[214] Prechal, 78.
[215] Prechal, 79.
[216] Prechal, 81.

loyalty.[217] When it comes to understanding loyalty not only between Member States and the EU, but also between different Member States' national authorities, loyal cooperation becomes mutual cooperation, which cannot function without mutual trust. As loyalty has become one of the most important principles of the system of EU law, it is not hard to imagine that mutual trust, as an integral part of loyal cooperation, would be more firmly embedded in the system of EU law in the foreseeable future.[218] In fact, the principle of sincere cooperation enshrined in Article 4(3) TEU also entails the principle of mutual trust, as it is demonstrated by several CJEU judgements.[219]

4.3 Solidarity

In the majority of the cases, solidarity as a general concept analyzed in EU-related research appears in the context of European social policy.[220] Moreover, it is usually understood as a binding force between individuals, or it refers to the duty of the European Union to protect its citizens. The free movement of people or workers' rights within the European Union are those territories where solidarity appears in many different constellations.[221] In addition, solidarity also has a humanitarian aspect in relation to the EU's duty to protect citizens or groups of people in its partner countries. Recently, this principle has appeared in an economic and financial context, due to the world financial and Eurozone crises, more precisely the bailout provided to countries in need. With the emergence of the European Monetary Union, solidarity among Member States, especially those being members of the currency union, have strengthened to a certain extent and have been institutionalized (e.g. EFSF, ESM).[222] Solidarity can be understood

[217] Prechal, 92.
[218] Prechal, 92.
[219] See for example: "Judgement of the Court in Case C-359/16 Criminal Proceedings against Ömer Altun and Others" (Court of Justice of the European Union, February 6, 2018), Para. 40.; "Judgement of the Court in Joined Cases C-370/17 and C-37/18, Caisse de Retraite Du Personnel Navigant Professionnel de l'aéronautique Civile (CRPNPAC) v Vueling Airlines SA, and Vueling Airlines SA v Jean-Luc Poignant" (Court of Justice of the European Union, April 2, 2020), Para. 62.; "Judgement of the Court in Case C-17/19 Criminal Proceedings against Bouygues Travaux Publics and Others." (Court of Justice of the European Union, May 14, 2020), Para. 40.
[220] J.-C. Barbier and F. Colomb, "The Janus Faces of European Policy," *Transfer: European Review of Labour and Research* 20, no. 1 (February 1, 2014): 23–36, https://doi.org/10.1177/1024258913515144; Stefano Giubboni, "Free Movement of Persons and European Solidarity," *European Law Journal* 13, no. 3 (May 2007): 360–379; John Erik Fossum, "The European Union: In Search of an Identity," *European Journal of Political Theory* 2, no. 3 (July 1, 2003): 319–340, https://doi.org/10.1177/1474885103002003005; Andrea Sangiovanni, "Solidarity in the European Union," *Oxford Journal of Legal Studies* 33, no. 2 (June 1, 2013): 213–241, https://doi.org/10.1093/ojls/gqs033; Manners, "The Normative Ethics of the European Union."
[221] Lisa Waddington, "The Expanding Role of the Equality Principle in European Union Law" (Robert Schuman Centre for Advanced Studies, October 2003): 1-29; Giubboni, "Free Movement of Persons and European Solidarity"; Sangiovanni, "Solidarity in the European Union."
[222] Vestert Borger, "How the Debt Crisis Exposes the Development of Solidarity in the Euro Area," *European Constitutional Law Review* 9, no. 01 (February 2013): 7–36, https://doi.org/10.1017/S1574019612001022.

as a normative principle of EU membership not only due to the commitments it creates among individuals, but also due to the fact that it creates a horizontal obligation among Member States to help each other in observing EU law.

As solidarity can appear in various forms, it might be useful to go through its different manifestations in scholarly discussions. Borger differentiates between factual and normative solidarity, with the former referring to a certain kind of interdependence between actors, while the latter being directed towards the achievement of a common good. He also describes negative solidarity, which is based on behavior that relates either to the self or the "other."[223] A difference can also be made between political, social and supranational solidarity, of which the latter is the most relevant in the EU context.[224] Sangiovanni calls for the development of solidarity in three main contexts in the EU: national, Member State and transnational solidarity. He calls this full account of solidarity in the EU reciprocity-based internationalism, which is based on a solidarity built upon the mutual production of collective goods by EU actors at all levels.[225] In his article discussing the normative ethics of the EU, Ian Manners mentions intergenerational, interstate and labor solidarity as different manifestations of the concept in the EU. Of these distinct "types" of solidarity appearing in the European Union, solidarity among Member States and solidarity between Member States and EU institutions are the most interesting dimensions for this thesis.[226]

The principles of loyalty, solidarity and mutual trust represent the collective nature of the EU in the Treaties: they should be followed by Member States in order for the collective system to function properly. *The constitutional principles described above suggest avoiding particularism because pursing national preferences by the Member States undermines the Union interests, and it also jeopardizes the interests of other Member States*, even the interests of the rogue Member State. I argue that particularism and the constant insistence on sovereignty are usually based on a misperception, which is centered on the assumption that the collective system exploits and suppresses members of the community. Particularism contradicts the rationale for European cooperation, and it recreates the problems and conflicts of unilateralism, which the Member States had wanted to avoid by signing up to the Treaties. Due to the high level of interdependence among Member States of the EU, one country's particularist behavior

[223] Borger.
[224] Nóra Chronowski, "A Szolidaritás Az Alkotmányi Étékek Között," *Studia Iuridica Auctoritate Universitatis Pécs*, 2010, 19–35.
[225] Sangiovanni, "Solidarity in the European Union."
[226] Manners, "The Normative Ethics of the European Union"; Sangiovanni, "Solidarity in the European Union."

might lead to another country acting unilaterally, which could cause a downward spiral of unilateralism and would endanger achieving common goals, and at the end it would endanger the functioning of the EU as a whole.

However, when it comes to pursuing national preferences and political interests, EU norms and principles might appear as burdens for Member States. To a certain extent, the role of the EU's normativity is to constrain autonomous and unilateral Member State behavior and to coordinate the national level of policy-making. However, as it will be further elaborated in Chapter V, VI and VII, some Member State actions cannot really be controlled by EU law. These are mainly the symbolic, rogue actions of countries, the regulation of which falls outside of the scope of the EU. Hungary's EU strategy is a perfect example for these two sides of EU membership. Some elements of Hungary's policy towards the EU are driven by political or economic interests, while others cannot be explained based on simple cost-benefit calculations. Instead, they are driven by the insistence on national sovereignty. Even though the EU has been trying to address this latter type of state conduct, for example by its rule of law mechanism, or Article 7 procedure, it has not been effective so far in its attempt. This is where the EU's normative deficit lies.

5. Core Member State obligations in the jurisprudence of the CJEU

5.1 The principle of loyalty in the CJEU case law

Loyalty as a principle of the normative dimension of EU membership has many aspects. Generally, it requires Member States to take all measures necessary to guarantee the application and effectiveness of EU law.[227] In its earlier formulations, Article 4(3) TEU obliges Member States to take necessary measures to ensure the fulfilment of the obligations stemming from the Treaties in order to facilitate the achievement of the Union's tasks and also to abstain from any measure that would jeopardize the achievement of the objectives of the Treaties.[228] This

[227] "Judgement of the Court in Case C-354/99 Commission v Ireland" (Court of Justice of the European Union, October 18, 2001), Para 46.

[228] "Judgement of the Court in Case 85/85 Commission v Belgium" (Court of Justice of the European Union March 18, 1986), Para. 22.; "Judgment of the Court in Case 22-70 Commission v Council - ERTA" (Court of Justice of the European Union, March 31, 1971), Para. 21.; "Opinion 1/03 [2006] ECR I-0000" (Court of Justice of the European Union, 2006), Para. 119.; These components may find expression in individual Treaty provisions or in provisions of secondary law requiring the fulfilment of EU obligations or abstention from jeopardising the fulfilment of Treaty objectives. "Judgement of the Court in Case 195/90 Commission v Germany (Heavy goods vehicles)" (Court of Justice of the European Union, May 19, 1992), Paras. 36–37.; "Judgement of the Court in Case C-304/02 Commission S v France (Fisheries)," July 12, 2005; "Judgement of the Court in Case C-105/2 Commission v Germany (TIR)" (Court of Justice of the European Union, March 21, 2002), Para. 98.; "Judgement of the Court in Case 274/83 Commision v Italy (Public works contracts)" (Court of Justice of the European Union, March 28, 1985), Para. 42.

means, in particular, that the authorities of the Member State must take the general or particular measures necessary to ensure that EU law is complied with within that state.[229] This obligation, which has been reinforced by more recent case law as well,[230] applies to all the authorities of the Member States, including the administrative and judicial bodies,[231] or criminal prosecution authorities.[232] In this context, Member States are allowed, however, to choose measures that they consider as appropriate, including the imposition of sanctions that may even be criminal in nature.[233] In other words, Member States and all national authorities have a duty to take whatever action is necessary to make the legal system of the EU work in the way that it is objectively intended to work, and a corresponding duty to avoid any action that would interfere with this working.[234] In addition, Member States are required to eliminate the unlawful consequences of a breach of EU law, meaning that the competent national authorities must take all necessary measures, within their sphere of competence, to remedy the failure previously carried out by a national authority.[235]

The principle of sincere cooperation does not only regulate the relationship among Member States and between Member States and EU institutions,[236] but it also affects individuals. Article 4(3) TEU creates an obligation for the courts of the Member States to ensure legal protection of an individual's rights under EU law.[237] The loyalty principle demands that "the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favorable than those governing similar domestic actions (principle of equivalence)

[229] See for example: "Judgement of the Court in Case C-495/00 Azienda Agricola Giorgio, Giovanni e Luciano Visentin and Others v AIMA" (Court of Justice of the European Union, March 25, 2004), Para. 39.; "Judgement of the Court in Case C-518/11 UPC Nederland BV v Gemeente Hilversum-" (Court of Justice of the European Union, November 7, 2013), Para. 59.
[230] "Judgment of the Court in Case C-370/12 Thomas Pringle v Government of Ireland and Others." (Court of Justice of the European Union, November 26, 2012), Para. 148.
[231] "Judgement of the Court in Case C-249/11 Hristo Byankov v Glaven Sekretar Na Ministerstvo Na Vatreshnite Raboti" (Court of Justice of the European Union, October 4, 2012), Para. 64.
[232] "Judgement of the Court in Case C-336/14 Crikinal Proceedings against Sebat Ince" (Court of Justice of the European Union, February 4, 2016), Para. 64.
[233] "Judgement of the Court in Case C-495/00 Azienda Agricola Giorgio, Giovanni e Luciano Visentin and Others v AIMA," Para. 32.
[234] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 8.
[235] "Judgment of the Court in Case C-24/19 A and Others v Gewestelijke Stedenbouwkundige Ambtenaar van Het Departement Ruimte Vlaanderen, Afdeling Oost-Vlaanderen." (Court of Justice of the European Union, June 25, 2020), Para. 83.
[236] "Judgment of the Court in Case C-677/18 Amoena Ltd v Commissioners for Her Majesty's Revenue and Customs." (Court of Justice of the European Union, December 19, 2019), Para. 55.
[237] ; "Judgment of the Court in Case C-404/13 The Queen, on the Application of: ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs." (Court of Justice of the European Union, November 19, 2014), Para. 52.; "Judgment of the Court in Case C-785/18 GAEC Jeanningros v Institut National de l'origine et de La Qualité (INAO) and Others." (Court of Justice of the European Union, January 29, 2020), Para. 32.

and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness)."[238]

Under Article 4(3) TEU, it is the responsibility of the Member State to recognize the consequences of its adherence to the Union in its internal order and, if necessary, to adapt its procedures for budgetary provisions in a way that they do not form an obstacle to the implementation of the obligations within the prescribed time-limits and the framework of the Treaties.[239] Basically, the Member States are prevented from relying on a particular way of regulating and administering domestic affairs or on the administrative difficulties and burdens of meeting EU obligations to justify violations of EU law.[240] Regarding the implementation of EU directives by the Member States, the principle holds that Member States are free to choose the means of implementation. However, this freedom does not cancel out the obligation of Member States to adopt all measures necessary in their national legal systems to ensure that the directive is fully effective, in accordance with the pursued objective.[241]

The principle of loyalty, read together with the Treaty provisions on fundamental economic freedoms, might lead to a breach of EU law. This can happen if a Member State fails to take action or to adopt appropriate measures to deal with actions by individuals on its territory that may jeopardize the free movement within the Union.[242] In other words, when the Treaty provisions on fundamental economic freedoms are read together with Article 4(3) TEU, the Member States are obliged to take "all necessary and appropriate measures"[243] to make sure that the fundamental freedoms are respected on their territory.[244]

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[238] "Judgment of the Court in Case C-234/17 XC and Others v Generalprokuratur" (Court of Justice of the European Union, October 24, 2018), Para. 22.; "Judgment of the Court in Case C-425/16 Hansruedi Raimund v Michaela Aigner." (Court of Justice of the European Union, October 19, 2017), Para. 41.
[239] "Judgement of the Court in Case 30/72 Commission v Italy (Premiums for grubbing fruit trees)" (Court of Justice of the European Union, February 8, 1973), Para. 11.
[240] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 8.
[241] "Judgement of the Court in Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen" (Court of Justice of the European Union, April 10, 1984), Para. 15.; "Judgment of the Court in Case C-341/94 Criminal proceedings against André Allain and Steel Trading France SARL" (Court of Justice of the European Union, September 26, 1996), Para. 23.; "Judgment of the Court in Case C-329/11 Alexandre Achughbabian v Préfet Du Val-de-Marne" (Court of Justice of the European Union, December 6, 2011), Para 43.; "Judgment of the Court in Case C-611/14 Criminal Proceedings against Canal Digital Danmark A/S." (Court of Justice of the European Union, October 26, 2016), Para. 30.
[242] "Judgement of the Court in Case C-265/95 Commission v France (Trade barriers)" (Court of Justice of the European Union, December 9, 1997), Para. 39.
[243] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 10.
[244] "Judgement of the Court in Case C-265/95 Commission v France (Trade barriers)," Paras. 30-35.

Article 4(3) TEU may serve as the basis of some form of solidarity among the Member States. This solidarity may serve as the basis of their obligations and prevents the adoption of unilateral measures by the Member States in breach of the Treaties.[245] The early jurisprudence spoke about a duty of solidarity, which was accepted by the fact of the accession to the EU and which "strikes at the fundamental basis of the Community legal order," making a principled link between the advantages of EU membership and the obligation to respect EU law.[246] This duty prevents a Member State from unilaterally breaking the "equilibrium between advantages and obligations flowing from its adherence to the Community" "according to its own conception of the national interest." This act would bring into question the equality of Member States before EU law and create discrimination "at the expense of the nationals, and above all of the nationals of the State itself which places itself outside the Community rules."[247] It is unclear whether solidarity so understood would provide a standalone constitutional basis for Member State obligations distinct from the principle of loyalty.[248] The principle of sincere cooperation, more precisely the first subparagraph of Article 4(3) TEU, also obliges Member States to ensure, in their respective territories, the application of and respect for EU law.[249]

"A failure to fulfil specific obligations under a directive, or under any other source of EU law, can consume the breach of Article 4(3) TEU,"[250] unless there is a "distinct failure" (or "specific failure")[251] to observe the principle of loyalty.[252] In fact, loyalty has been held to be subsidiary to more specific Treaty provisions on the ground that its wording is "so general that there can be no question of applying" it "independently when the situation concerned is governed by a

[245] "Judgment of the Court in Joint Cases 6 and 11-69 Commission v France" (Court of Justice of the European Union, December 10, 1969), Para. 16.
[246] "Judgement of the Court in Case 39-72 Commission v Italy (Premiums for slaughtering cows)" (Court of Justice of the European Union, February 7, 1973), Paras. 24–25.
[247] "Judgement of the Court in Case 39-72 Commission v Italy (Premiums for slaughtering cows)," Para. 24.
[248] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 9.
[249] "Judgement of the Court in Case C-64/16 Associação Sindical Dos Juízes Portugueses v Tribunal de Contas" (Court of Justice of the European Union, February 27, 2018).
[250] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 13.
[251] E.g. failure to cooperate in the infringement procedure.
[252] "Judgement of the Court in Case 195/90 Commission v Germany (Heavy goods vehicles)," Para. 38.48; "Judgement of the Court in Case C-48/89 Commission v Italy (Non-fulfiment)" (Court of Justice of the European Union, June 14, 1990), Para. 13.; "Judgement of the Court in Case C-374/89 Commission v Belgium (Directive 76/491/EEC and Artcile 5 of the EEC Treaty)" (Court of Justice of the European Union, February 19, 1991); "Judgement of the Court in Case C-35/88 Commission v Greece (Market in feed grain)" (Court of Justice of the European Union, July 12, 1990), Para. 43.

specific provision of the Treaty."[253] Moreover, loyalty was considered sufficient to interpret a specific provision of the Treaties alone "to provide the referring court with the reply that it needs."[254] The general duty of loyalty under Article 4(3) TEU has a specific expression in the obligation in ex Article 292 EC (now Article 344 TFEU) [255] to have recourse to the EU judicial system and to respect the exclusive jurisdiction of the Court of Justice.[256]

It is important to note that "the principle of loyalty applies when there is another rule of law or policy which defines the objective, but it does not apply when there is a specific rule dealing with the issue in the case concerned."[257] In *C-60/13 Commission v United Kingdom* regarding the infringement of Article 4(3) TEU, the Court held that "there are no grounds for holding that the United Kingdom has failed to fulfil the general obligations under that provision, which is separate from the established failure to fulfil the more specific obligations incumbent upon that Member State under the provisions referred to in the preceding paragraph."[258] In this case,[259] the Court found that the UK failed to fulfil its obligations under several articles, but not 4(3) TEU.[260] On the other hand, in two related infringement procedures,[261] the Court ruled that the Member States concerned failed to fulfill their obligations under Article 4(3) TEU because they did not ensure that the authorities of their Overseas Countries and Territories complied with EU law. The judgements confirm that the Commission can rely on the infringement procedure against Member States for a legal non-compliance that considers the loss of EU revenue. The legal basis for this is the breach of Article 4(3) TEU, just as it was the case in Brasserie du

[253] "Judgement of the Court in Joined Cases C-78/90 to C-83/90 Compagnie commerciale de l'Ouest and Others and Receveur principal des douanes de La Pallice Port" (Court of Justice of the European Union, March 11, 1992), Para. 19.; "Judgement of the Court in Case C-381/93 Commission v France (Freedom to provide services)" (Court of Justice of the European Union, October 5, 1994), Para. 18.
[254] "Judgement of the Court in Case C-31/00 Conseil National de l'Ordre des Architectes and Nicolas Dreessen" (Court of Justice of the European Union, January 22, 2002), Para. 30.
[255] "Judgement of the Court in Case C-459/03 Commission v Ireland (MOX plant)" (Court of Justice of the European Union, May 30, 2006), Para. 169.
[256] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 13.
[257] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 4.
[258] "Judgement of the Court in Case C-60/13 European Commission v. United Kingdom of Great Britain and Northern Ireland" (Court of Justice of the European Union, April 3, 2014), Para. 13.
[259] See also, by analogy, "Judgement of the Court in Case C-392/02 Commission v Denmark" (Court of Justice of the European Union, November 15, 2005), Para. 69.; "Judgement of the Coourt in Case C-19/05 Commisison v Denmark" (Court of Justice of the European Union, October 18, 2007), Para 36.; "Judgement of the Court in Case C-334/08 Commission v Italy" (Court of Justice of the European Union, July 8, 2010), Para 75.
[260] Article 8 of Decision 2000/597 and Articles 2, 6, 9, 10 and 11 of Regulation No 1150/2000.
[261] "Judgement of the Court in Case C-391/17 European Commission v The United Kingdom of Great Britain and Northern Ireland" (Court of Justice of the European Union, October 31, 2019); "Judgement of the Court in Case C-395/17 European Commission v Kingdom of the Netherlands" (Court of Justice of the European Union, October 31, 2019).

Pêcheur and *Factortame*,[262] in which the Court's judgement also relied on the principle of sincere cooperation to interpret individuals' damages actions against Member States as a breach of EU law.[263]

Regarding the direct applicability of EU measures, the Member States are obliged not to obstruct the direct applicability (direct effect) of regulations and other rules of EU law.[264] Compliance with the principle of direct effect is "an indispensable condition of simultaneous and uniform application" of regulations throughout the EU.[265] Thus, Member States cannot take any measures that might create exemptions from an EU regulation or affect an EU regulation adversely.[266] This also means that both the express provisions of an EU regulation and its aims and objectives must be taken into account.[267]

Regarding the potential reciprocal nature of the Member States' obligations and the EU institutions under Article 4(3) TEU, it was established that a breach by the EU institutions of Article 4(3) TEU "cannot entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty, in breach of that State's obligations" which may arise, among others, under Article 4(3).[268] As a result, a Member State may not unilaterally[269] adopt corrective or protective measures designed to avoid any breach by an institution of rules of EU law .[270]

Last but not least, in the case of the accession of a new Member State, the territorial extension of a common policy "constitutes a new material fact which does not have the effect of releasing Member States from their obligation to take all appropriate measures for guaranteeing the

[262] "Judgment of the Court in Joined Cases C-46/93 and C-48/93 Brasserie Du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, Ex Parte: Factortame Ltd and Others" (Court of Justice of the European Union, March 5, 1996).
[263] Daniel Sarmiento, "Can the EU Launch a Damages Action Against a Member State Using the Infringement Procedure? A Comment on Commission/UK and Commission/The Netherlands." *The EU Law Live Blog*, November 2019, https://eulawlive.com/blog/2019/11/04/can-the-eu-launch-a-damages-action-against-a-member-state-using-the-infringement-procedure-a-comment-on-commission-uk-and-commission-the-netherlands/.
[264] "Judgment of the Court in Case 50-76 Amsterdam Bulb BV v Produktschap voor Siergewassen" (Court of Justice of the European Union, February 2, 1977), Para. 5.
[265] "Judgment of the Court in Case 50-76 Amsterdam Bulb BV v Produktschap voor Siergewassen," Para. 6.
[266] "Judgment of the Court in Case 50-76 Amsterdam Bulb BV v Produktschap voor Siergewassen," Para. 8.
[267] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 13.
[268] "Judgement of the Court in Case C-45/07 Commission v Greece (IMO)" (Court of Justice of the European Union, February 12, 2009), Para. 26.
[269] "Judgement of the Court in Case C-45/07 Commission v Greece (IMO)," Para. 26.
[270] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 8.

operation and efficacity of the Community law applicable at the material time."[271] This practice also applies regarding the obligation of national courts to penalize breaches of EU law[272] in cases in which the corresponding EU provisions are absent.[273]

6. Findings of the chapter

This chapter presented the normative dimension of membership in the EU that is built up by several constitutional principles, as well as values, of EU law. Supremacy, direct effect, non-discrimination are principles that define the relationship between the European Union and Member States. However, loyalty takes a step further from the vertical level and is applicable on the horizontal level as well. Mutual trust and solidarity, on the other hand, can be understood only within the relationship of one Member State with another.

When joining the European Union**,** European countries agreed to achieve common objectives in the political arena. However, these common goals can only be achieved by sticking to certain rules and regulations. Therefore, besides hardcore legal provisions, common principles also emerged in EU law that guide Member State behavior and policy-making in the EU in order to attain those common objectives for their mutual benefit. This expresses the collective nature of the EU. Specifically, it provides articulation to the idea that together EU Member States are able to achieve more benefits than separately. The decisional dimension of EU membership requires Member States to determine what they want to achieve together. However, the realization of these goals requires observing the normative aspects of membership. Moreover, Member States also subscribed to certain legal obligations, which are enforceable and can constrain politics and policy-making in the Member States in a way that is likely to work against particularist attempts. National preferences give way to Member State particularism which can be a threat to the EU's collective system that was created on a political level and based on nations having common preferences and interests. Since this collective system can only function properly if the members cooperate, individual or particularist behavior that would harm common goals is unwanted. However, the EU's normative strength is put to a test when

[271] "Judgment of the Court in Case C-341/94 Criminal proceedings against André Allain and Steel Trading France SARL," Para. 28.
[272] "Judgment of the Court in Case C-341/94 Criminal proceedings against André Allain and Steel Trading France SARL," Para. 29.
[273] "The Principle of Loyalty in EU Law: Legal Benchmarks for Member State Conduct in the EU Under Article 4(3)TEU," 9.

it comes to enforcing certain principles and preventing rogue, unilateral Member State behavior, as it will be shown in the chapters to follow.

IV. The dynamics of Hungarian policy priorities towards the European Union

1. Introduction

In the previous chapters, we identified the factors that shape membership in the EU and define national politics and policy-making towards the EU. In parallel, small Member State strategies were also discovered. In the following pages, we will examine Hungary's strategy towards the EU. The analysis will start from its accession process focusing on the attitude of the country towards European integration and the changes it enacted in its domestic legislation in order to comply with EU norms. Adopting a bottom-up approach in our analysis is essential because even if the examined Hungarian strategy has primarily domestic aims, it has an effect on the country's relations with its international partners, such as the EU. Moreover, the EU is often used as a tool or point of reference by the Hungarian government when it defines its strategic aims and policies. The fact that Hungary is a Member State of the EU indicates that its domestic actions should also be evaluated from an EU point of view. Moreover, even though Hungary's recent perceptible 'anti-EU' strategy might have started out as a rhetorical tool to influence domestic politics in 2010, it became obvious following the refugee crisis that the Hungarian strategy aspires to become influential in European politics.

This chapter will analyze Hungary's EU politics as an example of a rational, benefit-maximizing strategy from the beginning of its accession process. The chapter argues that despite the strategic shift in 2010, Hungary has been driven by its domestic preferences and by realist goals already back in the 1990s, with the main objective of becoming an EU Member State as soon as possible. Hungary's EU accession was primarily driven by domestic political interests. The country had no other choice in the 1990s if it wanted to step on the road to economic and social development. Joining the EU was the only viable survival strategy for a small European country that had just been through a regime change. The main purpose of EU accession was for Hungary to achieve social and economic convergence with the Western part of the continent. Convergence in this period had two sides: Hungary had great expectations, based on promises of EU membership, about joining the European bloc. At the same time, the country was also trying to maximize its interests during the accession process.

In order to discover the dynamics of the Hungarian EU strategy, this chapter examines the process of Hungary's European integration. I will focus on the ways Hungary changed its strategic priorities towards Europe and pursued national preferences during the country's

adaption to becoming a Member State of the European Union since the rapprochement between the country and the European Communities have started, until 2010. In order to discover the above described patterns, the following analysis will mostly rely on the foreign policy strategies of the Hungarian governments in power since the 1990s, and the most important legal and political documents issued both by the EU and Hungary. These materials are expected to provide relevant insight into the Hungary-EU dynamic before and after accession. This chapter will go through the main legal obligations Hungary had to take up in the pre-accession period, the ways the Hungarian strategic priorities appeared, and how the EU reacted to them in this legal harmonization process.

Despite the always present focus on interests, it is evident that there was shift in the Hungarian tone towards the EU in 2010, which will be presented in the next chapter. There was a visible change in the narrative and strategy of the Hungarian government, which was in contrast with the previously pro-European, even conformist EU policy of the country. One of the reasons behind this shift can be the fact that during the accession process Hungary had largely been constrained and at the same time motivated by the EU's pre-accession conditionality. As Losoncz argues, Hungary's EU membership can be divided into 2 phases. The first one lasted until 2010. This period was characterized by the fact that the governments in power until 2010 considered the EU legal and political framework to be given and tried to maneuver within it, adjusting the economic policy of the country to this framework.[274] In the second phase, the new government started to adapt its own rule of law and democracy interpretation, putting its own political priorities into the forefront, and started to put a huge emphasis of national sovereignty – again, according to its own interpretation.[275]

This might also be one of the reasons why a few years after accession Hungary could shift towards a strategy in which national preferences gained focus. This strategy turned out to be conflict-seeking, taking advantage of the leeway permitted by EU law for the Member States to act rogue, maximizing their own interests, potentially disregarding EU principles and values. Out of the small state strategies explored in the previous chapter, Hungary adapted policy expertise during its accession process, thus making it the top contender for accession among the Central Eastern European countries. However, after accession, the country turned towards other strategies, such as creating a unified national position (Kronsell) and creating coalitions

[274] Miklós Losoncz, "Magyarország Tíz Éve Az EU-Ban – Mekkora Volt a Mozgástér?," *Közgazdasági Szemle* LXI. (April 2014): 490.
[275] Losoncz, 491.

or partnerships (Börzel, Panke, Wivel) in order to exert influence on EU matters. Moreover, the government's ambitions in the region and in the world also affected the Hungarian EU strategy, making it more pro-active, but sometimes even rogue, stepping out of the frame of small state characteristics. Hungary turned into one of the most widely criticized Member States from the perspective of EU values and principles across Europe.

The chapter will start with presenting the period before the regime change in Hungary. It will then continue by analyzing the main manifestations of the accession strategy during the different governments in power since 1990. The public attention and attitude towards the EU from Hungary and the accession process itself will also be analyzed. Then the chapter will continue with discussing the post-accession period, focusing on the alterations in the government strategies towards the EU until 2010, the year in which the second Orbán-government came to power. The aim of the current chapter is to demonstrate that *despite the shift in 2010 in Hungarian rhetoric, which inaugurated a more realist and sovereignty-oriented approach towards the EU, this change is not completely new, as the pursuit of national interest and sovereignty have been essential parts of Hungary's strategy towards the EU since the beginning of the country's relations with the EU*. This chapter will demonstrate that the national preferences of Hungary often got into conflict with EU accession: the country wanted to become an EU member, but it also wanted to protect its national interests and delay policy transpositions. The most salient legal and political conflicts involving Hungary since 2010 (e.g. infringement proceedings, conflicts with EU institutions etc.) and the EU will be examined in the next chapter.[276]

2. Establishing close relations with the EU - before the regime change of 1990

The post-1989 period was dominated by the national preference of an undisputable willingness and need to join the EU as soon as possible: primarily, joining the European market economy, bringing investments to the region, achieving economic growth, boosting employment, recovering and gaining position in the reformulating global economy. The country's integration and participation in European policies did not only put constraints on the Hungarian government(s), but also broadened their economic-political leeway.[277] Accession was perceived as not only bringing constraints upon the country, but also as a crucial, once-in-a-lifetime opportunity. First, the economic and trading ties between Hungary and the Common Market

[276] For the categorization of Hungary's relationship with the EU based on certain periods, see Table 1 in the Annex.
[277] Losoncz, "Magyarország Tíz Éve Az EU-Ban – Mekkora Volt a Mozgástér?," 489.

were established. Although this had been an aim since as early as 1984, this was not possible without the consent and acknowledgment of the Council for Mutual Economic Assistance (COMECON). The latter came on 25 June 1988, when the European Communities and COMECON delivered a joint declaration about establishing official relations and mutually recognizing each other. This was followed not only by creating diplomatic relations with the USSR and countries from the Soviet sphere of interest (such as the GDR, Bulgaria, Poland or Hungary), but also by bilateral agreements with certain countries. The European Communities' Agreement with Hungary on trade and commercial and economic cooperation was signed on 26 September 1988.[278] This agreement aimed at improving the access of Hungarian exports to the Community market, and it also paved the way for broad economic cooperation and investment in several areas. It corresponded with the national preference that Hungarian products should access the Western European market which would result in a capital inflow to the country. On 1 January 1990, the European Communities decided to delete special tariffs on Hungarian goods.[279]

Relevant in the formulation of Hungarian national preferences was the fact that the European Communities also launched a huge financial assistance program to initiate reforms in Hungary and Poland: the PHARE program (Poland Hungary Assistance for the Reconstruction of the Economy). The creation of this economic-financial-technical assistance tool was a result of a G7 summit held in 1989 during which the world's leading economies asked the European Commission to organize such a program for those non-EU countries that have already reached a certain level of development and reform. Throughout the 1990s, the scope of the program was broadened to include more and more countries with a long-term perspective to join the EU or at least establish partnership with it. As a result, in the period of 1990-1996, 672.8 MECU was allocated to Hungary.[280] The primary aim of the PHARE program was to provide an opportunity for these Member States to catch up with the European Communities. Moreover, this purpose was coupled with both social and economic reasons: the Communities were very much interested in creating a politically and socially stable, economically reliable Central and Eastern European area on its periphery, in order to be able to create fruitful business connections with these countries. The creation of these economic ties was perhaps even more valuable to

[278] "Operation PHARE - Poland/Hungary: Assistance for Economic Restructuring," Europa.eu, accessed January 17, 2016, http://europa.eu/rapid/press-release_DOC-89-4_en.htm.
[279] "A Magyar EU-Tagság Története," eu.kormany.hu, accessed November 1, 2015, http://eu.kormany.hu/a-magyar-eu-tagsag-tortenete.
[280] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13" (European Commission, July 15, 1997), 11, europa.eu/rapid/press-release_DOC-97-13_en.pdf.

Hungary because the country did not only want to establish diplomatic ties with the West. Its primary national preference was to achieve economic prosperity, sovereignty and development for which integrating to Europe and receiving a considerable amount of European funding meant an important help.

In line with their national preferences, the above-mentioned countries also expressed their willingness to go further than being trade and economic partners with the European Communities and conclude Association Agreements (AAs) and eventually become members of the Communities. The European Communities made clear at its December 1989 European Council meeting in Strasbourg that it was willing to create an association with Central Eastern European (CEE) countries open to economic and political reform.[281] Thus, a series of outlines were created for Association Agreements (also called as Europe Agreements) with Czechoslovakia, Hungary and Poland in 1990, which resulted in starting official negotiations with these countries.[282]

3. The transformation of the Hungarian legal and political order – after the regime change

3.1 National preferences and the Association Agreement

In the pre-accession period of Hungary, a rare and wide national unity was characteristic of Hungary in terms of its foreign policy strategy.[283] Although the first democratic elections held in 1990 brought a colorful palette of parliamentary parties to the Hungarian political scene, all of them (except for the independent smallholder party FKGP) envisioned Hungary as a part of the Western world, Europe and eventually the European Union. EC/EU membership was seen by the majority of Hungary's policy-makers as a symbol of modernization, and the chance for a prosperous, democratic Hungary.[284] It can be considered to be the national preference of a small state country – thus a small state strategy – when the small country realizes that its only option to achieve development and stability lies in joining a bigger, stronger alliance. It was a rational action by the government constrained at home by domestic societal, political and economic pressures and abroad by its strategic environment. However, it should be clarified

[281] "European Agreements with Czechoslovakia, Hungary and Poland," Europa.eu, accessed January 17, 2016, http://europa.eu/rapid/press-release_IP-91-1033_en.htm?locale=en.
[282] On 6 November 1990 Hungary also joined the Council of Europe.
[283] Péter Balázs, "Közeledés Vagy Távolodás?," *Közgazdasági Szemle* LXI., (April 2014): 350.
[284] Anna Molnár, "Ideas of Europe in Hungarian Political Discourse," in *Ideas of Europe in National Political Discourse*, ed. Cláudia Toriz Ramos, Fonti e Studi Sul Federalismo e Sull'integrazione Europea (Bologna: Il Mulino, 2011), 229–261.

that as in Hungary EU membership was seen as an ultimate political strategy or rather desire, it was not backed up by studies investigating the potential effects of EU accession on the Hungarian economy and everyday life.[285] Arguably, the disenchantment from the EU experienced in the years after the accession both from the public and the country's leadership, meant that the national preference of EU accession was not backed up by reality and rationality. It was a political and social desire, an incomplete or not fully explained preference.

The first elected government in 1990 defined its foreign policy based on three priorities: European and Atlantic ('Euro-Atlantic') integration, good relationship with the neighboring countries and the protection of national minorities. Securing Hungary's place in the institutional framework of the 'West' and defining Hungary's role in the region was the unconcealed main aim not only of the government, but the most important opposition parties as well (MSzP – Hungarian Socialist Party, SzDSz – Alliance of Free Democrats, Fidesz – Alliance of Young Democrats). This strategy manifested in approaching towards the EU and starting Hungary's NATO accession process that was completed in 1999. However, this strong Western and European orientation was coupled with a sovereignist dimension, focusing on re-gaining the country's independence after the long and troubled rule of the socialist regime.[286] Becoming a strong and sovereign state was a clear national preference after getting out of the Soviet sphere of interest. These two main goals were interrelated: Western orientation (so breaking up with the East) was needed for independence and sovereignty, and joining the West was a social and economic aspiration. At this point these objectives did not exclude each other radically: the West was believed to be able to deliver both. These strategical priorities drove Hungary to sign the Association Agreement (AA) with the European Communities in December 1991.

There were several limbs of the new foreign policy orientation of the interested countries, which reflected several national preferences. These were, for instance, commercial and economic aspects (such as setting up a free trade area). Moreover, the EU's Europe Agreements (or Association Agreements) with Czechoslovakia, Hungary and Poland aimed at creating a political dialogue and a cultural cooperation as well between the parties.[287] Other main components of the AAs in general were: creating a financial cooperation, a ten-year transitional period to establish a functioning market economy in the countries, creating the free movement

[285] Balázs, "Közeledés Vagy Távolodás?," 351.
[286] János Terényi, "1989-2009: Húsz Év a Magyar Külpolitikában," Külügyminisztérium honlapja, January 2009, http://www.mfa.gov.hu/kulkepviselet/DE/hu/20_eves_jubileum/terenyi.htm.
[287] "European Agreements with Czechoslovakia, Hungary and Poland."

of goods, workers and establishment, adapting European rules of competition and adapting national legislation to Community legislation. Perhaps these were the most important parts of the AA for Hungary, because they were the key to economic development and closing the gap between the West and CEE, thus achieving these – mainly economic - goals was the main strategic interest of the country.

A significant aspect of the AAs was that "in the preamble to the agreements, the parties recognize that the ultimate objective of the associated countries is to become members of the Community, and association should help them attain this objective."[288] This was the most valuable promise of the agreements for the countries involved – as well as the expression of their national preference – which was only to be achieved if they completed a significant legal, economic, fiscal etc. transition. Another important element of the AA for Hungary, besides the prospect of membership, was the creation of a free trade area with the Communities by 2000. This was also an important national preference and was induced by measures such as the abolishment of quantitative restrictions on imports into the country, the abolition of customs duties on imports and exports as well,[289] and opening the Hungarian market for foreign investors.[290] The national preference of Hungary indicated that the country undertook an immense amount of legal obligations unilaterally in order to integrate Community law in its domestic legal system. In return, the Communities promised to provide technical assistance to Hungary for adapting to its legal and institutional system.

The Association Agreement for Hungary expressed the national preference of the country and provided a framework for the desired socio-economic transformation. It meant the possibility of integration to the European market economy in every aspect. Moreover, it also provided a window of opportunity for the country to start aspiring for EU membership. However, it should be clarified here that with the signing of the AA the goals of the parties were not entirely fixed, but we can rather talk about blueprints and models that Hungary had to follow. The country wanted to join, and the EU also had an interest in this, but at this point the latter was politically not that certain; the conditions for accession were yet to be set in EU politics. The Europe Agreement gave a significant impetus to Hungary's accession process. In 1994, a law and parliamentary decree was enacted in Hungary about the implementation of the previously

[288] "European Agreements with Czechoslovakia, Hungary and Poland."
[289] "Association Agreement between the European Communities and Their Member States and the Republic of Hungary," December 31, 1993, 6–7.
[290] "Association Agreement between the European Communities and Their Member States and the Republic of Hungary," 13.

signed Association Agreement. On 31 March 1994, Hungary handed in its formal application for EU membership which was also enforced with a decree adopted by the Hungarian Parliament.

3.2 National preferences and the road to accession

The aim of quickly getting through the accession negotiations of Hungary to the EU was the primary preference of the Hungarian political elite, mainly the government whose main responsibility was to conduct a successful accession process. However, regardless of political orientation, this was a goal shared by all major political parties, including the socialist-liberal coalition as well, which came to power in 1994. Although in their political program Gyula Horn's government promised the biggest breakthrough in the area of neighborhood policy, they focused on Hungary's EU integration as well, and paved the way for the next government to start the accession negotiations in 1998. However, the EU applied some methods to slow down the accession process of the CEE countries, as preparedness for membership, which was the EU's preference and that of the Member States within, was to be tested. There was a few-year-gap between signing the Europe Agreements and creating a concrete strategic plan for the accession of the CEE countries. In this light, suitability to be a candidate for membership was also a politically important question in the EU.

In 1993, the Copenhagen criteria were created as the general pre-requisites of accession to the Union, creating the most important benchmarks for the future applicant countries. These criteria became the cornerstones of the EU's Pre-accession Strategy for the Enlargement of the European Union, which was adopted by the Essen European Council in December 1994 and which outlined the plan of achieving membership for the 'associated' CEE countries.[291] Arguably, these terms gave a leeway for the EU in how to conduct the accession process of the CEE countries and when to close it finally. From a functional perspective, it was also understandable because these countries needed to implement immense amount of changes in their political, legal and economic systems in order to achieve the minimal convergence necessary for EU membership.

The main pre-requisites for these countries to join the EU became to achieve a certain degree of institutional stability that guarantees democracy, the existence of a viable market economy and the ability to fulfil the accession obligations, including compliance with the objectives of a

[291] "Briefing No 24 - Pre-Accession Strategy for Enlargement of the European Union," European Parliament website, June 17, 1998, http://www.europarl.europa.eu/enlargement/briefings/24a2_en.htm.

political, economic and monetary union. The national preference of the candidate countries was generally the same, which means that these pre-conditions of membership were not simple hurdles, but they were also considered milestones in achieving those developmental goals that the candidate countries were interested in.

The first stage of the pre-accession strategy for the CEE countries included events up to the Luxembourg European Council of 12-13 December 1997, such as the Europe Agreements, the White Paper on the Single Market from 1985, a structured dialogue and the PHARE program.[292] The second stage brought in the Agenda 2000, invoking a re-enforced pre-accession strategy from 1997.[293] Agenda 2000 was an important internal condition and at the same time an obstacle to accession. The EU also had to reform its internal operation and prepare for the political impact of the accession of so many new countries, which made the closing of this program before accession an important interest of the Member States.

A huge part of Agenda 2000 was consecrated for the enlargement of the EU. "Agenda 2000: For a stronger and wider Union, comprises a single complete framework offering a clear and coherent vision of the Union's future on the threshold of the 21st century. Its primary aim was to ready the Union for its greatest challenges: the reinforcement of its policies and the accession of new members, within a strict financial framework."[294] The legislative package of Agenda 2000 was conceived in December 1995 at the Madrid European Council. This comprehensive program outlined the EU's strategic priorities in its main policy areas including finance, economy and enlargement. The project was completed in 1999 resulting in a package of the four-year legislation process, which covered four main, closely related areas: the reform of the common agricultural policy, structural policy reform, the pre-accession instruments, and the new financial framework. Agenda 2000 served as a tool to reform the European Union, preparing the organization for accepting and accommodating more Member States in the future.

The most important framework for the Hungarian pre-accession process (a part of the EU's Pre-Accession Strategy) was the European Commission's White Paper (COM (95) 163) on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the

[292] "Briefing No 24 - Pre-Accession Strategy for Enlargement of the European Union."
[293] "Briefing No 24 - Pre-Accession Strategy for Enlargement of the European Union (2)," European Parliament website, June 17, 1998, http://www.europarl.europa.eu/enlargement/briefings/24a3_en.htm.
[294] "Agenda 2000: For a Stronger and Wider Union" (European Commission, 1999), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l60001.

Internal Market of the Union.[295] This was adopted with the purpose of providing "a guide to assist the associated countries in preparing themselves for operating under the requirements of the European Union's internal market." The paper was addressed to the six countries that already have had Association Agreements that time (Poland, Hungary, the Czech Republic, Slovakia, Bulgaria and Romania), and was set to apply equally to those that were then negotiating Europe Agreements with the Union.

The document highlighted the fact that "[a]lignment with the internal market is to be distinguished from accession to the Union which will involve acceptance of the *acquis communautaire* as a whole."[296] This reveals that the primary aim of the EU was to bring these countries closer to the internal market, but in order for them to be eligible for accession they will have to implement fundamental changes in their domestic legislations. Besides outlining economic convergence through the AA, strict legal prerequisites were defined for Hungary's EU accession, given that the most important condition CEE countries had to fulfil was adapting the *acquis communautaire* as a whole to their national legal system. This should not be understood only as a way of the EU to make the accession process harder. Accession was a huge challenge for the EU from the perspective of its institutions, as well as from the point of view of the individual Member States. Arguably, Hungary's national preference was the same: the economic and social goals of the time were assessed to be achievable by means of institutional convergence and their achievement was expected to be brought about by implementing the changes demanded by the EU.

Institutional alignment was clearly set as a condition of accession. The White Paper highlights that a merely formal transposition of legislation was not enough from the respective countries. Rather, implementation and enforcement of measures to ensure the functioning of the internal market were also key to success. Hungary also received technical assistance from the EU, such as the PHARE, which was expected to induce economic reforms, stimulate trade and commerce, industrial restructuring, contributing to the overall alignment with the internal market.[297] The EU's assistance was necessary for the country to be able to implement the changes demanded

[295] "European Commission's White Paper (COM (95) 163) on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union" (Commission of the European Communities, May 3, 1995), http://aei.pitt.edu/1120/1/east_enlarg_wp_COM_95_163.pdf.
[296] "European Commission's White Paper (COM (95) 163) on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union," 95.
[297] "European Commission's White Paper (COM (95) 163) on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union," 2.

by the EU itself, and arguably it was also wanted by Hungary, as quick and smooth membership was also serving its interests based on national preferences.[298]

This document formed the basis of Hungary's 5-year legal harmonization program set out in government decree 2174/1995 as a sign of the country's willingness to fulfil the pre-requisites for accession. Government decree 2282/1996 outlined the integrated program of legal harmonization and internal market for Hungary' EU accession. Government decree 2212/1998 re-defined the legal harmonization tasks of Hungary until December 2002.[299] To prepare the accession process and implement institutional adjustment, the Central Eastern European countries seeking EU membership were handed a questionnaire by the EU, to which Hungary responded in 1996 before the accession process started. This questionnaire aimed at assessing the legal-administrative preparedness of the country for membership and was answered by ministries and other relevant government bodies. This document provided a basis for the Commission in preparing its Opinion on the countries' membership applications.[300]

In July 1997, the Commission issued its first Opinion on Hungary's Application for Membership of the European Union.[301] The document can be seen as a response to Hungary's formal application to the EU, three years after the application was submitted in 1994. The Opinion calls Hungary's accession a part of a historic process,[302] and repeats the conditions of the country's joining the EU, namely the criteria established by the Copenhagen Council of June 1993. It also evaluated Hungary's relationship with the EU mainly based on the Association Agreement and its implementation, which the Commission considered to be successful.[303]

The Opinion examined each criteria and policy area in which Hungary had to perform well in order to be accepted to join the EU: political and economic criteria, the country's ability to

[298] The White Paper's structure can be described as follows: the first chapter introduces the context, scope and approach of the document, the second provides a background about the main characteristics of the internal market, chapter 3 explains how legislation relevant to the creation and maintenance of the internal market has been selected and prioritised, the fourth chapter depicts the situation in the CEE countries relevant to the paper, chapter 5 concerns the continuing assistance which the Union will provide to the CEECs to support their efforts to prepare for the internal market, and the last one indicates the benefits that the implementation of the White Paper will bring to the MSs and the associated countries as well.
[299] Miklós Király, ed., *Az Európai Közösség kereskedelmi joga* (Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó, 2000), 44.
[300] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13."
[301] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13."
[302] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13," 5.
[303] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13," 12.

assume the obligations of EU membership, and its administrative capacity to apply the acquis were assessed. The Opinion states that Hungary's political criteria are satisfactory because its political institutions function properly, there are no major problems over respect for fundamental rights and, it presents the characteristics of a democracy.[304] Moreover, Hungary can be regarded as a functional market economy and it should be able to cope with competitive pressure and market forces within the EU in the medium term.[305] Regarding Hungary's capacity to take on obligations of EU membership, the Commission acknowledges Hungary's progress in the transposition of the *acquis*, while also highlighting that "despite the efforts undertaken, the progress made in transposing legislation still needs to be accompanied by concrete measures of implementation, as well as establishment of an effective administrative underpinning."[306]

Areas in which the Commission called for more improvement are, for instance, customs control, energy, and, most importantly, the field of environment.[307] The report stated that the Hungarian economy had developed to be characterized with functioning market mechanisms and thus possessed the basic institutional framework of a market economy. Regarding the general state of the legal and regulatory environment, the report established that a stable institutional framework essential for the observation of the rule of law was in place.[308] The Commission saw no significant administrative hurdles to setting up economic activities. The report praised the 'government's consensual approach to policy formulation,' which ensured the reduction of policy and regulatory uncertainty. It also highlighted the gradual developments of the 1990s in the field of market economy, trade, capital flows competition, public procurement, and the enforcement of property rights.[309]

Besides outlining the promising aspects of Hungary's accession progress, the Opinion also listed the shortcomings of the legal and regulatory environment. The Commission stated that the legal and regulatory framework was still lacking stability and predictability, and that the regulation and enforcement in some areas, such as in competition law or intellectual property law, was weak. The report also highlighted the inefficiencies of the public sector, such as the

[304] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13," 114.
[305] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13," 114.
[306] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13," 115.
[307] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13," 116.
[308] Hungarian Academy of Sciences, Centre for Social Sciences, Lendület-HPOPs Research Group, "The Legal and Regulatory Environment for Economic Activity in Hungary: Market Acces and Level Playing-Field in the Single Market - A Legal Expert Review Report," (2016): 8, https://hpops.tk.mta.hu/uploads/files/ExpertReviewReport.pdf.
[309] Hungarian Academy of Sciences, Centre for Social Sciences, Lendület-HPOPs Research Group, 9.

weak institutional framework for standardization, the lack of inland administrative capacities to replace border-controls, transparency and efficiency issues with state aid controls, or those institutional hiatuses in consumer protection that are capable of undermining enforcement.[310] The flaws of the justice system were also listed, such as the excessive caseload, long procedures, or overly complex procedural rules. The report also analyzed extensively the administrative and judicial capacities available in Hungary, and it found the administrative framework in place to be comparable to that of other EU countries and thus satisfactory. However, it also encouraged the implementation of some reforms in the area, which would enable an effective operation of the state machinery at high standards.[311]

The report found some serious problems in the administrative and judicial system of Hungary. In central administration, certain bodies were found to be lacking clearly defined scope, tasks, competences, and control powers. The functioning of the local government administration was considered problematic, as well as the increasing lack of experienced public sector staff, of management and other softer skills in civil service and of sufficient training for these posts. The report highlighted that the field of public administration was too legalistic, non-transparent, under-coordinated and increasingly exposed to corruption. The judiciary was criticized for operating with huge delays, low quality judgements and considerable institutional deficiencies.[312]

In light of these considerations, and despite the shortcomings registered in some areas, the EC recommended that negotiations for accession should be opened with Hungary and it envisioned its next report on Hungary's progress in 1998.[313] As a result, the Luxembourg European Council meeting of December 1997 decided to carry out the Commission's proposal and to start the accession talks with Hungary, the Czech Republic, Estonia, Poland, Slovenia and Cyprus.[314] The fact that the enlargement talks were carried out in two groups, not to mention that Romania and Bulgaria were left out of the 2004 enlargement wave, proves that the accession process experienced a clash between political reality and national preferences. The lesson that soon-to-be Member States learnt from the 2004 and 2007 accessions was that national preference in the question of gaining EU membership must also accept the necessity of local institutional

[310] Hungarian Academy of Sciences, Centre for Social Sciences, Lendület-HPOPs Research Group, 9.
[311] Hungarian Academy of Sciences, Centre for Social Sciences, Lendület-HPOPs Research Group, 10.
[312] Hungarian Academy of Sciences, Centre for Social Sciences, Lendület-HPOPs Research Group, 10–11.
[313] "Commission Opinion on Hungary's Application for Membership of the European Union DOC/97/13," 117.
[314] "Luxembourg European Council (12/97): Presidency Conclusions" (European Council, December 13, 1997), https://www.europarl.europa.eu/summits/lux1_en.htm.

adjustment, so that the relevant socio-economic desires can actually be achieved through membership in the EU. On 30 March 1998, Hungary participated at the opening session of the accession negotiations in Brussels. Before this session, the country handed in on 26 March 1998 its unpublished government report about the basic principles and fundamental questions of EU accession with the purpose of integration and implementing the legal harmonization process.[315]

A significant indicator of Hungary's strategic priorities during the accession period was decree 30/1998 of the Hungarian Constitutional Court issued in relation to the Association Agreement between Hungary and the EU. The details of Hungarian national preference were expressed in the Constitutional Court's interpretation of the Association Agreement. The Association Agreement does, in fact, reveal a more complex preference framework for Hungary than the general aim of accession. The Court's decision examined what concrete obligations the AA imposes on Hungarian law.[316] This can be seen as a follow-up, or reaction, to Article 67 of the AA, which declared that one of the pre-requisites of Hungary's EU accession was to harmonize Hungarian law with Community law. This article imposed a unilateral obligation on Hungary to modify its national law and bring it as close to Community law as possible.[317] The decision of the Hungarian Constitutional Court dealt with whether or not this obligation was binding to Hungary. The Constitutional Court declared that even though direct effect is a distinct feature of EU law, Hungary is not yet a Member State of the EU, which means that the principle should not be applied in this case.

One of the most important indications of this decision was the strict understanding of sovereignty by the Constitutional Court. We can discover a certain dichotomy at play here, which separates the general national preference and its political and legal manifestation in Hungary's accession. Despite the fact that the national preference of the Hungarian governments (first the Antall- and then the Horn-government) aimed at opening the Hungarian economic and legal system to Europe and institutional alignment, in order to receive financial support from the EU and achieve complete market integration as soon as possible, the Constitutional Court's reading of the AA reflects that the actual obligations undertaken are

[315] "Council Decision of 30 March 1998 on the Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnership with the Republic of Hungary" (Council of the European Union, March 30, 1998), https://www.europarl.europa.eu/enlargement/cu/agreements/300398a_en.htm.
[316] "30/1998. (VI. 25.) AB Határozat," accessed October 30, 2015, http://europaialkotmanyjog.eu/?p=264#more-264.
[317] József Petrétei, "A Magyar Jogharmonizáció Az Európai Uniós Csatlakozás Előtt És Után," *Romániai Magyar Jogtudományi Közlöny*, no. 1 (2005): 6–7.

different and represent a more nuanced framework of national preferences. Arguably, the Constitutional Court took notice of the risks of rushing ahead with membership obligations, particularly if they contradict or damage the country's interests at the time. The AA was politically asymmetrical and market opening in certain sectors was against the national interest.

The language of the Constitutional Court's decision is a reminder that Hungary and its legal order were still sovereign and independent from Community law, regardless of the fact that Hungary was already carrying out its accession talks with the EU. EU law and obligations were foreign law from Hungary's perspective, and its preferences should be safeguarded from unwarranted interferences and institutional alignment obligations from EU law. Arguably, the decision was in line with the politics of Hungarian accession: even though Hungary wanted to become an EU Member State, it still wanted to safeguard its national sovereignty and wanted to determine its relationship with the EU on the basis of its national interests.[318][319]

The European Commission's 1998 Regular Report on Hungary's progress towards accession followed the structure of the earlier report (1997) and mostly reiterated its content. The need for issuing the report on Hungary was established by Agenda 2000, in which the European Council called for the Commission to make regular reports "reviewing the progress of each Central and East European applicant state towards accession in the light of the Copenhagen criteria."[320] It concluded that Hungary continues to fulfill the Copenhagen political criteria, but attention has to be paid on fighting corruption and improving the situation of the Roma minority. The report considered that as long as Hungary maintains its efforts to establish the economic conditions of accession (i.e. trade integration and enterprise restructuring), it should be able to cope with the pressure of market forces within the EU.[321] The Commission evaluated Hungary's pace of transposition to be steady and sustainable, provided the country would speed up efforts in the area of environment.[322] The recommendations of this report indicate that institutional change in Hungary was slow or had not been implemented, which suggests the presence of national preferences, such as worrying about the cost of membership, or trying to delay meeting these costs as long as possible.

[318] Petrétei, 7.
[319] Moreover, this understanding of the AA, and in particular Article 67, made it possible to take economic, financial and other national interests into consideration during the legal harmonization process.
[320] "Regular Report from the Commission on Hungary's Progress towards Accession" (European Commission, 1998), http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/hungary_en.pdf.
[321] "Regular Report from the Commission on Hungary's Progress towards Accession," 45.
[322] "Regular Report from the Commission on Hungary's Progress towards Accession," 46.

3.3 National preferences and accession negotiations: the years before accession

The accession negotiations between Hungary and the EU officially started in April 1998. From the Hungarian side János Martonyi, Minister of Foreign Affairs, and Endre Juhász, chief negotiator, led the talks, which were structured around 30 'chapters' covering individual policy or cooperation areas.[323] In 1999, the negotiations went slower than the candidate states would have preferred. Politics changed, however, as in Berlin, EU leaders accepted the multi-annual financial framework for the period of 2000-2006 in which 58 billion euros were allocated for enlargement, for the first time in the EU's history.[324] Hungary opened all its chapters by the summer of 2000, but the accession process was slowed down due to the inclusion of six other countries in the enlargement process. In 2000, the Commission issued a new strategic paper on enlargement, outlining three-stage accession process for the first and second half of the year 2001 and the first half of 2002. During this period, certain chapters should be closed by the candidate states.[325] It was the Goteborg European Council of June 2001 that stated first that the best prepared candidate countries could finish their negotiations by the end of 2002. The negotiations were closed with ten candidates on the Copenhagen European Council of December 2002, when the most controversial chapters and issues concerning mainly budget agreements were finalized. Dividing the accession of the candidate countries into two groups and finalizing the accession of a larger group at the beginning of the 2000s demonstrates a conflict between the general preference of accession (both from the part of the EU and Member States), and the preferences and interests emerging in certain individual policy areas.

In this period, the government of Viktor Orbán's center-right coalition (1998-2002) pursued a generally pro-EU strategy and, just like any other government in the 1990s, tried to bring Hungary closer to EU accession. Although the beginning of the 2000s brought some small hiccups into the Hungary-EU relationship, the accession negotiations continued. The candidate countries experienced some difficulties even in the years preceding their accession, As the accession process was fast, it did not give them enough time to accommodate to the immense amount of institutional changes. In addition, the EU and its Member States got anxious, and the last final years became tense.[326] Tensions arose, for instance, because of the conflict between

[323] "A Magyar EU-Tagság Története."
[324] "Financial Report 2000-2006," European Commission website, accessed March 26, 2020, https://ec.europa.eu/budget/financialreport/2012/annexes/annex1/index_en.html.
[325] "Enlargement Strategy Paper: Report on Progress towards Accession by Each of the Candidate Countries" (European Commission, July 11, 2000), 29, http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/strat_en.pdf.
[326] Balázs, "Közeledés Vagy Távolodás?," 353.

the general interest of the candidates to join the EU and national preferences in specific policy areas where EU obligations were unwanted, expensive, politically undesirable or disadvantageous.

For the EU, besides the debates about the number of countries to be accepted in the Union, some problems were caused by the 9/11 attack on the United States of America and the US-Iraq conflict.[327] When the Central Eastern European candidate countries signed a letter supporting the US in its involvement in Iraq, French President Jacques Chirac allegedly commented that "they have missed a great opportunity to shut up."[328]

The general preference for accession gained support in the Hungarian Parliament's act 2002. LXI. Amending the Constitution, it inserted a paragraph about the country's EU membership, called the 'Europe clause.'[329] However, it was not settled business and it brought out the internal political tensions in the country.[330] The main problem was the lack of express political agreement on how exactly some domestic issues related to EU membership should be handled. Some of these issues pertained to the support of SMEs and agricultural workers or increasing wages. National preference formation on these issues was incomplete or was shunned by the more robust preference for gaining membership as soon as possible. This again reflects a domestic battle within Hungary between wanting to join the EU and being aware of the economic benefits of membership, but at the same time trying to protect some crucial sectors and its national sovereignty. The Europe clause reflected this ambivalent political situation. It defined the creation of European unity among the goals of Hungary, it outlined that Hungary exerted its influence in the EU through the relevant EU institutions and also that EU law can define obligatory criteria that have to be incorporated in Hungarian national law. For the time being, the doubts about the conflicts were put to rest by the April 2003 referendum, in which 83,76% of participants voted in favor of joining the EU.[331]

[327] Dunay Pál, "Az Átmenet Magyar Külpolitikája," in *Magyar Külpolitika a 20. Században: Tanulmányok*, ed. J. László Kiss and Ferenc Gazdag (Budapest: Zrínyi Kiadó, 2004), 221–243.
[328] "Chirac Lashes out at 'New Europe,'" CNN.com, February 28, 2003, http://edition.cnn.com/2003/WORLD/europe/02/18/sprj.irq.chirac/.
[329] This 'Europe Clause' was adopted by the Hungarian Fundamental Law of 2010 as well.
[330] András Somos, "Politikai Vita a Csatlakozási Menetrendről: Magyaros Út Az Unióba," Magyar Narancs, September 26, 2002, http://magyarnarancs.hu/belpol/politikai_vita_a_csatlakozasi_menetrendrol_magyaros_ut_az_unioba-62211.
[331] "Az Euroatlanti Integráció," Biztonságpolitikai Szemle - Corvinák, accessed October 17, 2015, http://biztpol.corvinusembassy.com/?module=corvinak&module_id=4&cid=17&scid=121.

The whole accession process of the Central Eastern European countries reflects some mainstream small state issues. These states were hoping to gain political, strategic and economic advantages from joining the EU, therefore the goal of membership prevailed over specific problems, costs and disadvantages of membership. The lack of information surrounding the practical effects of membership in Hungary is a perfect example for this, as will be shown in the following pages.

3.4 National preferences and derogations in the accession treaty

The conflict between the general preference to join and specific preferences in individual policy areas manifested in the derogations in certain policy areas that were crucial for the country's economy.

Some interest-clashes were visible already before the accession, for instance regarding the question of the purchase of agricultural land, or the free movement of capital. Nevertheless, the willingness of the parties to solve the disputes triumphed and consensual agreements were born,[332] resulting in providing derogations to the new Member States. It is interesting to see whose preferences were observed in the outcomes of these negotiations. Firstly, it was Hungary's main aim to protect the Hungarian agriculture and have 'control' over its farming lands as long as possible. The country succeeded in securing a seven-year prohibition "on the acquisition of agricultural land by natural persons who are non-residents or non-nationals of Hungary and by legal persons."[333] After the period expired, the derogation was extended for three more years, eventually ending in May 2014.

Secondly, in the case of the freedom of movement of workers and the freedom to provide services, the country was not so successful in exerting its preferences. In these policy areas, the interests of the older Member States prevailed, who wanted to protect their labor market and services from the Central-Eastern European countries. Therefore, the EU fifteen reserved the right to restrict the employment of EU nationals coming from the 2004 accession countries for seven years. However, not all Member States used their priorities in this case. The UK, Ireland and Sweden allowed the citizens of new Member States in at once, while others eased restrictions gradually, with Austria and Germany being the last (2011) to do so.

[332] Balázs, "Közeledés Vagy Távolodás?," 353.
[333] "Treaty of Accession of Hungary to the European Union - Annex X" (European Parliament, April 16, 2003), http://www.europarl.europa.eu/enlargement_new/treaty/default_en.htm.

Hungary also received temporary exemptions from taxation (business tax and VAT), in the area of environmental policy (namely the treatment of urban wastewater) and transportation. Last but not least, Hungary had an opt–out from some competition law and state aid regulations, which enabled the country to apply, for example, corporate tax benefits granted prior to 1 January 2003 to some SMEs. These opt-outs served the protection of the Hungarian economy, market and businesses, giving the country time to accommodate to being a full-fledged member of the European market-economy.

Thus, after the accession, Hungary (and other new Member States) did not possess a membership that could have been considered equal to that of the old Member States. This was obviously due to the fact that not all elements of Community obligations and benefits applied to these countries. This shows that defining the rights and obligations that stem from being an EU member is done along the line of interests and national/EU preferences. From a certain point of view, one could argue that this was a result of the circumstances and Hungary had to comply with what was a conscious decision coming from above (Brussels, in this case).[334] However, what really happened was that Hungary had a very big stake in these derogations and the negotiators were well aware of what those areas were in which postponing complete integration would be beneficial for the country. In fact, this picture shows us that Hungary was trying to defend its national interest during the accession process by the protection of its lands. Hungary, being an agricultural country, considered its lands to be assets that it was not willing to make accessible to foreigners, not even for the sake of integrating into the European market. This is a clear indication of the duality of the general interest of the state to join the EU and at the same time wanting to maintain some sovereign sources of income and economic integrity in line with its particular interests in specific sectors and policy areas.

In 2003, the European Commission issued its Comprehensive monitoring report on Hungary's preparations for membership, which was the last big evaluation document about the country before it became an EU Member State. The paper goes through each chapter Hungary closed during the accession negotiations, and it evaluates the commitments and requirements Hungary has to complete due to its accession and also the economic developments of the country. The most important observations of the Commission are as follows. "The overall macro-economic equilibrium of the Hungarian economy has deteriorated, in particular as regards the composition of GDP, external accounts and exchange interest rate stability. Moreover, a significant budget

[334] See for example Losoncz in "Magyarország Tíz Éve Az EU-Ban – Mekkora Volt a Mozgástér?," 487.

deficit in 2002 was present which has been addressed by a tighter albeit very ambitious fiscal policy stance in 2003."[335]

The Commission also stated that Hungary's economic reform path had been pursued "in a credible manner" due to some liberalization and privatization practices. So, the institution criticized Hungary for the deterioration of its macroeconomic equilibrium but stated that Hungary had stepped on an economic reform path. In the case of those areas in which the previous report suggested improvements (e.g. general government deficit, health care sector reform, wage developments), the Commission stated that "some progress has been made, but challenges remain."[336] Regarding the overall administrative and judicial capacity of the country, the Commission determined that "sufficient conditions are in place for the implementation of the *acquis* by the Hungarian public administration and judiciary, but there is room for further improvements."[337] The institution also noted that Hungary "has reached a high level of alignment with the *acquis* in most policy areas."[338]

Some areas in which Hungary was expected to be in a position to implement the *acquis* by accession were, for instance, the four freedoms of the internal market, company law, competition policy, agriculture, fisheries, taxation, economic and monetary union, regional policy, social policy and employment.[339] In other areas, it was noted that Hungary partially met the commitments but it had to fulfil more requirements and "enhanced efforts in order to complete its preparations for accession."[340] Some aspects of the free movement of goods and services, company law, transportation, environment policy and agriculture belonged to this group of policy areas. Last but not least, the Commission stated that "Hungary must take immediate and decisive action to address four issues of serious concern in one chapter of the *acquis* if it is to be ready by the date of accession."[341] This chapter was the agriculture chapter, in which Hungary had to take action to set up its Paying Agency, to implement the Integrated Administration and Control System, to prepare for the implementation of rural development measures and to ensure public health standards in agri-food establishments.

[335] "Comprehensive Monitoring Report on Hungary's Preparations for Membership" (European Commission, 2003), 55, http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/cmr_hu_final_en.pdf.
[336] "Comprehensive Monitoring Report on Hungary's Preparations for Membership," 55.
[337] "Comprehensive Monitoring Report on Hungary's Preparations for Membership," 55.
[338] "Comprehensive Monitoring Report on Hungary's Preparations for Membership," 55.
[339] "Comprehensive Monitoring Report on Hungary's Preparations for Membership," 55–56.
[340] "Comprehensive Monitoring Report on Hungary's Preparations for Membership," 56.
[341] "Comprehensive Monitoring Report on Hungary's Preparations for Membership," 56.

This monitoring report shows perfectly that Hungary was excelling and willing to comply in some policy areas, whereas it had difficulties, or it even deliberately delayed integration in certain sectors. The country's general interest lay in institutional convergence, but it was reluctant to meet the costs of institutional adjustment. Moreover, the country's national preferences urged it to wait until membership with full legal and institutional transposition. Accession itself was a huge task and burden on the Hungarian public administration, which did not make the case of convergence easier either. Last but not least, it was visible already at this stage of accession that the promise of full economic and social convergence was far from being completed by the time of accession. In addition, it became evident that EU accession itself will not solve the internal problems of Hungary, especially as the institutional and administrative transformation of the country is tattered, or simply too expansive.

Despite the far from flawless evaluation of the European Commission, the accession treaty was signed by Hungarian Prime Minister Péter Medgyessy (2002-2006) on 16 April 2003. Hungary joined the EU in May 2004 with a 98,66 % transposition record, a ratio that was above the EU average.[342] The fact that the accession was broadened to ten candidates slowed the process down, which was a deliberate strategy from the EU and which kept Hungary waiting before the accession finally happened in 2004. From this time on, the EU became the determining field of Hungary's foreign policy actions as well as the most important framework for promoting Hungary's national interest.[343] During the accession process, Hungary was always a top achiever, ready to come up with solutions to continue the accession process smoothly. This was a result of the political unity regarding the EU membership, the professionalism of the group of experts who guided Hungary on its way to accession,[344] and the all-encompassing state interest that all governments tried to push through unconditionally. However, the above analysis also revealed that the accession process had a sobering effect on Hungary and made the Hungarian policy-makers realize that joining the EU will require big administrative and legal changes and sacrifice. It also uncovered some local preferences in certain policy areas that were outright confronting the general interests of EU accession.

This short assessment of Hungary's legal transformation into the EU served the purpose of showing the priorities driving Hungary and the European Union during the country's accession

[342] Gábor Baranyai, "Magyarország Uniós Jogi Integrációja: Főbb Tendenciák És Kiemelt Jogi Ügyek," in *Magyarország Első Évtizede Az Európai Unióban 2004-2014*, ed. Attila Marján (Budapest: Nemzeti Közszolgálati Egyetem, 2014), 149.
[343] "Comprehensive Monitoring Report on Hungary's Preparations for Membership."
[344] Balázs, "Közeledés Vagy Távolodás?," 353.

process. Hungary's realist, benefit-maximizing strategy was already visible through the accession years. Another tendency to be observed was the discrepancy between Hungary's general aim to conduct a rapid and effective accession process and the EU's reluctance to do so. It is clearly visible from the timeline of the 1990s that the EU needed some time to accommodate the accession of countries from the post-soviet sphere of interest, whereas the candidate states were determined to join the EU as soon as possible due to realist, small state interests. The caution from the EU's side was completely understandable due to the political, economic and social differences that existed back then between the EU Member States and the applicant countries. However, this caution was in the interest of the candidates as well. Hungarian governments were cognizant, for instance, of the need to safeguard national specificities and preferences, none of which were to be sacrificed for institutional and political alignment with the EU.

Some elements of the legal harmonization process (e.g. 30/1998. or the debate over the Europe clause) also suggest that Hungary's determination to join the EU was coupled with a certain kind of realist strategy, maintaining its focus on Hungary's sovereignty and Hungary's interests during the association process. Hungary's raw interest was to join the EU at all stakes, which took a lot of work. However, the EU itself also had to work a lot, primarily to define the framework of accession for Hungary and the other candidate countries, and to do so in a way that meets everyone's expectations. The accession process had to fulfil the needs of both the EU bureaucracy and the Member States whereas the acceding countries had to show that they are indeed eligible for membership, and, in the meantime, they had to protect their national interests and maintain their strategic priorities. The result was a legal procedure accompanied by a certain level of political and economic screening, which was mainly driven by liberal intergovernmentalist strategic thinking from the Hungarian and the EU side. Hungary can be considered a policy expert throughout the accession process to a certain extent,[345] because it was the top contender of membership among the other CEE applicants. Notwithstanding this expertise, Hungary consciously chose to go against the EU by refusing to adopt EU standards in certain, strategically important policy areas.

4. Hungary's EU accession in the political discourse

Hungary's willingness to join the European club cannot only be presented by the above detailed documents, but also by the political discourse present in the country before and around the time

[345] Panke, "The Influence of Small States in the EU: Structural Disadvantages and Counterstrategies," May 2008.

of accession. The political discourse around the time of the accession revealed that the Hungarian elite was very much in favor of the EU accession, and they wanted to transmit this message to the Hungarian citizens. However, the analysis presented later will also show that there was no visible discussion present about the consequences EU membership will have on Hungary. As an example, Péter Medgyessy, Prime Minister of Hungary (2002-2004), referred to Hungary as a country "returning home to Europe" when he signed the Accession Treaty in Athens. He also emphasized that besides being a continent, Europe is also a spiritual mentality, and no difficulties occurring in the history of Hungary could "divert Hungarians from their natural allegiance to European values."[346]

Ferenc Mádl, President of the Republic of Hungary between 2000 and 2005, also praised the accession process by arguing that the future of our country can be certain only as part of the European integration. Not only politicians from the government side, but those from the opposition also expressed their content about Hungary's EU accession. Viktor Orbán, president of the Fidesz party praised the EU accession itself, referring to the legacy of József Antall and the Christian democratic concept of European integration.[347] However, Orbán also criticized some aspects of the accession process, namely the government's costly EU accession campaign and the lack of a real political dialogue with Hungarian citizens. The following paragraphs will evaluate how the EU accession topic was presented in the Hungarian media and government discussion, thus projected to the Hungarian citizens.

One considerable trend to be discovered is the presence of the European Union as a topic in the most prominent Hungarian newspapers. According to the study of Miklós Sükösd, since 2000 the number of articles related to Hungary's EU accession increased significantly in the Hungarian print media.[348] Most of these articles were short news reports about events related to the EU, while long, explanatory publications, which could have given a broader context to the readers about the EU itself, were scarce. The political elite bringing Hungary into the EU gets quite frequently criticized for the lack of a real discussion about Europe and the effects EU membership will have on the country's economy, and the everyday lives of people. The

[346] "Dr. Medgyessy Péter Miniszterelnök Beszéde Az Európai Unióhoz Csatlakozásról Szóló Szerződés Aláírásakor Athénban," April 16, 2003.
[347] Zsolt Bogár, "Eredményhirdetés Után -EU-Bulik: Ünnepélyes Keretek Közt," Magyar Narancs, April 17, 2003, http://magyarnarancs.hu/belpol/eredmenyhirdetes_utan_-eu-bulik_unnepelyes_keretek_kozt-61841.
[348] Miklós Sükösd, "Kommunikációs Deficit Magyarország Európai Uniós Csatlakozásának Média bemutásában," Médiakutató, 2003, http://www.mediakutato.hu/cikk/2003_04_tel/04_kommunikacios_deficit.

disenchantment and the decrease in the EU's popularity among citizens after the accession can be easily explained by this major mistake.

Another trend revealed by media analyses conducted around the time of the accession was the fact that the Hungarian EU accession mainly appeared as a foreign policy-related or diplomatic topic. There was no mention about the basic principles, values along which the EU was functioning, nor about the long-term prospects of the EU. In addition, the main practical consequences of EU membership, such as investments, projects and EU subsidies were not focused on either. The main protagonists of these articles were politicians and diplomats, but experts or businessmen were missing. Moreover, at that time there was no real argument existed in public discourse that would have opposed joining the EU. This was probably due to the fact that Hungary had no other choice but to join the EU if it wanted to associate itself with the West, rather than the East. To sum up, the EU was present in the Hungarian print media only in relation to Hungary's accession, while little public effort was made to familiarize the EU and introduce topics closer to the citizens.[349]

It is interesting to mention here that despite the fact that both the governing leftist parties and the majority of the right-wing opposition were in favor of the accession, no real 'campaign coalition' emerged among them in order to call for the Hungarian citizens to say yes in the upcoming referendum about EU accession. Talking about the 'real' questions of Hungary's EU accession and the material consequences it would have on people's life would have been essential in the pre-accession years, perhaps already in the 1990s.[350] This is the consequence of the phenomenon experts of the topic call 'communication deficit.'

To put it in a nutshell, we can conclude that Hungary's willingness to join the European Union was the driving force of its EU integration process, together with the fact that there was no real public discourse and debate about it involving the Hungarian citizens. This short summary gives us the impression that Hungary was a good and enthusiastic 'student' participating in the EU integration process with the main aim of complying with all the necessary pre-requisites of EU memberships as soon as possible. However, some elements of a realist, sovereignty-oriented political strategy can already be discovered in these years as well, as it has been presented in the previous pages.

[349] Sükösd.
[350] Sükösd.

5. The post-accession period: 2004-2010

With its Treaty of Accession Hungary undertook the obligations of an EU Member State that, as in the case of other Member States, greatly restricted its political and legal maneuverability even in cases of high importance to the local economy and society, which made it a generally compliant Member State. However, as mentioned before, political discourse paid scant attention to these obligations. EU membership was perceived and transmitted to the Hungarian population as a prerequisite of Hungary's development and prosperity, without mentioning the obligations, even burdens, that it would impose on the country. The 'EU as a promise land' narrative did not entertain the possibility that Hungary will lose some room for maneuver and will have to act as a member of a collective system from 2004. As a result, the post-accession period in Hungary was not as smooth as the previous fifteen years.

A certain kind of disenchantment is also usually experienced in new EU members. Hungary was no exception in this regard, primarily because the country's EU membership was driven by a permissive consensus, without a proper implementation strategy that would have considered its practical effects. One year after EU accession, the Eurobarometer survey conducted in Hungary showed explicitly that Hungarians were disappointed in the first year of EU accession, revealing that membership did not fulfill their expectations. Support for the EU in Hungary decreased and the number of neutral or uncertain people regarding membership increased.[351] If we take the number of Hungarians according to whom EU membership for Hungary is a good thing, their number was in a general decline (with some alterations) between 2003 and 2008.[352]

This decrease in the EU's popularity can partly be seen as the fault of the political leadership in Hungary from 1989 to 2004.[353] These governments only focused on getting the most short-term benefits from the EU as possible, so they did not care about strategically EU-wide reform processes, even though these processes could have been the key to define and build up a coherent Hungarian national interest.[354] Nevertheless, it must also be highlighted that defining the EU membership for Hungary was much easier before the EU accession. because it was an

[351] "Eurobarometer 63.4 - Public Opinion on the European Union Spring 2005 - National Report on Hungary," Spring 2005, 3, http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/ResultDoc/download/DocumentKy/63326.
[352] "Eurobarometer 72 - Public Opinion in the European Union Autumn 2009 - National Report on Hungary," Autumn 2009, 2, https://ec.europa.eu/commfrontoffice/publicopinion/archives/eb/eb72/eb72_hu_en_exec.pdf.
[353] Balázs, "Közeledés Vagy Távolodás?," 355..
[354] László Csaba, "A Félig Tele Pohár," *Közgazdasági Szemle* LXI., (April 2014): 439–451.

evident political, and mainly realist economic, goal. After the accession, however, it was much harder to define Hungary's role within the EU, which led to a certain kind of purposelessness in the period after 2004.[355]

However, we cannot say that the post-accession period in Hungary brought a completely uniform EU strategy: there is a clear rupture between the governments reigning between 2004 and 2010, and the Fidesz government from 2010. Hungary as an EU Member State became more erratic,[356] and the political consensus experience in the pre-accession years was clearly missing from 2010.[357] Moreover, even though it is true that already in the pre-accession period some realist elements of the Hungarian EU strategy were traceable, after a few years of membership Hungary started to get further and further away from European values and principles and started to take up conflicts with the EU more openly. We can even say that in Hungary's European integration process starting from the 1990s, it was the government elected in 2010 that carried out the first real political shift.[358] This was the first government that openly started to represent Hungary's realist European strategy and which did not shy away from taking up serious conflicts with the EU to protect national interests. Hungary's particularist behavior as a small Member State within the EU can serve to demonstrate the difficulties in finding the boundaries of particularism. In order to pin down the country's national preferences and identify its increasing particularism, it is indispensable to go through the alterations in the EU strategies of the different governments since the 2004 accession.

5.1 The official foreign policy strategies of Hungary - governmental approaches to the EU

At the time of Hungary's accession to the EU, the Hungarian Socialist Party was in power. During the six years of socialist government three prime ministers were reigning: Péter Medgyessy (2002-2004), Ferenc Gyurcsány (2004-2009) and Gordon Bajnai (2009-2010). All the governments within this period had a pro-EU stance, which manifested in an attitude of trying to keep a low profile and comply with EU rules in order to get the best out of Hungary's EU membership. This strategy can easily be evaluated to be conformist, and making Hungary

[355] Balázs, "Közeledés Vagy Távolodás?," 351.
[356] Balázs, 355.
[357] Balázs, 356.
[358] Federigo Argentieri, "Hungary: From Postcommunism to Populist Nationalism," in *Central and East European Politics: From Communism to Democracy*, ed. Sharon L. Wolchik and Jane Leftwich Curry, vol. 3rd edition (USA: Rowman & Littlefield, 2015), 293–315.

seem to be more irrelevant and smaller than it really was. Hungary's security and foreign policy strategies created in this period provide proof for this statement

The demand for a renewed foreign policy strategy for Hungary was increased by the accession to the EU and it manifested in the creation of an official foreign policy strategic document in 2008. Before 2008, no such official strategy existed, the closest to it was the national security strategy of Hungary. The post-accession security strategy of Hungary was drafted in March 2004, which indicates that it was an effect of Hungary's upcoming EU accession. This document mentions the EU as the field for widening and deepening European integration, in which process Hungary should participate equally as other EU Member States. It also draws attention to the importance of Hungary's integration to the EU institutional system, and to the fact that Hungary shares common values with the EU and the US as well. The strategy also highlights the importance of the fact that Hungary's national interest (which has political, economic and security angles as well) can only be realized within the framework of the Euro-Atlantic integration.[359] This shows that Hungary already focused on its national interest as a strategic priority, but since EU accession was the most important foreign policy goal at that time, the two aims had to be merged and synchronized.

The first official foreign policy strategy of Hungary was issued in April 2008 by the Hungarian Ministry of Foreign Affairs.[360] If we focus on the aspects relevant to the country's EU strategy, the first conclusion to be drawn after reading the document is that Hungary's first strategic priority was to create a competitive Hungary within the EU. (The second was to create a successful Hungary within the region and the third was to create a responsible Hungary in the world.) "Due to its membership, Hungary can affect policy-making, and its room for maneuver is affected by the extent to which it is able to support common European projects, thus contribute to the strengthening and global adaptability of the EU as a whole."[361] The EU was seen as the most important framework of Hungarian policy-making, whereas some national aims (such as the protection of minorities) were also emphasized in the document. The Hungarian national consciousness was seen to be shaped by specific national, Central European and European values, interests and observations. Moreover, all the main goals and priorities mentioned in the strategy (global challenges, economy, defense, environment, migration,

[359] "A Magyar Köztársaság Nemzeti Biztonsági Stratégiája," March 31, 2004, http://www.mfa.gov.hu/NR/rdonlyres/0AA54AD7-0954-4770-A092-F4C5A05CB54A/0/bizt_pol_hu.pdf.
[360] "Magyarország Külkapcsolati Stratégiája."
[361] "Magyarország Külkapcsolati Stratégiája," 2.

culture etc.) were understood in relation to the EU. To conclude the evaluation of this strategy, it is apparent that the decision-makers in power that time considered the EU not only the main framework, but also the main tool of Hungary's foreign policy-making, and they saw the Union as a key to Hungary's success in Europe and on the world political scene.

It should be noted here that there was no official update to this strategy since 2008, even though the political and international environment has significantly changed, and new circumstances have emerged to which Hungary had to adapt in its foreign policy-making. Only a new National Security Strategy was adopted in 2012, which contains Hungary's priorities in the field of security and military policy.[362]

Since the victory of the center-right Fidesz party in 2010, there has been a change in tone in the Hungarian EU strategy. The realist interests already discernable during the pre-accession years came to the forefront and became the main drivers of the Hungarian government. This does not mean, however, that Hungary has implemented a turnaround towards realism in its Europe-policy. The difference from the post-accession leftist governments was that the government elected in 2010 could start to apply a stronger, more independent tone towards the EU due to its firm support from the Hungarian citizens, and a 2/3 majority in the parliament, which the previous governments did not have.

In the official foreign policy strategy of the Orbán-government, which was issued after Hungary's Council Presidency (2011), a much bigger emphasis has been put on achieving the county's national and economic interests than in the previous documents.[363] The strategy, like the one from 2008, also refers to the European values, which are determining factors for Hungarian policy-making. However, this strategy raises some problems the EU is facing and due to which the EU's economic and political system should be refurbished. It mentions the fact that Hungary's international evaluation has deteriorated due to the EU's incapacity to solve severe economic and social crises. The strategy also raises the need of putting Hungary's economic interests in the center of its foreign policy-making. Moreover, the document mentions Hungary's sovereignty and territorial integrity as the most important national values of the country's foreign policy.[364] According to this strategy, besides being committed to European

[362] "A Kormány 1035/2012. (II. 21.) Korm. Határozata Magyarország Nemzeti Biztonsági Stratégiájáról" (Magyar Közlöny, 2012), https://2010-2014.kormany.hu/download/f/49/70000/1035_2012_korm_hatarozat.pdf.
[363] "Magyar Külpolitika Az Uniós Elnökség Után."
[364] "Magyar Külpolitika Az Uniós Elnökség Után," 4.

integration and believing in the future of the EU, the main goal of the Hungarian EU policy in the following years should be to define and promote Hungarian interests,[365] and insert them into the common European goals.[366] The strategy also highlights that European cooperation has non-EU dimensions as well, and puts a special focus on bilateral partnership between Hungary and some partners, namely Russia and the post-Soviet region. To put it in a nutshell, besides keeping Hungary's ties close to the EU, the new foreign policy strategy extends the scope of policy-making and puts greater emphasis on activities outside the EU as well.

5.2 Hungary's EU membership in the political discourse

Despite the visible difference between the 2008 and 2011 foreign policy strategies, it is important to note that the shift in the EU-strategy of the country is even better reflected in the political discourse, namely the speeches of politicians and their interactions with their peers in international fora. One of the most prominent representatives of the 'new' EU foreign policy of Hungary was János Martonyi, who, after holding the post of Foreign Minister in the first Orbán-government (1998-2002), also held the post in the second Orbán-government for 4 years. It is clear that Martonyi's foreign policy strategy built on a strengthened national consciousness that was aimed at avoiding Hungary to become a weak, neglected Member State in the EU.[367] However, this national commitment was coupled with a continuous devotion to remain in the European project. In one of his interviews (in 2010), he highlighted that blaming the EU for most of the occurring problems is a common tactic among EU governments.[368] It is interesting to note here that although this scapegoating strategy became more salient after 2010, Martonyi condemned the preceding pro-EU socialist governments for applying such a strategy. Another accusation frequently leveled by governmental representatives is the allegation that the EU is employing double standards against Hungary, condemning the country for deeds and affairs that other Member States are not.

Pál Dunay argues that since the changing of the political system, the conservative governments of Hungary tended to frame the country's role in the world as bigger and stronger than how other players in the international scene perceive it to be, while the socialist-liberal governments

[365] Bálint Ódor and László Sinka, "Magyar Európa-Politika 2010–2014: Kihívások És Eredmények," *Európai Tükör* 19, no. 1 (February 2014): 15.
[366] "Magyar Külpolitika Az Uniós Elnökség Után."
[367] László Csaba, Géza Jeszenszky, and János Martonyi, *Helyünk a Világban: A Magyar Külpolitika Útja a 21. Században*, Manréza-Füzetek 8 (Budapest: Éghajlat, 2009), 180.
[368] Csaba, Jeszenszky, and Martonyi, 179.

have made it appear smaller and less significant.[369] I argue that both tactics have their benefits and disadvantages. However, it is clear that the consensual support for the EU experienced in the early post-accession period resulted in the lack of a real discussion about European matters in Hungary, which did not help Hungary's European integration on the long run.[370] Moreover, this can also be among the reasons why the strategy of the government elected in 2010 appears so different, even hostile, compared to that of the previous ones. To sum up, the official foreign policy strategies of Hungary show a quite complex picture. The European Union is still seen as the primary environment of Hungary's foreign policy-making, but there is a visible shift from a conformist, almost solely EU-focused strategy, to a more critical tone and a more independent strategy.

6. Findings of the chapter

This chapter aimed at examining Hungary's 'European' policy from the changing of the political system until 2010. Even though the next chapter will demonstrate that Hungary's EU strategy started to openly exert a realist, conflict-seeking strategy towards the European Union in 2010, which seeks to protect national interests even at the expense of the country's political or legal compliance, the current chapter revealed that Hungary's attitude towards the EU has always been driven by raw, rational interests. These national preferences had already appeared during the accession process and can be best explained by liberal intergovernmentalism. At the beginning of the 1990s, EU accession was the ultimate goal that served the economic and political interests of Hungary. However, this objective was also coupled with the country's intention to follow its national preferences, namely protecting its economy and delaying the transposition of EU law in some strategically important policy areas. During the short accession process, the difficulties of the transposition of the EU *acquis* became evident to Hungary, which resulted in some hiccups during the process as well as some derogations both from the EU's and Hungary's side. After accession, a disenchantment from the EU took off as the real effects of EU membership on the everyday lives of people were not anticipated during the accession process. A few years after accession, the landscape has changed, allowing for new strategic priorities to come to the surface.

[369] Pál Dunay, "A Külpolitika Esélyei a Hármas Prioritás Megvalósulása Után," in *A Magyarok Bemenetele. Tagállamként a Bővülő Európai Unióban*, ed. István Hegedűs (Budapest: Demokrácia Kutatások Magyar Központja Alapítvány, 2006), 391.
[370] Molnár, "Ideas of Europe in Hungarian Political Discourse."

Thus, it is evident that Hungary's EU strategy was never homogenous, so it is easy to divide it into different periods.[371] The first period is the pre-accession period, reconstructed in this chapter. However, even this period cannot be considered homogenous, and can be divided into the 1990s and the few years before accession. The 1990s could be called the period of *'all in'*, when EU accession was the primary aim of Hungary and it did whatever it took to facilitate EU accession. Then in the finish line, as membership became certain the country gained more and *more confidence* and started to get leeway: maximizing its national interests and protecting the most important sectors became a priority, even against EU interests. The most evident division within the post-accession period is the one before 2010 and after 2010. As explained by the foreign policy strategies of Hungary, the former period was characterized by the *cautious first steps,* getting used to membership, so not knowing what a new Member State can or cannot do, acting as a shy, small Member State and focusing on compliance in most areas, avoiding serious conflicts with the EU. The disenchantment of Hungarian citizens with the EU and membership that did not live up to the expectations also started in this period. The latter period that started in 2010 will be analyzed in detail in the next chapter.

[371] See Table 1 in the Annex.

V. The 'Hungarian affair': post-2010 relations with the EU

1. Introduction

This chapter will continue to analyze Hungary's EU strategy from the perspective of the analytical framework introduced previously: the national preference formation of small EU Member States within the normative framework of the Union. However, the previous chapter already demonstrated that these theories cannot explain all Member State actions. Rogue Member State behavior which goes against both the expectations of liberal intergovernmentalism/preference formation and small state theories is yet to be discovered. This chapter will pay special attention to this rogue behavior. It does so by separating strategies that fit into the theoretical framework from those Member State actions that not only refuse to follow norms due to certain national interests and preferences but could rather be labelled as symbolic policy-making driven by different motivations. In Hungary's case, several strategic steps were not driven by objective interest, but by symbolic motivations of the government. This chapter, and the case studies that follow, will try to discover the dividing line between interest-driven, rational state behavior and rogue, symbolic resistance (for example against certain values or principles of the EU).

The following paragraphs will examine the relationship of Hungary with the European Union, more specifically the dialogue between the Hungarian government and the European political sphere between 2010 and until 2020.[372] Although, as demonstrated by the previous chapters, Hungary once adopted a leadership role in European integration among the candidate countries of the 1990s, this role faded away quite soon after EU accession. The disenchantment of Hungarians in the European project is well reflected in the Hungarian government's EU strategy, to be presented in the following pages.

Hungary's EU strategy after 2010 can also be divided into two parts. Between 2010 and 2015, the main purpose of the government was to *show the true colors* of Hungary: to depict the country as a competent Member State, defend national interests at all costs, showing that the EU cannot dictate to Hungary. However, at that time, there was a discrepancy between the openly hostile rhetoric deployed by the Prime Minister and prominent Hungarian politicians towards the EU, and the general legal compliance of the country with EU law. It was the refugee crisis in 2015 when the Hungarian strategy shifted towards an even more ambitious goal. It made apparent that the government is not playing towards the domestic audience anymore, but

[372] The aspects related to migration or citizenship will be discussed as case studies in the next chapters.

it also wants to become a certain kind of leader, a *norm entrepreneur* (a smart state according to Grøn and Wivel) in the EU. The leadership wanted to depict Hungary as a protector of the European Union from invaders and a promoter of an intergovernmental Europe, and real European values such as Christianity and national sovereignty. In order to achieve this, Hungary started to take up more and more legal conflicts with the EU and formed alliances with other Member States (Poland or Czech Republic), as it will be shown in the next chapters.

The main argument of this chapter is that Hungary has been conducting a 'particularist' behavior within the EU since 2010, focusing on national preferences at all costs. However, the roots of this strategy are not completely new: the previous chapter showed that Hungary is and has been driven by interest-maximizing realist aims throughout its whole relationship with the EU. The change in the country's leadership and the international environment brought to the forefront a new, more openly critical standpoint towards the EU in 2010. The most visible aspect of Hungary's new, particularist strategy is the determined defense of national positions in the EU, which was not expressed and articulated so openly by any other government before. One could even say that "Hungary went through a process from EUphoria to EUphobia since its accession to the Union."[373] This strategy dragged Hungary into false conflicts,[374] which appeared in many different forms and reached their peak in the conflict with the EU over the country's comprehensive constitutional and legal reforms.

Some of the international concerns about the Hungarian government's acts were framed in terms of rule of law and democracy considerations, while others were directed against matters of constitutional importance or more technical, legal questions. These critiques appeared in several forms, such as institutional reports, statements and opinions, infringement procedures, parliamentary debates, or most recently the initiation of the Article 7 procedure against Hungary. The aim of this chapter is to present *what were the causes of the shift in tone towards the EU, what kind of a 'particularist' strategy Hungary followed after 2010 and how did the EU deal with the 'Hungarian case.'* Besides presenting the nature and the specificities of the Hungarian strategy, the chapter also aims at discovering *what kind of tools the EU uses against such Member State non-compliance and where are the boundaries between legitimate diversity and illegitimate particularism (or symbolic, rogue behavior)* when it comes to Member State actions. The answer to the latter question is not straightforward because a certain kind of

[373] Molnár, "Ideas of Europe in Hungarian Political Discourse," 232.
[374] Balázs, "Közeledés Vagy Távolodás?," 357.

thematic realism can be detected in the case of Hungary. Although the government takes up conflicts with the EU in many fields, there are still some policy areas in which the country is fully compliant and enthusiastically supports EU rules.

In order to answer these questions and present the EU strategy of Hungary from 2010, the analysis will go through the most important aspects of the Hungary-EU dialogue in the past few years. First, the Hungarian Council Presidency of 2011 will be presented. This was the first intense period in Hungary's EU membership during which the country has gotten into the spotlight, and the Hungarian government's EU strategy received international attention. Then the chapter will present the constitutional changes the government enacted after taking power. It will also focus on the political pressure coming from EU institutions, in the form of infringement procedures and Hungarian cases before the CJEU. The most recent conflicts such as the migration crisis since 2015, which contributed to the initiation of the rule of law mechanism, will be presented as a case study in the next chapter.

2. The Hungarian Council Presidency: problematic issues

The analysis of the Presidency in this chapter is essential because it marks the beginning of a tense period between Hungary and not only the European Union but other European institutions as well. The conflict primarily consisted of the alleged undermining of democracy and the rule of law in Hungary. In this regard, different actions of the Hungarian government can be identified as interest-driven small state strategies or symbolic, rogue behavior.

Hungary's Council Presidency in the first semester of 2011 can be evaluated as an average 'small state Presidency.' This means that the country's administrative and bureaucratic personnel tried its best to get through the six months without any major hiccups, and it wanted to show to its fellow Member States that Hungary had become an integral part of Europe and now is able to act as a leader for a designated period of time. At the same time, the Hungarian government's dedication to present Hungary as a sovereign state responsible for and capable of achieving its own policy priorities in Europe was also clearly manifested in its Council Presidency. In the academic discourse, it is a widely accepted opinion that holding the Presidency is a significant determinant of the preference formation of a country.[375] Moreover, it provides an excellent opportunity for small states to exert influence and promote their national

[375] Verhoeff and Niemann, "National Preferences and the European Union Presidency"; Hine, "Explaining Italian Preferences at the Constitutional Convention."

priorities in the EU.[376] So, it comes as no surprise that the new Hungarian EU strategy was clearly manifested by the Hungarian Presidency of the EU Council in the first half of 2011 as well.

In general, the Hungarian semester can be considered to be a successful Presidency. Hungary came up with a realistic and well-structured program for itself. The main priorities were: growth and social inclusion (including the creation of a Roma Strategy), a stronger Europe (including boosting the Danube Strategy), a citizen friendly Europe (which involved bringing Romania and Bulgaria into the Schengen area) and a responsible enlargement (closing the accession negotiations with Croatia).[377] Moreover, the integration of the European energy sector, namely finding ways to diversify the energy supplies of the Member States and create new gas routes, was also a main goal.[378] According to Enikő Győri, Hungarian Secretary of State Responsible for EU Affairs, the choice of the strategic priorities during the Presidency means a great challenge for the given Member State because they set the tone of the six months, and they are the main points of reference in the evaluation of the Presidency for the EU.[379] This means that the good choice of priorities is the first step towards a successful Presidency. 'Good' in this sense can also mean not difficult, or easy to achieve, because no Member State wants to end its presidency with unfinished tasks. In Hungary's deliberately chosen areas, some major steps were taken due to the effective maneuvering of Hungarian politicians and experts (for example MEP Lívia Járóka's role in the Roma Strategy). In other areas, the results are debatable.

Péter Balázs, former Minister of Foreign Affairs of Hungary, argues that conducting a successful presidency does not depend only on carrying out the strategic priorities chosen beforehand, but the country should also be able to focus on long-term tasks and handle unexpected events.[380] In the case of the long-term duties, the strengthening of the EU economic governance was the biggest task in which Hungary performed well, despite not being a

[376] Baldur Thorhallsson and Anders Wivel, "Small States in the European Union: What Do We Know and What Would We Like to Know?," *Cambridge Review of International Affairs* 19, no. 4 (December 2006): 651–668, https://doi.org/10.1080/09557570601003502; Annika Björkdahl, "Norm Advocacy: A Small State Strategy to Influence the EU," *Journal of European Public Policy* 15, no. 1 (January 2008): 135–154, https://doi.org/10.1080/13501760701702272; Elgström, "Dull but Successful – the Swedish Presidency."
[377] Enikő Győri et al., "A Magyar EU-Elnökség Tapasztalatai," in *Magyarország Első Évtizede Az Európai Unióban 2004-2014*, ed. Attila Marján (Budapest: Nemzeti Közszolgálati Egyetem, 2014), 172.
[378] Balázs, Péter. "General evaluation. The first Hungarian EU Council Presidency," Achievements of the First Hungarian EU Council Presidency. EU Frontiers Policy Paper - Center for EU Enlargement Studies 8 (June 2011): 6.
[379] Győri et al., "A Magyar EU-Elnökség Tapasztalatai," 168.
[380] Balázs, "General evaluation. The first Hungarian EU Council Presidency," 4.

Eurozone member and other cooperative formations (e.g. Euro Plus Pact).[381] In the enlargement area, which was another long-term goal, Hungary pushed the case of the Croatian accession quite well. The Hungarian government officials were very proud of this achievement and they liked to refer to it as "pulling Croatia into the EU." The country also handled unexpected events, such as the Arab Spring, smoothly despite being a small country with no direct geo political interest in the area. In Libya, the Hungarian Embassy of Tripoli was the only EU representation that remained active during the worst times of the crisis.[382] If we look at most of the mandatory tasks during the six months, we get a decent picture about the Hungarian Presidency altogether, and we can argue that Hungary performed well based on national preferences and small state interests.

However, despite the successfully conducted presidential semester (from several aspects), some politically sensitive issues cast their shadows over the six-month period. The Hungarian government adopted some legislative measures, for example the new media law, which has led to an unbalanced broadcasting system in Hungary, or the new Fundamental Law despite heavy criticism from EU circles and the Venice Commission.[383] In the European Parliament (EP), during Prime Minister Viktor Orbán's first presentation as President of the Council, he already had to face harsh criticism over his government's acts.[384] These 'attacks' initiated a change in the Prime Minister's rhetoric towards Brussels, which became more and more firm and critical. Moreover, one of the most important events of the Presidency was supposed to be the summit between EU and Eastern Partnership countries, but the meeting was postponed to the semester of the succeeding Polish Presidency, which meant that there was no European Council meeting in Budapest in 2011. The official reason behind postponing the event was coordination problems, but some assume that the Hungarian government's work fell short of adequately preparing for the meeting in Budapest.[385]

Some of the Hungarian government's actions could even have been perceived as insults, or symbolic offenses from the EU's perspective. These include removing the EU flag behind the Prime Minister during major speeches, and instead surrounding him with Hungarian flags

[381] Balázs, 5.
[382] Balázs, 7.
[383] Attila Ágh, "The Hungarian Rhapsodies: The Conflict of Adventurism and Professionalism in the European Union Presidency: The Hungarian Rhapsodies," *JCMS: Journal of Common Market Studies* 50 (September 2012): 71, https://doi.org/10.1111/j.1468-5965.2012.02254.x.
[384] "Orbán Ready for Battle," *Hungarian EU Presidency Website*, January 19, 2011, http://www.eu2011.hu/news/ep-debate-orban-ready-battle (accessed March 12, 2014).
[385] Balázs, "General evaluation. The first Hungarian EU Council Presidency," 6-7.

only.[386] Another mistake during the six months was that the center of all EU negotiations was not Budapest, but Gödöllő, a small town close to the Hungarian capital. This meant that Hungarian citizens did not 'meet with the Presidency', they did not know that something essential was going on in their country, so the six months did not bring Europe closer to its citizens. Enikő Győri defended this standpoint by arguing that the Hungarian Presidency was a "Brussels-centered" Presidency, so most of the tasks were done not in Hungary, but in the permanent representation in Brussels.[387]

In the first half of 2011, international attention was increasingly directed towards Hungary, but not in the most favorable way. However, Hungarian policy-makers were not bothered by the international critiques; their strategy was based on focusing on professional issues and their tasks concerning the Presidency, so they did not care about the possibility of decreasing reputation and they were not afraid to stand up against the EU. In a nutshell, we can conclude that the Hungarian Presidency can be characterized by the "contrast between the political activities of the Government and the professional activities of the administration."[388] Minister of Foreign Affairs János Martonyi praised the Hungarian Presidency for the experience and knowledge gained by the people working for organizations that participated in the Presidency, and also for building connections with EU institutions.[389] He also called for the Hungarian parliamentary opposition, which harshly criticized the government for its domestic actions taken during the time of the Presidency, to be happy for the Hungarian Presidency's success and not to support a hostile international environment towards Hungary.[390]

The Hungarian Council presidency marks the beginning of a Hungarian EU-strategy that is more willing to antagonize the EU and Brussels in politically sensitive areas, most of which might have symbolic importance for Hungarian domestic politics. A change in Prime Minister Viktor Orbán's rhetoric can also be detected that manifested in many of his speeches in both Hungary and abroad. One of the first of these blatantly anti-EU speeches was held on the Hungarian national holiday of 15 March in 2012. In this controversial speech, he emphasized

[386] Balázs, 9.
[387] Győri et al., "A Magyar EU-Elnökség Tapasztalatai," 179.
[388] Ágh, "The Hungarian Rhapsodies," 72.
[389] "Martonyi János: A Soros Elnökség Után," Website of the Hungarian Ministry of Foreign Affairs, October 13, 2011, http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedek-publikaciok-interjuk/martonyi-janos-a-soros-elnokseg-utan.
[390] "Martonyi János a Magyarországot Ért Kritikákról," Website of the Hungarian Ministry of Foreign Affairs, November 7, 2011, http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedek-publikaciok-interjuk/martonyi-janos-a-magyarorszagot-ert-kritikakrol.

that Hungary insists on national sovereignty and does not need the "unsolicited assistance of foreigners."[391] Comparing the EU to the former Soviet dominance of Hungary, he stated that for his country "freedom means that we decide about the laws governing our own lives, we decide what is important and what is not."[392] The President of the European Commission, José Manuel Barroso (2004-2010) reacted by saying that "those who compare the European Union with the USSR show a complete lack of understanding of what democracy is."[393] This dialogue can be seen as a useful indicator of the discussion that has started and been going on between Budapest and Brussels since the Hungarian government change of 2010.

3. Constitutional changes and transparency in 2010-2013

After the parliamentary elections of 2010, the Fidesz party obtained a 2/3 majority of the seats in the Hungarian Parliament by forming a coalition with the Christian Democratic Party. This victory enabled the new government to enact fundamental changes to the country's constitution and legislation as a whole, within a short period of time.

The changes brought by the Fidesz government had legal consequences, such as the reduction of the retirement age of judges or appointing a new media-supervising authority, while others had symbolic importance, such as modifying the country's official name to Hungary (instead of the Republic of Hungary) and defining the concept of family in a way that could be seen as discriminatory against persons of different sexual orientations. Many of these changes were added to the Hungarian Fundamental law (formerly called Constitution), which was amended several times in a short period of time since the spring of 2010. It is a widely accepted argument that "the constitutional regime that operated in Hungary from the end of communist rule until January 2012 represented a broadly satisfactory framework for the consolidation of liberal democracy, the rule of law and the protection of human and minority rights."[394] However, the new Fundamental Law and other related legal instruments and policies of the Hungarian government have endangered fundamental democratic freedoms and the principle of checks and balances that previously characterized the Hungarian constitutional system.[395] Some of the most

[391] Ian Traynor, "Hungary Prime Minister Hits out at EU Interference in National Day Speech," *The Guardian*, March 15, 2012, http://www.theguardian.com/world/2012/mar/15/hungary-prime-minister-orban-eu (accessed January 13, 2014).
[392] Traynor.
[393] Klaus Dahmann, "Hungary's Premier Orban Softens Rhetoric," DW.com, March 18, 2012, http://www.dw.com/en/hungarys-premier-orban-softens-rhetoric/a-15816308.
[394] István Pogány, "The Crisis of Democracy in East Central Europe: The 'New Constitutionalism' in Hungary," *European Public Law* 19, no. 2 (2013): 341.
[395] Pogány, 357.

widely criticized elements of the Hungarian Fundamental law include the 'ethnification' of the Constitution, changes concerning the role of the President, the perceived threat to judicial independence, and restrictions on the independence and freedom of Hungary's print and electronic media.[396] The Fundamental Law clearly represents a rupture and a certain kind of self-actualization of the Hungarian nation in comparison to the pre-2010 period,[397] and it protects traditional values that do not necessarily reflect the values of EU law.[398] Moreover, not only the content of the new Fundamental Law, but the method of the making of the new constitution raised concerns: such profound changes would have required a slow and very thorough preparation for a new constitution.[399] These domestic actions cannot be considered to be part of Hungary's EU strategy, but they are nevertheless important because they symbolize Hungary's gradual distancing from European norms and can be seen as the first manifestations of rogue Member State behavior.[400]

These subjects generated heated debates in Europe, not only involving different Member States and EU institutions, but also international organizations, such as the Council of Europe, namely its legal advisory body, the Venice Commission.[401] The Venice Commission issued several different opinions regarding specific changes that happened to the Hungarian legal system and the Fundamental Law itself. The first such Opinion came in March 2011, and it reacted to some legal questions arising in the process of drafting the new Hungarian Constitution.[402] A few months later this was followed by another Opinion on the new Constitution itself.[403] The Venice Commission found it regrettable that the constitution-drafting process took place in a non-transparent fashion, without sufficient political dialogue. In addition, there was no adequate

[396] Pogány, 357.
[397] "Editorial Comments - Hungary's New Constitutional Order and "European Unity"," *Common Market Law Review* 49, no. 3 (2012): 874.
[398] "Editorial Comments - Hungary's New Constitutional Order and "European Unity"," 876.
[399] Attila Vincze and Márton Varju, "Hungary The New Fundamental Law," *European Public Law* 18, no. 3 (2012): 438.
[400] Bozóki and Hegedűs argue that these domestic changes occuring in Hungary under the EU's watch transformed the country into an „externally constrained hybrid regime." See András Bozóki and Dániel Hegedűs, "An Externally Constrained Hybrid Regime: Hungary in the European Union," *Democratization* 25, no. 7 (October 3, 2018): 1173–1189, https://doi.org/10.1080/13510347.2018.1455664.
[401] "Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at Its 95th Plenary Session, Venice, 14-15 June 2013," Council of Europe website, June 2013, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e.
[402] "Draft Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary" (European Commission for Democracy Through Law (Venice Commission), March 17, 2011), http://www.venice.coe.int/webforms/documents/?pdf=CDL(2011)016-e.
[403] "Opinion on the New Constitution of Hungary" (European Commission for Democracy Through Law (Venice Commission), June 20, 2011), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e.

public debate about the new Fundamental Law and the changes were introduced in a very short timeframe. The amount of cardinal legislation proposed in the Fundamental Law was also found inappropriate, as these kinds of laws make crucial social and economic issues very difficult to change and amend. The significance of cardinal laws is that they can only be accepted by the 2/3 majority of MPSs and they can only be applied in certain defined policy areas. The Venice Commission also gave its view on specific legislative changes, for example concerning the limitation of the powers of the Constitutional Court in certain matters. They had some concerns about the standards of fundamental rights protection. These shortcomings were all seen to pose a real threat for the sustainability and legitimacy of the Fundamental Law.

Two years later, in 2013, the Venice Commission issued its Opinion on the fourth amendment of the Fundamental Law. The body concluded that the modifications were problematic in three areas: the role of the Constitutional Court, the functioning of the ordinary judiciary, and the protection of individual human rights.[404] It argued that the amendments in question were problematic because they contradicted principles of the Fundamental Law and European Standards.[405] Moreover, it even raised concerns about the possible undermining of democracy and the rule of law in Hungary.[406]

János Martonyi, Minister of Foreign Affairs, reacted to these criticisms by stating that the Venice Commission has overstepped its authority and made observations motivated by political standpoints.[407] It should also be noted here that after two and a half years of investigation of the Council of Europe Parliamentary Assembly, the body decided not to launch a monitoring procedure against Hungary.[408] This decision was praised by the Hungarian government and made it possible for Martonyi to evaluate the Hungarian foreign policy after 2010 to be successful and to ask not to overestimate the importance of political debates (e.g. Tavares Report), but to look at the results Hungary has achieved within the EU.[409] He also emphasized

[404] "Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at Its 95th Plenary Session, Venice, 14-15 June 2013."
[405] "Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at Its 95th Plenary Session, Venice, 14-15 June 2013," 31.
[406] "Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at Its 95th Plenary Session, Venice, 14-15 June 2013," 32.
[407] "Martonyi János a Velencei Bizottság Véleményéről," Website of the Hungarian Ministry of Foreign Affairs, June 17, 2013, http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedek-publikaciok-interjuk/martonyi-janos-a-velencei-bizottsag-velemenyerol.
[408] Bálint Ódor, "A Tagállami Működés Keretei – Magyar Érdekérvényesítés," in *Magyarország Első Évtizede Az Európai Unióban 2004-2014*, ed. Attila Marján (Budapest: Nemzeti Közszolgálati Egyetem, 2014), 123.
[409] "Három Év Alatt Látványos Eredményeket Ért El a Magyar Külpolitika," Website of the Hungarian Ministry of Foreign Affairs, Spring 2013, http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedek-publikaciok-interjuk/harom-ev-alatt-latvanyos-eredmenyeket-ert-el-a-magyar-kulpolitika.

that the EU might be Hungary's opponent in some issues, but it is never an enemy (notwithstanding the Prime Minister's hostile rhetoric towards the EU).[410] The Minister of Foreign Affairs saw his country to be Eurorealist and not Eurosceptic, because Hungary never violated any basic rights and always made the proper changes to its legislation that were demanded by the EU.

These remarks of the former Foreign Minister confirm the argument of this thesis according to which in the first couple of years since 2010, the aim of the government was mainly to accumulate as much power as it could and to address issues which resonated with the Hungarian public, thus wanting to engage with them and capture their votes. However, at that time, Fidesz did not aspire to openly confront major EU policies: its hostile rhetoric towards the EU was present only on the façade, but in the mainstream EU-level decision-making processes Hungary was a cooperative and compliant Member State. As indicated by Hungary's infringement record, a general legal compliance is detectable until 2015. During this period, the anti-EU stance was demonstrated mainly by the hostile rhetoric against Brussels, as well as the adoption of domestic legislation which was not in line with the mainstream European liberal thinking and undermined certain EU values and principles. Therefore, the thesis argues that *the EU strategy of a country can also be defined from a bottom-up approach, by analyzing the domestic legislation and political agenda of a certain Member State*.

4. Political pressure from EU institutions

During the first years of the government change, the discussion about the domestic developments in Hungary was the most intense with the European Commission, namely its Vice President and Commissioner for Justice, Fundamental Rights and Citizenship (2010-2014), Viviane Reding. Reding warned Hungary on several occasions about her concerns with the recent changes in Hungary, such as the reduction of the retirement age of judges or the consistency of the new Hungarian Fundamental Law with EU law and the spirit of the Treaties. She did so, for example, in a 2011 letter addressed to Tibor Navracsics, Minister of Justice and Public Administration.[411]

[410] Ian Traynor, "Hungary Prime Minister Hits out at EU Interference in National Day Speech," The Guardian, March 15, 2012, http://www.theguardian.com/world/2012/mar/15/hungary-prime-minister-orban-eu.
[411] "Viviane Reding's Letter to Tibor Navracsics" (European Commission, December 12, 2011), http://ec.europa.eu/commission_2010-2014/reding/pdf/news/20120109_1_en.pdf.

The European Commission's annual country report is also a means through which a Member State can be evaluated. Foreign Minister Martonyi considered the 2012 report on Hungary to be a success, mainly because Hungary could remain under the 3% government deficit threshold and state debt also decreased. Although he evaluated the report to be generally positive, he condemned the European Commission for prognosticating deteriorating results in the near future. The Minister argued that the Commission should not criticize Hungary's success and popularize forecasts that are both dubious and grim.[412] On 11 March 2013, a Statement from the President of the European Commission and the Secretary General of the Council of Europe has been adopted as a reaction to the Fourth Amendment to the Hungarian Fundamental Law. It considered the newly introduced measures to raise concerns with respect to the principle of rule of law, EU law and Council of Europe Standards. However, at the same time, the statement also welcomed the Hungarian Prime Minister's confirmation about the Hungarian Government's commitment to European norms and values.[413]

The European Parliament also voiced its discontent with the situation of fundamental rights in Hungary. First, the Parliament issued a resolution in February 2012 about the "recent political developments in Hungary," which suggested the possibility of resorting to Article 7(1) of TEU if the country's authorities do not respond to the concerns of the EU.[414] This resolution was followed by the first report that was particularly harsh and controversial, namely the motion of MEP Rui Tavares in the summer of 2013. The Tavares Report regarded the reforms of the Hungarian Government as unprecedented and incompatible with several EU values and TEU Articles.[415] It provided a detailed assessment of the main concerns in several different political areas, such as the Fundamental law of Hungary and its implementation, the democratic system of checks and balances, the independence of the judiciary, the electoral reform, media pluralism, the rights of persons belonging to minorities, the freedom of religion or belief and

[412] "Martonyi János Az Európai Bizottság Országjelentéséről," Website of the Hungarian Ministry of Foreign Affairs, November 11, 2012, http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedek-publikaciok-interjuk/martonyi-janos-az-europai-bizottsag-orszagjelenteserol.
[413] "Statement from the President of the European Commission and the Secretary General of the Council of Europe on the Vote by the Hungarian Parliament of the Fourth Amendment to the Hungarian Fundamental Law" (European Commission, November 3, 2013), http://europa.eu/rapid/press-release_MEMO-13-201_en.htm.
[414] "European Parliament Resolution of 16 February 2012 on the Recent Political Developments in Hungary (2012/2511(RSP))" (European Parliament, February 16, 2012), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0053+0+DOC+PDF+V0//EN.
[415] "Report by Rui Tavares on the Situation of Fundamental Rights: Standards and Practices in Hungary (Pursuant to the European Parliament Resolution of 16 February 2012)" (European Parliament, June 25, 2013), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN#title1.

recognition of churches. The resolution concluded with resorting to Article 7(1) of TEU "in case the replies from the Hungarian authorities appear not to comply with the requirements of Article 2 TEU."[416]

This motion created a clear division between MEPs: some of them, mainly leftist politicians, supported Tavares in his criticisms against Hungary, while others considered them to be an exaggeration. This suggests that some points made by the report might have been politically motivated. As a response to this document, one day before the report was put up for vote at the European Parliament, Hungarian Prime Minister Viktor Orbán paid an unexpected visit in Brussels, and he sharply criticized the report in front of the European Parliament for being 'insulting' and 'unfair' towards the Hungarian people.[417] Moreover, he declared the proposal set forth in the report to be in "serious breach of the Founding Treaties" because it "would bring one of the Member States of the European Union under control and guardianship."[418] According to Orbán, the European Parliament's support for such a report would "mean a real danger for the future of Europe."[419] Despite the PM's efforts, on 3 July 2013, the European Parliament issued its resolution on the Hungarian situation, which reiterated most of Tavares's concerns.[420] The legislative body reacted to Orbán's accusations by denying that it applied double standards, and by reminding that its opinion about basic values and principles of the EU was valid to all Member States of the European Union, not just to Hungary. Moreover, it urged Hungary to "implement as swiftly as possible all the measures the European Commission as the guardian of the treaties deems necessary in order to fully comply with EU law, fully comply with the decisions of the Hungarian Constitutional Court and implement as swiftly as possible the (…) recommendations."[421]

The recommendations of the European Parliament contained revoking the controversial issues mentioned above and complying with the decisions of the Constitutional Court. The Hungarian

[416] "European Parliament Resolution of 16 February 2012 on the Recent Political Developments in Hungary (2012/2511(RSP))."
[417] "Prime Minister Orbán's Speech in the European Parliament," Website of the Hungarian Government, July 2, 2013, http://www.kormany.hu/en/prime-minister-s-office/the-prime-ministers-speeches/prime-minister-orban-s-opening-speech-in-the-european-parliament.
[418] "Prime Minister Orbán's Speech in the European Parliament."
[419] "Prime Minister Orbán's Speech in the European Parliament."
[420] "European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary (Pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI))" (European Parliament, March 7, 2013), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0315+0+DOC+XML+V0//EN.
[421] "European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary (Pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI))."

government reacted with its own decree accusing the European Parliament of overstepping its authority and calling on the EU to treat Hungary on equal footing with other Member States and to respect its sovereignty.[422] The stressing of national sovereignty was a major tactical tool for the Hungarian government during those years, as proven by the interactions of Prime Minister Orbán with EU politicians and institutions, as well as the Hungarian Parliament's activism in protecting the government. Even before its decree about the Tavares Report, the Hungarian legislative body issued two different decrees in March 2012. These decrees expressed gratitude to the Lithuanian[423] and Polish[424] society and politicians for raising their voices in support for Hungary and against all the foreign political criticism which was directed against Hungarians in those times, thus supporting Hungarian sovereignty and autonomy.

Martonyi reacted to the debate between his government and the EU institutions by urging not to mix legal issues with political ones. He argued that the EU refers to the protection of rule of law and democratic rights, even though what it criticizes are actually political issues. He also condemned the Hungarian opposition for bringing a domestic political debate to the European political scene. His proof for this was the standpoint of the European People's Party, which defended Hungary from the attacks coming from the leftist European political parties. He saw the reason behind the 'campaign' against Hungary in the fact that the new Hungarian foreign and economic policy harmed many foreign economic interests.[425] In an interview with a popular Hungarian news portal, he admitted that when he started his second term as Minister of Foreign Affairs, he did not think that he would have to give so many explanations and justifications about Hungarian foreign policy. However, he also highlighted that Hungary's so-called 'freedom fight' with Brussels is fought for 'his European dream,' claiming that that if one EU institution oversteps its authorities and exceeds the legal framework of European integration,

[422] "Resolution 69/2013. of the Hungarian Parliament," accessed January 15, 2014, http://www.complex.hu/kzldat/o13h0069.htm/o13h0069.htm.
[423] "12/2012. (III. 7.) OGY Határozat a Litván Civilek És Parlamenti Képviselők Állásfoglalásáról a Magyarországi Átalakulást Érő Nemzetközi Bírálatokkal Szemben - Törvények És Országgyűlési Határozatok" (Magyar Országgyűlés, March 7, 2012), https://mkogy.jogtar.hu/jogszabaly?docid=A12H0012.OGY.
[424] "11/2012. (III. 7.) OGY Határozat a Lengyel Civilek És Politikusok, Köztük Donald Tusk Miniszterelnök Állásfoglalásáról a Magyarországi Átalakulást Érő Nemzetközi Bírálatokkal Szemben - Törvények És Országgyűlési Határozatok" (Magyar Országgyűlés, March 7, 2012), https://mkogy.jogtar.hu/jogszabaly?docid=A12H0011.OGY.
[425] "Martonyi János Miniszter Az Elmúlt Időszak Magyar Diplomáciájáról," Website of the Hungarian Ministry of Foreign Affairs, June 7, 2013, http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedek-publikaciok-interjuk/martonyi-janos-miniszter-az-elmult-idoszak-magyar-diplomaciajarol.

the whole EU integration would be threatened.[426] This is the rhetoric that Hungary used to defend its symbolic, rogue actions from European and international critiques.

Martonyi ended his political career as Minister of Foreign Affairs in 2014. In the third Orbán government, the former Secretary of State for Foreign Affairs, Péter Szijjártó inherited his post, which was also renamed to Minister of Foreign Affairs and Trade. The new minister did not shy away from emphasizing that the nature of the Hungarian foreign policy has changed, and the main motives behind Hungary's foreign actions became clearly economic. This notion was reinforced by him when he said in an interview that Hungary conducts a 'Hungarian friendly' policy that only focuses on Hungarian interests. The government sees the success of its Europe-policy in harmonizing domestic, foreign, security and national goals and interests.[427] The need for rephrasing Hungary's EU policy was increased by the economic crisis, and Hungary's interest-promotion had to be likewise reconfigured in a crisis context.[428] This strategy is also manifested by Hungary's recent economic and political approach to Russia, despite the deteriorating relationship between the EU and its giant Eastern neighbor.

The above analysis showed what kind of leeway a Member State has when it comes to enacting symbolic, political system-defining changes into their domestic political fields. At first, they might not seem problematic from an EU point of view, because they directly do not affect the country's strategy on the European scene. However, when certain Member State actions start to question common European norms or values, the problem becomes outsourced to the EU level. However, this also reveals that while the EU has its tools to regulate normal state interest articulation, it has a normative deficit when it comes to controlling symbolic, rogue Member State behavior that might violate common interests. The following sub-chapters will demonstrate what kind of normative leverage the EU has in regulating different Member State actions.

5. Infringement procedures and Hungarian cases before the CJEU

Besides being a constant protagonist of the Brussels-based discussion (either in the form of resolutions, or sometimes in a more informal way) some legal actions have also been taken against Hungary. These cases are worth examining because they can reveal the interest

[426] "Martonyi János-Interjú Az Origón," Website of the Hungarian Ministry of Foreign Affairs, July 16, 2013, http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedek-publikaciok-interjuk/martonyi-janos-interju-az-origon.
[427] Ódor, "A Tagállami Működés Keretei – Magyar Érdekérvényesítés," 95.
[428] Ódor, 118.

articulation methods of the Member State in question, as well as the ways the EU handles interest-based Member State behavior.[429] One of these 'formal' procedures against Hungary was the Excessive Deficit Procedure that the country has been under since 2004. The resolution of this issue was among the biggest aims of the Hungarian government since 2010, and finally the European Commission recommended the abrogation of the Procedure in May 2013, and the Ecofin agreed to lift it in June the same year.[430] The case was interesting because of the divergent interpretations of the events on the level of politics. On the one hand, the Hungarian government evaluated the lifting of the Procedure as a success, adding that this step by the Commission was an acknowledgement of Hungary's economic achievements.[431] On the other hand, members of the opposition and independent experts claimed that it happened because Hungary came under serious pressure from the EU, and the government complied by introducing austerity measures that led to increased poverty across the country.[432]

Member States can participate before the CJEU on a voluntary basis, but the countries may appear as defendants as well. A specific type of legal proceeding launched against countries is the infringement procedure. It is an interesting trend that the Commission is not very strict with new Member States when it comes to infringements. Instead, it tends to give them time to adjust to EU law, and the cases launched against these Member States usually do not end up before the CJEU in the first years of their membership.[433] Moreover, many of the cases are repealed due to Member State compliance in the end. The first wave of infringements that reached the Court stage were launched against Hungary only around 2009-2010. The first infringement case against Hungary launched by the Commission was *Case C-253/09* about the freedom of

[429] Granger, argues that governments participate before the EU Court based on three basic motivations: the defense of the domestic national interest, the promotion of national visions in Europe (with the aim to influence EU law or practices) and acting as amicus curiae, so assisting the Court in clarifying significant questions of EU law. In the following Chapters, we will see that Hungary turned towards the ECJ in the matter of the refugee crisis motivated by some of these factors. Marie-Pierre Granger, "When Governments Go to Luxembourg…: The Influence of Governments on the European Court of Justice," *European Law Review* 29, no. 9 (2004): 10–13.
[430] "EU Frees Hungary from Excessive Deficit Procedure after Nine Years," politics.hu, June 21, 2013, http://www.politics.hu/20130621/eu-frees-hungary-from-excessive-deficit-procedure-after-nine-years/.
[431] "Hungary's Economic Performance Is Acknowledged: Excessive Deficit Procedure Lifted," Website of the Hungarian Government, May 29, 2013, http://www.kormany.hu/en/news/hungary-s-economic-performance-is-acknowledged-excessive-deficit-procedure-lifted.
[432] "Excessive Deficit Procedure against Hungary to Be Lifted," Budapost - A Hungarian press review, May 31, 2013, http://budapost.eu/2013/05/excessive-deficit-procedure-against-hungary-to-be-lifted/.
[433] Baranyai, "Magyarország Uniós Jogi Integrációja: Főbb Tendenciák És Kiemelt Jogi Ügyek," 154.

establishment and purchase of property.[434] The Court dismissed the Commission's claim in 2011.

In 2010, the Commission declared to bring Hungary, along with Portugal, before the CJEU over introducing controversial taxes.[435] The judgement of the Court came out in 2011,[436] and the case was closed in 2012 because Hungary has modified its VAT legislation accordingly. In January 2012, the European Commission launched infringement proceedings of a particularly sensitive nature, over the independence of Hungary's central bank and data protection authorities, as well as over measures affecting the judiciary. The Commission stated that the "Hungarian legislation conflicts with EU law" in several respects.[437] In November 2013, two infringement procedures were launched against Hungary, one concerning waste management problem (2013/0389) and another about alleged market distortions of mobile payment services.[438] The latter case reached the court-phase and the CJEU declared in 2018 that Hungary breached EU law on services in the internal market.[439] However, not all cases resulted in retortions against the country. Some of them, for example the procedure against telecommunications taxes, were dropped because the Court of Justice of the EU decided that they are in line with EU legislation. In other cases, Hungary promised to act and modified the parts of its laws criticized by the Commission.

In April 2012, the Commission expressed its satisfaction about the measures Hungary promised to take in the case of its central bank statute.[440] The *Central Bank*-case was closed by the European Commission after modifications were made to the Fundamental Law of Hungary.[441]

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[434] "Judgement of the Court in Case C-253/09 European Commission v Republic of Hungary" (Court of Justice of the European Union, December 1, 2011).
[435] "VAT Refunds: The European Commission Decides to Bring Hungary before the European Court of Justice for Its VAT Legislation Which Precludes Hungarian Taxable Persons from Claiming Reimbursement of Input VAT Where the Underlying Supply Has Not Been Paid" (European Commission, March 18, 2010), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/common/infringements/factsheet/2010/03/2010-03-296-hu-vat_en.pdf.
[436] "Judgement of the Court in Case C-274/10 European Commission v Republic of Hungary" (Court of Justice of the European Union, July 28, 2011).
[437] "European Commission Launches Accelerated Infringement Proceedings against Hungary over the Independence of Its Central Bank and Data Protection Authorities as Well as over Measures Affecting the Judiciary," Europa.eu, January 17, 2012, http://europa.eu/rapid/press-release_IP-12-24_en.htm?locale=en.
[438] "EU Launches Two New Infringement Procedures against Hungary," politics.hu, November 22, 2013, http://www.politics.hu/20131122/eu-launches-two-new-infringement-procedures-against-hungary/.
[439] "Judgement of the Court in Case C-171/17 European Commission v Hungary" (Court of Justice of the European Union, November 7, 2018).
[440] "Hungary - Infringements: European Commission Satisfied with Changes to Central Bank Statute, but Refers Hungary to the Court of Justice on the Independence of the Data Protection Authority and Measures Affecting the Judiciary," europa.eu, April 25, 2012, http://europa.eu/rapid/press-release_IP-12-395_en.htm.
[441] Baranyai, "Magyarország Uniós Jogi Integrációja: Főbb Tendenciák És Kiemelt Jogi Ügyek," 154.

Since 2010 Hungary has been subject to several politically sensitive judicial procedures, out of which some of them will only be briefly mentioned. The most important ones from the perspective of this thesis, the ones concerning the rule of law or expressing the raw economic and political interests of Hungary, will be presented in more detail.

One of the most prominent cases from 2012 was *Case C-286/12 European Commission v Hungary* about the 'forced retirement of judges.' The Hungarian Parliament introduced a significant decrease in the retirement age for judges, prosecutors, and notaries from 70 to 62 years of age. The CJEU's judgement, which evaluated that the law discriminates based on age, came in November 2012, after the Hungarian Constitutional Court had struck it down in July 2012.[442] The First Chamber of the Luxembourg Court ruled that Hungary "has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation."[443] Moreover, the Hungarian Constitutional Court "declared the implementing provisions lowering the retirement age for judges as unconstitutional."[444] It is interesting to note that the Hungarian Constitutional Court only addressed the case of judges and did not deal with the case of notaries and prosecutors.

The Venice Commission gave an exhaustive evaluation of the scheme in more than one Opinion. First, in March 2012, it evaluated the reform to be contradictory with European standards and called for the amendment of the Constitution where necessary.[445] In October 2012, the Venice Commission welcomed the Hungarian Constitutional Court's ruling on the case, but called for an action from the legislator's part to reinstate dismissed judges.[446] Hungary introduced a law in 2013 to replace the involved judges in the system and compensated them. However, not all of them wanted to come back to their offices. Finally, the procedure was closed in November 2013. This case is an example of a certain Hungarian compliance with EU law.

[442] "Decision of the Constitutional Court of Hungary No. 33/2012" (Official Gazette (Magyar Közlöny), July 16, 2012), http://mkab.hu/letoltesek/en_0033_2012.pdf.
[443] "Judgement of the Court in Case C-286/12 European Commission v Hungary" (Court of Justice of the European Union, June 11, 2012).
[444] "European Commission Closes Infringement Procedure on Forced Retirement of Hungarian Judges," Europa.eu, November 20, 2013, http://europa.eu/rapid/press-release_IP-13-1112_en.htm.
[445] "Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary" (European Commission for Democracy Through Law (Venice Commission), March 19, 2012), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282012%29001-e.
[446] "Opinion on the Cardinal Acts on the Judiciary That Were Amended Following the Adoption of Opinion CDL-AD(2012)001 on Hungary" (European Commission for Democracy Through Law (Venice Commission), October 15, 2012), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282012%29020-e.

The early retirement of judges was crucial for Fidesz to form the Hungarian judiciary system according to its preferences, primarily by packing courts with government-friendly judges. As soon as the EU warned that the legislation is not acceptable, however, Hungary corrected some parts of the controversial legislation. With this move, the Hungarian government hit two birds with one stone. It formally complied with EU rules, all the while cementing its influence across the Hungarian judicial system.

In *Case C-288/12 European Commission v Hungary* the CJEU ruled that Hungary violated EU law concerning the abolishment of the Ombudsman for Data Protection.[447] The Court's decision emphasized the importance of the role data protection supervisory authorities fulfil in the protection of privacy and personal data. It also argued that with ending the mandate of the Ombudsman before the expiry of his term, the government undermined the independence of the data protection authority. The Hungarian government accepted the decision, apologized to Ombudsman András Jóri, and financially compensated him as per the Court's decision.

About Hungary's tax-exemption on pálinka (*Case C-115/13 European Commission v Hungary*) the Commission argued that Hungary does not comply with Directive 92/83/ECC, which allows a maximum of 50% tax reduction.[448] The Court of Justice determined that Hungary violated Community law with exempting from taxation the home production of pálinka. An interesting addition to this case is that the introduction of the possibility of tax-free pálinka production was a politically motivated decision by the government. This specific type of alcoholic beverage is considered a 'Hungaricum,' making the decision a particularly popular one among Hungarian citizens. In this case, the same thing happened as in the judges-case. Hungary backed off and implemented the necessary modifications in the legislation following the CJEU's ruling.

A 2012 tax regulation change in Hungary introduced a system that favored national cafeteria vouchers and cards to the previously applied paper-based vouchers by different distributors. The companies affected by the new rule turned to the European Commission, which appealed to the CJEU in June 2013 on grounds of discrimination and the freedom to provide services.[449] The clear aim of Hungarian foreign and economic policy since 2010 was to favor Hungarian

[447] "Judgement of the Court in Case C-288/12 European Commission v Hungary" (Court of Justice of the European Union, August 4, 2014).
[448] "Judgement of the Court in Case C-115/13. European Commission v Hungary" (Court of Justice of the European Union, October 4, 2014).
[449] "Action Brought on 10 April 2014 — European Commission v Hungary (Case C-179/14)" (Court of Justice of the European Union, June 30, 2014), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CN0179.

companies, investors and producers, rather than foreign ones. In line with this policy, the distributors of vouchers negatively affected by the 'nationalization' of the Hungarian cafeteria system were mainly foreign, namely French investors. In September 2015, Advocate General Yves Bot argued in his motion that this Hungarian regulation violates EU law from several aspects, such as the freedom of establishment for companies.[450] The Court's ruling came on the 23rd of February in 2016, in which it declared the Hungarian cafeteria system reform to be contrary to EU law based on the freedom of establishment and to provide services.[451] The case is a good example for the interest and profit-maximizing foreign/economic policy that characterized Hungary in its EU-strategy.

Another prominent case related to Hungary is *Case C-385/12* (*Hervis*), in which the national tax legislation establishing an exceptional tax on the turnover of store retail trade was examined by the Court. The basis of the case lied in the Hungarian special tax system introduced in 2010. According to Hervis, the tax system is positively discriminating companies operating in their own business model thus favors them to companies functioning in other constellations, mainly franchises. It was the local court of Székesfehérvár that asked for the preliminary ruling of the Court, which was issued in February 2014. The ruling of the CJEU argued that such a progressive type of tax introduced by the Hungarian authorities might be contrary to the freedom of establishment,[452] but it is the local court that has to decide whether such violation causes indirect discrimination among the different companies.[453] The Court of Székesfehérvár declared in November 2014 that the legislation indirectly resulted in the negative discrimination of companies based in other Member States.[454]

[450] "Opinion of AG Yves Bot on Case C-179/4" (Court of Justice of the European Union, October 17, 2015), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5bd46fbe382844f56b63ad1bdd9c2e95d.e34KaxiLc3eQc40LaxqMbN4Oc3yRe0?text=&docid=167903&pageIndex=0&doclang=SK&mode=req&dir=&occ=first&part=1&cid=172223.
[451] "Judgement of the Court in Case C-179/14 European Commission v Hungary" (Court of Justice of the European Union, February 23, 2016).
[452] "Judgement of the Court in Case C-385/12 Hervis Sport- És Divatkereskedelmi Kft. v Nemzeti Adó- És Vámhivatal Közép-Dunántúli Regionális Adó Főigazgatósága" (Court of Justice of the European Union, May 2, 2014).
[453] Attila Vincze, "A Kiskereskedelmi Különadó Összeegyeztethetősége Az Uniós Joggal," HAS CSS Lendület-HPOPs Research Grop, April 16, 2014, http://hpops.tk.mta.hu/blog/2014/04/a-kiskereskedelmi-kulonado-osszeegyeztethetosege.
[454] "Ítélet Született a Hervis-Ügyben," Székesfehérvári Törvényszék honlapja, July 11, 2010, https://szekesfehervaritorvenyszek.birosag.hu/sajtokozlemeny/20141107/itelet-szuletett-hervis-ugyben.

In 2015 the European Commission started investigating whether Hungary's advertisement tax introduced in June 2014 complied with the EU's state aid regulations.[455] The Commission argued that the progressive tax rate provided a considerable advantage to some media companies. In November 2016, the European Commission considered the Hungarian advertisement tax to be in breach of EU state aid rules "because its progressive tax rates grant a selective advantage to certain companies. It also unduly favors companies that did not make a profit in 2013 by allowing them to pay less tax." Therefore, it requested Hungary to remove the unjustified discrimination that the 2014 Advertisement Tax Act created among companies and to restore equal treatment in the market. However, Hungary brought the annulment of the Commission decision before the General Court. The Court found in June 2019 that the Commission was not entitled to infer that there were certain advantages deriving from the structure of the advertisement tax. As a result, it annulled the contested decision in its entirety.[456]

In May 2016, Hungary appeared on the EU's radar due to the segregation of Roma children in schools. In its letter of formal notice, the Commission expressed its concerns about Hungarian legislation and administrative practices in the education of Roma children, mainly its non-conformity with Directive 2000/43/EC on Racial Equality, which prohibits discrimination on grounds of racial or ethnic origin in education. The Commission argued that the Hungarian practices in education lead to the disproportionate over-representation of Roma children in special schools for mentally disabled children. The body claimed that they are also subject to a considerable degree of segregated education in mainstream schools.[457] The procedure is still active (Infringement number: 2015/2206), and authorities are investigating whether Hungary took the necessary steps to prevent and eliminate the segregation.

In March 2015, the Commission opened infringement proceedings against Hungary, Bulgaria, Lithuania, and Slovakia on investor restrictions for agricultural land. The laws of these countries regulating the acquisition of agricultural land were found to be discriminative to foreign buyers (investors from other Member States). Moreover, they restricted the free

[455] "Állami Támogatás: A Bizottság Részletes Vizsgálatot Indít a Magyarország Által Bevezetett Reklámadó Kapcsán," Europa.eu, December 3, 2015, http://europa.eu/rapid/press-release_IP-15-4598_hu.htm.
[456] "Judgement of the Court in Case T-20/17 Hungary v European Commisison" (Court of Justice of the European Union, June 27, 2020).
[457] "May Infringements' Package: Key Decisions," Europa.eu, May 26, 2016, http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm.

movement of capital and freedom of establishment within the EU.[458] Later next year the Commission sent a Reasoned Opinion to these countries (plus Latvia), and requested to amend legislation on the acquisition of agricultural land on the grounds that it violates the above mentioned principles.[459] The land law is a signature example of Hungary's protectionist economic policy and the tendency to discriminate against foreigners in certain cases where it serves the national interest. After the Commission's request, Hungarian government officials said that the law was indeed directed against shutting foreign investors out of Hungary and that they were willing to go to 'war' against Brussels in this matter. The judgement of the Court came in May 2019, whereby the CJEU declared that "by cancelling the rights of usufruct over agricultural and forestry land located in Hungary that are held, directly or indirectly, by nationals of other Member States, Hungary has failed to fulfil its obligations under Article 63 TFEU in conjunction with Article 17 of the Charter of Fundamental Rights of the European Union."[460] In two related cases before the CJEU, which concerned the foreign acquisition of land in Hungary (*Joined Cases C-52/16 and C-113/16 'SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala* and *Günther Horváth v Vas Megyei Kormányhivatal*) the Court also declared that depriving persons of their right of usufruct if they do not have a close family tie with the owner of agricultural land in Hungary is contrary to EU law.[461]

In 2018, two significant cases (*Case C-75/18 Vodafone*[462] and *Case C-323/18 Tesco*[463]) were launched before the CJEU, both of them preliminary rulings requested by the Administrative and Labor Court of Hungary. The Hungarian court asked the opinion of the CJEU regarding Hungary's special TAX system, more precisely the special taxes levied in Hungary on the turnover of telecommunications operators and of undertakings in the retail trade sector. The CJEU's ruling came in March 2020, and it defined that these special taxes were compatible

[458] "Financial Services: Commission Opens Infringement Procedures against Bulgaria, Hungary, Lithuania and Slovakia on Investor Restrictions for Agricultural Land," Europa.eu, March 26, 2015, https://europa.eu/rapid/press-release_IP-15-4673_EN.htm.
[459] "Financial Services: Commission Requests Bulgaria, Hungary, Latvia, Lithuania and Slovakia to Comply with EU Rules on the Acquisition of Agricultural Land," Europa.eu, May 26, 2016, https://europa.eu/rapid/press-release_IP-16-1827_EN.htm.
[460] "Judgement of the Court in Case in C-235/17 European Commission v Hungary" (Court of Justice of the European Union), 17, accessed October 1, 2019.
[461] "Judgment of the Court in Joined Cases C-52/16 and C-113/16 'SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal" (Court of Justice of the European Union, June 3, 2018).
[462] "Judgement of the Court in Case C-75/18 Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó-És Vámhivatal Fellebbviteli Igazgatósága" (Court of Justice of the European Union, March 3, 2020).
[463] "Judgement of the Court in Case C-323/18 Tesco-Global Áruházak Zrt. v Nemzeti Adó-És Vámhivatal Fellebbviteli Igazgatósága" (Court of Justice of the European Union, March 3, 2020).

with the principle of freedom of establishment and Directive 2006/1121('the VAT Directive'). The specificity of these cases was that these special taxes affected undertakings owned by persons from other Member States. However, as these ventures are the ones that achieve the highest turnover in the Hungarian markets concerned, the Court stated that these taxes actually reflect the market's economic reality and cannot be considered a discrimination against these companies.

In several infringement proceedings (e.g. about the special telecommunication tax, or the assignment of spectrum in the radio broadcasters) the case did not get to a stage in which it would have to be presented in front of the CJEU. This was because Hungary responded to the formal notice of the Commission positively and it exerted the required changes in its laws. This is something that the Orbán-government is especially proud of, and it often argues that those who criticize the country about its violations of law are in fact wrong, because in the most significant cases Hungary always abides by the Commission's requests. However, this 'belated compliance' still falls into the category of rogue Member State tactics. It does not change the fact that in certain cases (e.g. the case of judges or the ombudsman) the damage is done and the government is able to achieve its main goal even if it restores legislation after the warning from Brussels or Luxemburg.

Hungary was not only the respondent of cases before the CJEU, but it also appeared as claimant in some of them. In fact, Hungary has been fairly active in this regard before the CJEU. Many of these cases were related to taxation or the special system of taxes in Hungary.[464] One of the most important cases was the one launched by Hungary against Slovakia in 2010. The motive for Hungary to turn towards the CJEU was the refusal of Slovakia in 2008 to let the Hungarian President of the Republic László Sólyom (2005-2010) through its border on an official visit in Slovakia. As the date of the visit coincided with a historically sensitive Slovakian event (the anniversary of the occupation of Czechoslovakia by countries of the Warsaw Pact), Slovakia denied entry to the President by referring to security risks. Hungary argued that Slovakia violated the directive about the free movement of citizens within borders. As the Commission was not willing to launch a proceeding against Slovakia in the matter, Hungary wished to initiate it itself, but without success. In its October 2012 decision, the Court ruled that the rules derived from international law regulating the rights and obligations/treatment of heads of states

[464] See for example: "Judgement of the General Court in Cases T-554/15 and T-555/15" (Court of Justice of the European Union, April 25, 2018); "Judgment of the Court (First Chamber) of 4 June 2020 — Hungary v European Commission (Case C-456/18 P)" (Court of Justice of the European Union, June 4, 2020).

overrides the directive about the free movement of people.[465] It was therefore justified for Slovakia not to let Sólyom past the border due to security concerns. Because the visit would have occurred in Sólyom's official capacity, he would not have entered the country as a regular citizen.[466] An interesting aspect of the case is that the Court did not consider the implications of loyalty, even though Advocate General Bot argued not only that Article 4(3) TEU obliges Member States to refrain from any activity that would jeopardize European integration, but that this loyal cooperation has to be binding in bilateral relations as well.[467] Moreover, the Court did not take into consideration the concept of neighborliness, or good relationship between Member States, a factor Hungary clearly disregarded when filing a case against Slovakia. Some researchers argue that such negligence from the part of the CJEU questions the commitment of the body to European integration as a value essential in the European Union.[468] Other relevant court cases not mentioned here (infringements about the higher education law, the anti-NGO law, Hungary's appeal to the court in relation to the mandatory relocation of refugees etc.) will be discussed in the next sub-chapter, connected to the case studies.

All in all, the legal cases before the European Commission or the Court of Justice do not undermine the fact that the overall legal compliance of Hungary is satisfactory.[469] In the case of implementing directives, Hungary was successful in the period between 2011 and 2012. In 2012, twenty-six infringement proceedings were launched against Hungary due to the late implementation of directives. This result was a great improvement compared to 2011. Moreover, Hungary was 19th out of the twenty-seven Member States in this regard.[470]

Based on the data from the European Commission's 2014 document monitoring the application of EU Law, "the number of new complaints made against Hungary rose slightly in 2014 after two years of decline. (…) The overall number of pending infringement cases has fluctuated to some extent over the last five years. New infringement cases for late transposition rose back to

[465] "Judgement of the Court in Case C-364/10 Hungary v Slovak Republic" (Court of Justice of the European Union, October 16, 2012).
[466] Ernő Várnay, "Az Európai Bíróság Ítélete a Magyarország Kontra Szlovákia Ügyben - Sólyom László Uniós Polgár És/Vagy Államfő?," *Jogesetek Magyarázata*, no. 4 (2013): 80–91.
[467] Lucia Serena Rossi, "EU Citizenship and the Free Movement of Heads of State: Hungary v. Slovak Republic," *Common Market Law Review* 50 (2013): 1461–1462.
[468] Béatrice Delzangles, "Les Affaires Hongroises Ou La Disparition Du Valeur 'Intégration' Dans La Jurisprudence de La Cour de Justice," *Revue Trimestrielle de Droit Européen* 2013, no. avril-juin (n.d.): 201–215.
[469] "Internal Market Scoreboard 26" (European Commission, February 2013), http://ec.europa.eu/internal_market/score/docs/score26_en.pdf.
[470] Baranyai, "Magyarország Uniós Jogi Integrációja: Főbb Tendenciák És Kiemelt Jogi Ügyek," 149.

their 2012 level but were still considerably lower than in 2010 and 2011."[471] In 2014, the European Commission launched 893 new procedures by sending a letter of formal notice, thirty-eight of which directed against Hungary. With this number, Hungary was in the upper-middle half of the Member State ranking.[472] In 2013, thirty-seven infringement cases were open against Hungary. This number was forty-four in 2014, thirty-eight in 2015 and fifty-seven in 2016 and forty-eight in 2017. 2016 was a five-year-record for Hungary in terms of ongoing cases against it.[473] Still, the country was situated only somewhere in the middle when it came to open infringement cases by country.[474] Since Hungary's accession, the European Commission has launched 700 infringement proceedings against Hungary (until April 2020), most of them concerning the late implementation of directives.[475] In the past years the number of its infringement cases have placed Hungary in the center or first half of Member States. Nevertheless, the severity of the infringement cases also must be taken into account in evaluating a country's general performance. In this respect, we can say that the infringement proceedings in which Hungary was involved in the past years were usually significant or politically sensitive.[476]

These numbers confirm that according to a strict legal interpretation, Hungary is not performing worse than most EU Member States in compliance with EU law. The government operates according to what is called the *peacock dance*, a careful balancing of obligations that consists of modifying domestic legislation as it best serves its national economic or government interests, all the while making sure that it responds to EU institutional critiques positively. However, when it comes to the most recent existential conflicts of the EU, such as the question of the rule of law or the refugee crisis, it will be apparent that Hungary has been in the spotlight for being a rogue Member State. It should also be mentioned that the principle of loyalty hardly

[471] "Monitoring of Application of Union Law - Annual Report on Hungary 2014" (European Commission, July 2015), http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_32/country_sheet_hu_en.pdf.
[472] "Report from the Commission - Monitoring the Application of Union Law: 2014 Annual Report" (European Commission, September 7, 2015), 13, http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_32/com_2015_329_en.pdf.
[473] "Monitoring the Application of European Union Law - Annual Report 2017 - Hungary" (European Commission, December 31, 2017), https://ec.europa.eu/info/sites/info/files/national-factsheet-hungary-2017_en.pdf.
[474] "EU: Record Number of Infringement Cases against Hungary," Budapest Beacon, November 7, 2017, https://budapestbeacon.com/eu-record-number-infringement-cases-hungary/.
[475] "Infringement Decisions," European Commission website, accessed April 6, 2020, https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=HU&typeOfSearch=true&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&EM=HU&title=&submit=Keres%C3%A9s.
[476] Balázs, "Közeledés Vagy Távolodás?," 356.

appeared in these infringements as a point of reference either form the claimants or from the CJEU itself.[477]

6. Rule of law mechanism in Europe and the erosion of rule of law in Hungary

6.1 The erosion of the rule of law in Hungary

The most difficult part of analyzing the Hungarian situation, or any similar interaction between an EU institution and a Member State, is deciding whether there is a real problem lying behind the seemingly politically sensitive discussions of the country and the EU. The cases mentioned above suggest that criticism coming from different European institutions can be indeed overshadowed by political motivation (i.e. the *Tobin*-case discussed later). However, the European Commission's recent activity aiming at appearing as the guardian of the rule of law and the Treaties shows that the Commission indeed had some serious concerns about the rule of law in some EU Member States, including in Hungary. The procedure defined in Article 7 TEU, which serves as an instrument for the EU to sanction value-violating Member State behavior, dates back to the Treaty of Amsterdam and was adopted "in direct anticipation of the 'big-bang' Eastern enlargement of the EU."[478] Nevertheless, even though Article 7 outlined a scenario for handling rogue Member States, for a long time it has never been applied, not even in the case of the infamous Haider-affair in Austria, in 2000.[479] However, due to some political developments and the increasing diversity of Member States, the need to somehow strengthen the mechanism and make it easier to apply became more and more pressing.

On 11 March 2014, the Commission presented a new framework to safeguard the rule of law in the European Union.[480] The framework serves as a "tool to deal, at the EU level, with systemic threats to the rule of law" and it is complementary to infringement procedures and Article 7. The most important feature of the new rule of law mechanism is its early warning mechanism that allows the Commission to enter a dialogue with the Member State in question as early as possible. The introduction of this mechanism suggested that the concerns of the

[477] The only case among the aforementioned infringements where Article 4(3) was mentioned in the judgement was the 'tobacco case' (Cases T-554/15 and T-555/15) where Hungary as a claimant referred to the principle of sincere cooperation, but the Court dismissed its plea.
[478] Dimitry Kochenov, "Busting the Myths Nuclear: A Commentary on Article 7 TEU," *EUI Working Papers Department of Law* (October 2017): 1-13, http://cadmus.eui.eu/bitstream/handle/1814/46345/LAW_2017_10.pdf?sequence=1.
[479] Veronika Czina and Teona Surmava, "The Rise of Populist and Extremist Parties in the EU The Case of Hungary and Austria" (Project for Democratic Union, January 2015), http://www.democraticunion.eu/wp-content/uploads/2015/06/pdu-study-2015-1.pdf.
[480] "European Commission Presents a Framework to Safeguard the Rule of Law in the European Union," europa.eu, November 3, 2014, http://europa.eu/rapid/press-release_IP-14-237_en.htm.

European Union about the state of rule of law in some EU countries were legitimate. It was already foreseeable at the time of its presentation that this framework could be advantageous for the future because it clarifies the authority of the Commission and could hopefully prevent politically heated discussions and accusations about the EU overstepping its authority, such as those surrounding the Tavares Report. In fact, the need to boost up and reform the procedure surrounding Article 7 TEU was in a way initiated by the already mentioned 'Tavares Report,' as it was the first step in the creation of a new type of rule of law mechanism and it was followed by other institutional reports.[481] Instead of supporting the Commission's proposal, the Council decided in December 2014 to establish an annual rule of law "dialogue among all Member States within the Council" based "on the principles of objectivity, non-discrimination and equal treatment of all Member States" and to be "conducted on a non-partisan and evidence-based approach."[482] However, this did not prove to be very effective as it will be demonstrated through the interactions between Hungary and certain European institutions presented in the following paragraphs.

The 'Hungarian question' was put on schedule in numerous EP plenary sessions since the safeguarding of the rule of law became a primary concern for Brussels. On 19 May 2015, the European Parliament's plenary session discussed the Hungarian case and mainly focused on recent political developments and Viktor Orbán's remarks about immigration. At the debate both the Council and the Commission issued a statement about the recent developments in Hungary. The latter referred to the principle of loyalty and solidarity as the guiding sources of Member States when finding common solutions to pressing European issues.[483] As a follow-up, in June 2015, the EP adopted a resolution on the Situation in Hungary, urging "the Commission to activate the first stage of the EU framework to strengthen the rule of law, and therefore to initiate immediately an in-depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary."[484] The problematic issues that triggered the Parliament to act included Prime Minister Orbán's statement about the possible reinstallation of death penalty, the public consultation of May 2015 on migration (with leading

[481] Carlos Closa and Dimitry Kochenov, eds., *Reinforcing Rule of Law Oversight in the European Union / Edited by Carlos Closa, Dimitry Kochenov* (Cambridge, United Kingdom: Cambridge University Press, 2016).
[482] "Press Release of the 3362nd General Affairs Council Meeting" (Council of the European Union, December 16, 2014), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/146348.pdf.
[483] "Commission Statement on the Situation in Hungary First Vice-President Timmermans Strasbourg, 19 May 2015," Europa.eu, May 19, 2015, http://europa.eu/rapid/press-release_SPEECH-15-5010_en.htm.
[484] "European Parliament Resolution of 10 June 2015 on the Situation in Hungary," European Parliament, June 10, 2015, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0227+0+DOC+XML+V0//EN.

and rhetorical questions), and the related billboard campaign (misleading content and language linking immigration to terrorism). In autumn 2015, the EP's liberal ALDE group started a campaign for applying Article 7 against Hungary despite the opposition of S&D. This call came after the escalation of the refugee crisis in Europe that led to a hostile policy from the Hungarian government, including the erection of a fence on Hungary's southern borders and refusing to participate in common EU attempts to reform the European migration policy.[485] However, the EP's Civil Liberties, Justice and Home Affairs Committee rejected the ALDE MEP's initiative.

As the Council and the Commission remained silent in the matter, another form of initiative appeared as a demand for reaction to the Hungarian events: a citizens' initiative. The initiative named Wake up Europe! was launched by the European Humanist Federation,[486] and the European Commission registered it on 30 November 2015. The initiative was 1 million signatures away from 7 EU Member States for the Commission to have an obligation to investigate the Hungarian events,[487] but it was eventually withdrawn in June 2016.[488] The EP's 2 December 2015 plenary session also dealt with the Hungarian question. It was stated that the Commission saw no systemic threat to the state of democracy in Hungary, but concerns remained. Commissioner Jurová "listed several recent contentious issues that the Commission monitored in Hungary, including the treatment of asylum seekers, segregated education and discrimination of the Roma, the treatment of non-governmental organizations managing Norwegian funds, questionable judgments by the judiciary, state aid to media and for the construction of a nuclear plant, as well as corruption affecting public procurement."[489] The plenary resulted in another resolution in which the EP reiterated its position expressed in the June resolution due to further developments in Hungary regarding the handling of migration,

[485] "Hungarian Laws to Hunt down Refugees Are a Reminder of Europe's Dark Past - ALDE Group to Maintain Demand for 7.1 Procedure," Cecilia wikstrom.eu, July 10, 2015, http://cecilia wikstrom.eu/en/hungarian-laws-to-hunt-down-refugees-are-a-reminder-of-europes-dark-past-alde-group-to-maintain-demand-for-7-1-procedure/.
[486] "Wake up Europe! Stop the Authoriarian Drift in Europe," act4democracy.eu, accessed January 17, 2016, http://act4democracy.eu/.
[487] "Commission Registers European Citizens' Initiative on EU Fundamental Values in Hungary," November 30, 2015, http://europa.eu/rapid/press-release_IP-15-6189_en.htm.
[488] "European Citizens' Initiative - Wake up Europe! Taking Action to Safeguard the European Democratic Project," European Commission website, accessed January 27, 2019, http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2015/000005.
[489] "European Parliament Press Release - Hungary: No Systemic Threat to Democracy, Says Commission, but Concerns Remain," European Parliament website, December 2, 2015, http://www.europarl.europa.eu/news/en/news-room/20151201IPR05554/Hungary-no-systemic-threat-to-democracy-says-Commission-but-concerns-remain.

and called on the Commission to activate "the first stage of the EU framework to strengthen the rule of law." [490]

Among the many contested issues connected to Hungary, one of the most prominent was the situation of NGOs in Hungary, whose operation became extremely difficult due to budgetary restrictions. The fundamental rights of NGOs have been hampered gradually, starting already in 2011 by an Act on right to association and legal status of civil organizations and public utility status (Act CLXXV of 2011).[491] The Act restricted the conditions of becoming a legal entity and accession to public utility status. Moreover, between 2013-2015 an illegitimate state audit was launched into the use of the EEA/Norway Grants NGO fund and their tax numbers were suspended.[492] To be more specific, some provisions of a new Hungarian law ('Transparency Law')[493] on foreign-funded NGOs introduced in the summer of 2017 **"**indirectly discriminate and disproportionately restrict donations from abroad to civil society organizations."[494] As a result, the European Commission initiated an infringement procedure against Hungary and referred the country to the CJEU in December 2017 as a third step of the proceeding.[495]

The NGO law, however, was only the tip of the iceberg. It was mainly targeted against those organizations that were claimed to "support migration" and were allegedly linked to George Soros, the Hungarian-American philanthropist billionaire.[496] This affair was part of the 'campaign' launched by Fidesz against Soros, who became after 2017 the primary conspirator responsible for the refugee crisis and an enemy wanting to destroy the Europe of nation-states. In 2018, the law curtailing the rights of NGOs became part of the 'Stop Soros' bill, which was accepted by the Hungarian Parliament in June 2018. The Stop Soros bill makes possible the

[490] "European Parliament Resolution of 16 December 2015 on the Situation in Hungary (2015/2935(RSP)" (European Parliament, December 16, 2015), http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0461&language=EN.
[491] "2011. Évi CLXXV. Törvény Az Egyesülési Jogról, a Közhasznú Jogállásról, Valamint a Civil Szervezetek Működéséről És Támogatásáról" (Magyar Országgyűlés, December 14, 2011), https://net.jogtar.hu/jogszabaly?docid=A1100175.TV.
[492] Judit Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," in *Human Rights of Asylum Seekers in Italy and Hungary: Influence of International and EU Law on Domestic Actions*, ed. Balázs Majtényi and Tamburelli Giuanfranco (Torino; The Hague (NL): G. Giappichelli : Eleven International Publishing, 2019), 142.
[493] "2017. Évi LXXVI. Törvény a Külföldről Támogatott Szervezetek Átláthatóságáról - Hatályos Jogszabályok Gyűjteménye" (Magyar Országgyűlés, June 28, 2017), https://net.jogtar.hu/jogszabaly?docid=A1700076.TV.
[494] "European Commission Refers Hungary to the Court of Justice for Its NGO Law," Europa.eu, accessed January 27, 2019, http://europa.eu/rapid/press-release_IP-17-5003_en.htm.

[496] "Civil Organizations in Hungary Brace for Government Crackdown on NGOs," Reuters, April 25, 2018, https://www.reuters.com/article/us-hungary-orban-ngos/civil-organizations-in-hungary-brace-for-government-crackdown-on-ngos-idUSKBN1HW1ZN.

legal prosecution of persons 'organizing migration,' and is therefore directed against those organizations that support migration..[497] It does not come as a surprise that the Venice Commission adopted an Opinion after the declaration of the bill, criticizing the legislation and declaring that it should be repealed.[498] In July 2018, the Commission referred Hungary to the CJEU as a last step of an infringement procedure "for non-compliance of its asylum and return legislation with EU law," and also started a new infringement procedure "concerning new Hungarian legislation which criminalizes activities that support asylum and residence applications and further restricts the right to request asylum,"" meaning the 'Stop Soros' bill.[499] In July 2019, the Commission took the next step by referring Hungary to the CJEU in the matter. At the same time, the Commission has also decided to send a letter of formal notice to Hungary concerning the treatment of persons who are detained in the Hungarian transit zones at the border with Serbia.[500] The Court delivered its judgement on the Transparency Law in June 2020, stating that the Hungarian restrictions on the financing of civil organizations by persons established outside that Member State violate EU law. The Court argued that the Transparency Law had introduced discriminatory and unjustified restrictions regarding both the organizations at issue and the persons granting them such support. [501]

In 2017-2018 the Hungarian political discourse was mainly occupied by the Soros-topic, which resulted in another conflict that invited severe criticism from the international community. The Hungarian government targeted the Central European University, which was founded by George Soros, and was operating in Budapest issuing both Hungarian and American degrees. In April 2017, the government amended its Higher Education Law[502] in a way that

[497] "Magyarország Kormányának Javaslata a Stop Soros Törvénycsomagról" (Hungarian Government, June 2018), http://www.kormany.hu/download/c/9a/41000/STOP%20SOROS%20T%C3%96RV%C3%89NYCSOMAG.pdf.

[498] "Hungary: 'Stop Soros' Provision on Illegal Migration Should Be Repealed, Says Venice Commission," Council of Europe website, June 22, 2018, https://www.coe.int/en/web/human-rights-rule-of-law/events/-/asset_publisher/E5WWthsy4Jfg/content/hungary-stop-soros-provision-on-illegal-migration-should-be-repealed-as-it-seriously-impairs-legitimate-ngo-work-say-venice-commission-legal-experts.

[499] "Migration and Asylum: Commission Takes Further Steps in Infringement Procedures against Hungary," Europa.eu, July 19, 2018, http://europa.eu/rapid/press-release_IP-18-4522_en.htm.

[500] "Commission Brings Infringement Proceedings against Hungary," Text, European Commission website, July 25, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260.

[501] "Judgment of the Court (Grand Chamber) in Case C-78/18 European Commission v Hungary" (Court of Justice of the European Union, June 18, 2020).

[502] "2017. Évi XXV. Törvény a Nemzeti Felsőoktatásról Szóló 2011. Évi CCIV. Törvény Módosításáról - Törvények És Országgyűlési Határozatok" (Magyar Országgyűlés, April 10, 2017), https://mkogy.jogtar.hu/jogszabaly?docid=A1700025.TV.

disproportionately restricted the operation of foreign universities in Hungary.[503] CEU was among those few Hungarian universities that fell under the scope of this law. The law set certain requirements (such as needing to provide higher education services in the country of origin) that would have made the operation of the University illegal in Hungary unless CEU begins proper teaching activities in the United States. After more than a year of long negotiations between CEU and the government, even though CEU fulfilled the operating conditions set by the new law, the Hungarian government refused to sign the deal that would have made it possible for the university to stay in the country. In the autumn of 2018, CEU thus announced to move to Vienna.[504] The infringement procedure that the EC launched against Hungary is still ongoing, as the European Commission referred Hungary to the CJEU in the matter.[505] In his Opinion delivered in March 2020, Advocate General Juliane Kokott suggested to the CJEU to condemn Hungary because the requirements Hungary set for CEU are discriminatory and disproportionate of freedom of establishment, the Services Directive, the Charter of Fundamental Rights and the national treatment rule of the GATS. She argued that "Hungary must treat foreign and national higher education institutions equally."[506]

The two cases briefly depicted above – NGOs and CEU – had a lot to do with an intensifying EU dialogue targeted against Hungary regarding the respect for the rule of law and other values mentioned in Article 2 TEU. In a resolution adopted in May 2017, the European Parliament called for triggering Article 7 against the country by declaring that "Hungary's current fundamental rights situation justifies launching the formal procedure to determine whether there is a 'clear risk of a serious breach' of EU values by a Member State."[507] This resolution was a follow-up to a plenary debate held on 26 April 2017 in the EP, during which MEPs discussed the Hungarian education law, the tightening rules for NGOs and asylum seekers and a

[503] "Commission Refers Hungary to the European Court of Justice of the EU over the Higher Education Law," Europa.eu, December 17, 2017, http://europa.eu/rapid/press-release_IP-17-5004_en.htm.
[504] "Message from President and Rector Michael Ignatieff," Central European University website, December 17, 2018, https://www.ceu.edu/article/2018-12-03/update-ceus-move-vienna-future-students.
[505] "Commission Refers Hungary to the European Court of Justice of the EU over the Higher Education Law."
[506] "Court of Justice of the European Union PRESS RELEASE No 25/20 - Advocate General's Opinion in Case C-66/18 Commission v Hungary" (Court of Justice of the European Union, 2020), https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-03/cp200025en.pdf?fbclid=IwAR31nqXUInZX_7RwmNpIWwjx14LKcCdGDOWFkNuSvLBWjv6pVZrVjaRtj-Q.
[507] "Fundamental Rights in Hungary: MEPs Call for Triggering Article 7," European Parliament website, May 17, 2017, http://www.europarl.europa.eu/news/en/press-room/20170511IPR74350/fundamental-rights-in-hungary-meps-call-for-triggering-article-7.

government survey entitled 'National Consultation – Let's Stop Brussels!'[508] The survey was carried out in the spring of 2017 focusing on illegal immigration, framing Brussels as the power that constantly attacks Hungary and its ways to solve the refugee crisis.[509] In the plenary, Prime Minister Orbán denied that his government wanted to close CEU, he also claimed that the national consultation is a democratic tool of the government to involve Hungarian citizens in decision-making processes and argued that the law on NGOs is based on a US example.[510]

After several years of trying to urge the Commission to act, the European Parliament stepped up in September 2018 by adopting a resolution "on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded."[511] The document was a result of the so-called Sargentini Report, named after Rapporteur Judith Sargentini from the Committee on Civil Liberties, Justice and Home Affairs, who presented a motion for an EP resolution back in July and provided a detailed assessment on the Hungarian conditions perceived as posing threats to fundamental values of the EU.[512] Based on Sargentini's motion, in its September resolution the European Parliament listed several areas where the rule of law might not prevail in Hungary: the functioning of the constitutional and electoral system; the independence of the judiciary and of other institutions and the rights of judges; corruption and conflicts of interest; privacy and data protection; freedom of expression; academic freedom; freedom of religion; freedom of association; right to equal treatment; rights of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities; fundamental rights of migrants, asylum seekers and refugees; economic and social rights.

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[508] "MEPs Discuss Situation in Hungary with Prime Minister Orbán," European Parliament website, April 26, 2017, http://www.europarl.europa.eu/news/en/press-room/20170424IPR72035/meps-discuss-situation-in-hungary-with-prime-minister-orban.
[509] Zoltán Kovács, "The National Consultation and Why We Listen to the People," About Hungary, March 23, 2017, http://abouthungary.hu/blog/the-national-consultation-and-why-we-listen-to-the-people/.
[510] "MEPs Discuss Situation in Hungary with Prime Minister Orbán."
[511] "European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2017/2131(INL)" (European Parliament, September 12, 2018), 7, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340+0+DOC+XML+V0//EN&language=EN#def_1_2.
[512] Judith Sargentini, "Report on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2017/2131(INL)" (European Parliament, Committee on Civil Lieberties, Justice and Home Affairs, July 4, 2018), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0250+0+DOC+XML+V0//EN&language=en.

On the parliamentary debate held in Strasbourg on 11 September 2018, the Hungarian Prime Minister called the attention of MEPs that if they vote in favor of the resolution then they will denounce not the Hungarian government, but the country and its people. Furthermore, he argued that the "report applies double standards, it is an abuse of power, it oversteps the limits on spheres of competence, and the method of its adoption is a treaty violation."[513] He highlighted Hungary's role in protecting Europe from illegal immigration and in reference to the refugee crisis he stressed that "every nation and Member State has the right to decide on how to organize its life in its own country." This is a clear reference to the importance of national sovereignty, which is a constant element of the Hungarian government's discourse in the area of the migration crisis, as the next chapter will show.

Hungary is not the only country who is targeted by the EU through the Article 7 procedure. As a result of the Commission's several failed attempts to engage the Polish authorities in a constructive dialogue regarding the state of fundamental values in Poland (mainly judicial independence), in December 2017 the Commission concluded that there is a clear risk of a serious breach of the rule of law in Poland and thus proposed to the Council to adopt a decision under Article 7(1) TEU.[514]

At the time of finishing this dissertation, the Article 7 procedures against Hungary and Poland are still ongoing. The first hearing on the case of Hungary was held on 16 September 2019, almost a year after Article 7 had been triggered. The General Affairs Council also held a hearing on 10 December 2019 on the Hungarian case, in which it discussed the alleged breaches of judicial independence, academic freedom and freedom of expression.[515] In a European Parliament resolution issued in January 2020, the EP declared that the discussions with these two countries did not result in a realignment with the EU's founding values. The legislative body came to this conclusion by taking into consideration reports and statements by the European Commission, the OSCE, the Council of Europe and the UN. The EP considered the hearings held by the Council within the Article 7 framework to be "neither regular, nor

[513] "Address by Prime Minister Viktor Orbán in the Debate on the So-Called 'Sargentini Report,'" The Hungarian Government's website, kormany.hu, September 11, 2018, http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/address-by-prime-minister-viktor-orban-in-the-debate-on-the-so-called-sargentini-report.
[514] "Rule of Law: European Commission Acts to Defend Judicial Independence in Poland," Europa.eu, December 20, 2017, http://europa.eu/rapid/press-release_IP-17-5367_en.htm.
[515] Vlagyiszlav Makszimov, "'Soros Orchestra': The next Chapter in Hungary's Article 7 Odyssey," *Www.Euractiv.Com* (blog), December 11, 2019, https://www.euractiv.com/section/justice-home-affairs/news/soros-orchestra-the-next-chapter-in-hungarys-article-7-odyssey/.

structured," and it called on the Council to issue concrete recommendations and deadlines to the countries concerned. The text also urged the Commission to use its own tools to prevent the serious breach of EU values (infringement proceedings and applications for interim measures before the Court of Justice). The Parliament also complained about its own diminished role in monitoring these Member States.[516]

On 14 May 2020, the EP held a plenary session where it addressed the state of the rule of law in Hungary again, this time in relation to COVID-19 emergency measures in Hungary and their impact on democracy, the rule of law and fundamental rights. These measures included prolonging the state of emergency indefinitely, authorizing the government to rule by decree, and weakening the Parliament's oversight. Many of the MEPs were on the opinion that the indefinite state of emergency is incompatible with EU values. They urged the Commission to open infringement procedures and the Council to proceed with the Article 7 procedure.[517]

6.2 How can the EU handle rogue Member State behavior?

As Hungary has been 'monitored' by various European institutions due to its particularism for a while now, examining the Hungarian case can give useful insight about how the EU can handle rogue Member State behavior. Although this dissertation does not undertake the task of suggesting alternative ways for the EU to motivate Member States to respect EU law, examining the Article 7 procedure itself is still indispensable because it brings us closer to discovering the EU's normative deficit that Hungary has tried to abuse deliberately. On those areas where the EU has effective restrictive tools, such as infringements, the country is more moderate and plays according to the rules of interest-based Member State behavior. However, where these tools are less effective (i.e. Article 7), the country constantly pushes its national preferences harder, emphasizing the symbolic dimension of these policy areas and unafraid of being rogue in them.

The EU has more than one tool to address a rogue Member State when a breach of EU law is detected. The ways of doing so have been extensively discussed in the academic literature as well as in several news platforms, particularly after the Article 7 procedure against Poland

[516] "Rule of Law in Poland and Hungary Has Worsened," January 16, 2020, https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened.
[517] "Hungary's Emergency Measures: MEPs Ask EU to Impose Sanctions and Stop Payments," European Parliament website, accessed July 13, 2020, https://www.europarl.europa.eu/news/en/press-room/20200512IPR78917/hungary-s-emergency-measures-meps-ask-eu-to-impose-sanctions-and-stop-payments.

(December 2017) and then against Hungary (September 2018) had been launched. It is hard to define, however, which tool is the most effective in which scenario. In today's academic discussion there is a growing tendency to argue for the more effective implementation or further development of the Commission's rule of law framework, as it is seen as the only way to protect fundamental constitutional and democratic values in the EU.[518]

Kochenov and Pech praise the Commission's early 2014 willingness to reform the rule of law procedure of Article 7 and they condemn the Council for not being supportive in this matter. Instead of accepting the Commission's reform mechanism, the Council decided to hold an annual rule of law dialogue among all Member States within the Council itself.[519] They also "encourage the European Parliament to endorse the Commission's rule of law framework and the Commission to undertake some additional work to make its 'pre-Article 7 procedure' more workable and effective."[520] They also argue that the effect of infringements is limited because non-specific violations of EU law cannot be punished though them.[521] Some scholars came up with alternatives or rather complementary methods for the protection of the rule of law and fundamental rights. Jan Werner Müller insists on keeping the Article 7 procedure as a rule of law mechanism but suggests some reforms to it. He recommends creating a separate Commission, the Copenhagen Commission, which would be responsible for the continuous monitoring of the state of rule of law in Member States, or adding the possibility of Member State exclusion to the toolkit of the mechanism.[522] Kim Lane Scheppele, on the other hand, calls for the creation of a systemic infringement action mechanism. This would allow the Commission to file systemic complaints against a Member State by tying a group of infringements together under the banner of Article 2 and the values it presents.[523] Another idea for the reform of the protection of rule of law in the EU is the concept of 'reverse Solange' introduced by von Bogdandy et al. What it entails is that "a violation by a Member State, even in purely internal situations, can be considered an infringement of the substance of Union

[518] Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States?," *European Law Journal* 21, no. 2 (March 2015): 150.
[519] Dimitry Kochenov and Laurent Pech, "Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction Dimitry Kochenov," *EU Working Papers* (April 2015): 1-16, http://cadmus.eui.eu/bitstream/handle/1814/35437/RSCAS_2015_24.pdf?sequence=3.
[520] Kochenov and Pech, 14.
[521] Kochenov and Pech, 4.
[522] Jan-Werner Müller, "Safeguarding Democracy inside the EU - Brussels and the Future of Liberal Order," *Transatlantic Academy Paper Series* 2012–2013, no. 3 (February 2013): 1–27.
[523] Kim Lane Scheppele, "What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions" (Princeton University, November 2013): 1-13.

citizenship." This means that essentially Member States are responsible for fundamental rights protection, but in case of a systemic violation of fundamental rights, "individuals can rely on their status as Union citizens to seek redress before national courts."[524]

European institutions and leaders are also staying alert about the question of monitoring rule of law violations in Member States. This is proven by the fact that tying the payment of EU funds to the state of the rule of law in certain countries has been on the table recently. On 21 July 2020, the European Council fought a deal on a special Covid-19 recovery package and the EU's next budget plan.[525] The most important result of the summit, however, was that leaders agreed to link the payment of EU funds to legal norms, which would in theory cut the funding of Member States who breach the rule of law. This decision was a compromise between Northern countries, on the one hand, who wanted a more straightforward cut of funding from the rule-breakers, and Hungary and Poland, on the other and, who threatened to veto the budget in its entirety if a direct link between the payments and rule of law standards was accepted. The deal was presented as a victory from both sides, which already indicates its vagueness. Although there is a reference to Article 2 in the decision, it is only mentioned in relation to "the EU's financial interest." Moreover, both the European Commission and the Council (with a qualified majority decision) are involved in the process, which could make the realization of the cuts complicated and not very effective in the future.[526]

The Hungarian example shows that the 'alternative' ways to address a rogue or non-compliant Member State did not work out well when it comes to systemic violations of the rule of law or in other politically sensitive cases. The seemingly erratic nature of Hungary's EU policy that is characterized by a hostile rhetoric towards the EU on the surface but compliance in day-to-day business and by introducing controversial laws but later modifying them to avoid retortions, was successfully controlled by the EU's usually applied toolkit (infringements, warnings from institutions and politicians etc.) for a while. However, when Hungary stepped up its game and Viktor Orbán found his real voice at the time of the refugee crisis by urging other Member States to act in defense of national sovereignty at the expense of European solidarity, the usual

[524] Armin von Bogdandy et al., "Reverse Solange - Protecting the Essence of Fundamental Rights Against EU Member States," *Common Market Law Review* 49 (2012): 491.
[525] "European Council Conclusions, 17-21 July 2020" (European Council, July 21, 2020), https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf.
[526] Beatriz Rios and Sam Morgan, "Council Brokers Historic Stimulus Pact as Budget Cuts, Rule of Law Retreat Plague Deal," Euractiv, July 21, 2020, https://www.euractiv.com/section/politics/news/council-brokers-historic-stimulus-pact-as-budget-cuts-rule-of-law-retreat-plague-deal/.

tools were not enough anymore. This is why the European Parliament initiated Article 7 against the country in 2018, in the hope of achieving a more serious punishment of rule-breaking behavior. Even though infringements worked for a while and their use is reasonable in some policy areas for tackling interest-based state strategies, they do not fulfil the same purpose when it comes to protecting fundamental rights, values, democratic standards and the rule of law in the EU. Moreover, they also entail lengthy procedures: sometimes the judgement of the CJEU already comes at a time when 'the damage is already done' and a late Member State compliance does not really make a difference. The more frequent application of expedited procedures might improve this situation. It is still too early to tell how effective tying EU funds to the state of the rule of law will be in practice, and it will surely depend on the activism of the institutions involved and their interpretation of the July 2020 European Council conclusions. The next chapters will show how the EU reacted to the most apparent value-violating behavior of Hungary, first in the case of Hungary's migration policy and then concerning the Member State's citizenship policy.

7. The Hungarian Parliament's relevant decisions in major EU-related issues

As already mentioned above, in some cases, the Hungarian EU policy can be characterized with a certain kind of duality. Many times, the Hungarian government generated false conflicts via a hostile rhetoric towards Brussels in order to ensure Hungary's position as a savior of national interests in the eyes of the Hungarian public (e.g. the billboard campaigns targeting Soros or Brussels). However, in reality there was no real conflict behind these 'campaigns' and the government either gave in to the instructions of the EU regarding these cases or the EU did not react at all. On the other hand, many conflicts Hungary took up with Brussels were based on genuine differences of views and interests between the two parties (e.g. the refugee crisis). The former cannot be evaluated in this thesis as a policy action because its real aim is not to influence EU policy-making, but to shape the Hungarian electorate's opinion, so what we should mainly focus on are those conflicts and challenges between Hungary and the EU that can be considered to be parts of Hungary's genuine EU policy.

The Hungarian Parliament's reactions to certain EU-related affairs can help us identify these different types of conflicts and they also help us evaluate Hungary's realist, sovereignty-oriented EU-strategy. The resolutions confirming certain practical issues, for instance the sectoral cooperation of Hungary with the EU in different policy areas (e.g. traffic, transportation, free movement, competition) will not be detailed here, only the ones with

political/policy significance. The first parliamentary decrees closely related to the EU came out in the early 1990s and were connected to the country's rapprochement with the European bloc. Decrees 80/1992.[527] and 10/1993.[528] both served as a confirmation of the Association Agreement by the Parliament. In the latter, the MPs called the government to provide proper and regular information on the execution of the Europe Agreement, which shows that the legislative body was well aware of the significance of the AA, and the consequences it could have on the country. Decree 16/1994.[529] entitled the government to file its application for membership. The next decree,[530] which confirmed Hungary's EU commitment, came almost 10 years later, in 2003, when the Parliament confirmed Hungary's EU accession. It based on the fact that EU membership was one of the main goals of the regime change in Hungary, and it was a common purpose of the four freely elected governments elected since 1990, and the Hungarian public also expressed its supporting opinion in the matter through a referendum. In decree 105/2004.[531] the Parliament supported the European constitution signed by the Hungarian authorities. These parliamentary decrees might have only been symbolic, but their significance is unquestionable: they show the undeniable commitment of the Hungarian political elite to Hungary's EU membership.

Contrary to this harmony of Hungarian interests with the EU, in other decrees the Parliament also expressed that Hungarian economic interests are not always served by the EU. In decree 54/2011.[532] the Parliament declared that the cutback in the Hungarian sugar industry, which led to the dismantling of several Hungarian sugar factories, was due to the sugar reforms of the

[527] "80/1992. (XI. 25.) OGY Határozat a Magyar Köztársaság És Az Európai Közösségek És Azok Tagállamai Között Társulás Létesítéséről Szóló, Brüsszelben, 1991. December 16-án Aláírt Európai Megállapodás Megerősítéséről" (Magyar Országgyűlés, November 25, 1992), https://mkogy.jogtar.hu/jogszabaly?docid=992H0080.OGY.
[528] "10/1993. (III. 5.) OGY Határozat a Magyar Köztársaság És Az Európai Közösségek És Azok Tagállamai Között Társulás Létesítéséről Szóló, Brüsszelben, 1991. December 16-Án Aláírt Európai Megállapodás Végrehajtásáról" (Magyar Országgyűlés, March 5, 1993), https://mkogy.jogtar.hu/jogszabaly?docid=993H0010.OGY.
[529] "16/1994. (III. 31.) OGY Határozat a Magyar Köztársaság Kormányának Felhatalmazásáról a Magyar Köztársaságnak Az Európai Unióhoz Való Csatlakozási Kérelme Beadására - Törvények És Országgyűlési Határozatok" (Magyar Országgyűlés, March 31, 1994), https://mkogy.jogtar.hu/jogszabaly?docid=994H0016.OGY.
[530] "133/2003. (XII. 17.) OGY Határozat" (Magyar Országgyűlés, December 17, 2002), https://mkogy.jogtar.hu/jogszabaly?docid=A03H0133.OGY.
[531] "105/2004. (X. 20.) OGY Határozat Az Európai Alkotmány Létrehozásáról Szóló Szerződés Aláírásáról" (Magyar Országgyűlés, October 20, 2004), 2019-07-27, https://mkogy.jogtar.hu/jogszabaly?docid=A04H0105.OGY.
[532] "54/2011. (VI. 29.) OGY Határozat a Cukorgyárak Privatizációját, Valamint Magyarország Európai Unióhoz Történő Csatlakozása Óta a Közösségi Cukorreformok Során Képviselt Magyar Álláspontot Értékelő, És Annak Itthoni Következményeit Feltáró Vizsgálóbizottság Felállításáról" (Magyar Országgyűlés, June 29, 2011), https://mkogy.jogtar.hu/jogszabaly?docid=A11H0054.OGY.

European Community, all of which contradicted the interests of the nation. The Parliament created an investigative committee with the purpose of revealing the main actors, events and factors that resulted in the decapitation of the Hungarian sugar industry. The follow-up of this decree came out in 2012, and it argued that the decisions made by previous governments that have led to closing Hungarian sugar factories and losing sugar quotas were not in harmony with the interests of Hungarian economy (25/2012.).[533] This was in fact a sore spot for Hungary because the sugar industry, especially chocolate manufacturing, was considered a national pride and economic interests were also tied to it.

In some cases, the Hungarian Parliament did nothing more than backed up the government in its anti-EU rhetoric and its emphasis on Hungarian sovereignty that needs protection from Brussels. One example for this is the decree concerning the *Tobin*-case,[534] when the Parliament condemned Viviane Reding for justifying an EU Member State's law-breaking behavior (in this case Ireland) due to political motivation. In this long and sensitive judicial case, Francis Tobin, an Irishman, caused the death of two children in a car accident in 2000, in Leányfalu, Hungary. During the legislative process Tobin was allowed to return to Ireland, and even though the Hungarian court sentenced him to prison, he was not imprisoned because his home country did not extradite him to Hungarian justice, despite Hungary's repeated calls for a decade. In March 2013, Commissioner Reding stated in an interview to Frankfurter Allgemeine Zeitung that she is not surprised that Ireland does not extradite Tobin to a country where serious concerns exist about the independence of the judicial authorities.[535] This indeed was a politically motivated comment, and Hungary did not let it slip without highlighting that Hungary is, again, a victim of foreign powers meddling in its domestic policy and violating its sovereignty.

When it comes to sovereignty and taking pride in not letting a foreign power dictate to the country, Hungary was a front-runner, reacting harshly whenever Brussels issues any kind of warning against Hungary. As mentioned at the beginning of the chapter, already in 2012,

[533] "25/2012. (III. 28.) OGY Határozat a Cukorgyárak Privatizációját, Valamint Magyarország Európai Unióhoz Történő Csatlakozása Óta a Közösségi Cukorreformok Során Képviselt Magyar Álláspontot Értékelő, És Annak Itthoni Következményeit Feltáró Vizsgálóbizottság Vizsgálatának Eredményéről Szóló Jelentés Elfogadásáról" (Magyar Országgyűlés, March 28, 2012), https://mkogy.jogtar.hu/jogszabaly?docid=A12H0025.OGY.
[534] "34/2013. (V. 9.) OGY Határozat Viviane Reding, Az Európai Bizottság Jogérvényesülés, Alapvető Jogok És Uniós Polgárság Biztosának a Tobin-Ügyben Tett Lépéseivel Kapcsolatos Kérdésekről Szóló Jelentés Elfogadásáról - Törvények És Országgyűlési Határozatok" (Magyar Országgyűlés, May 9, 2013), https://mkogy.jogtar.hu/jogszabaly?docid=A13H0034.OGY.
[535] "Hungarian Parliament Passes Resolution Condemning Comments of EC Commissioner Reding," politics.hu, April 30, 2013, http://www.politics.hu/20130430/hungarian-parliament-passes-resolution-condemning-comments-of-ec-commissioner-reding/.

Hungary received criticism from international organizations and the EU due to its constitutional reforms. However, this criticism was not unanimous and some EU Member States vocally supported Hungary in this question. Poland[536] and Lithuania[537] were among those countries, and the Parliament did not fail to thank them in a decree that expressed Hungary's gratitude towards these states. Poland was 'addressed' in another decree as well, decree 2/2018.[538] in which the Hungarian parliament called the government to step up on Poland's side and to not support launching the Article 7 process against the V4 ally. These cases are clear manifestations of conflicts that had symbolic importance to Hungary.

The latest EU-related parliamentary resolutions concerned George Soros and the refugee crisis. In 2017 the Parliament condemned in its decree the European Parliament's resolution about the so-called 'Soros-plan,' which the Hungarian government alleged was the EU's plan to accept and distribute refugees within Member States. The decree repeats the government's negative statement and refuses the quota plan with the purpose of protecting the sovereignty of Hungary.[539] Already in 2015, the Hungarian Parliament sent a message to EU leaders in the form of a decree asking them not to urge refugees to come to Europe.[540] The decree emphasized the importance of Hungarian culture and social protection, reminding EU leaders that they should protect European citizens. Two more decrees came as direct reactions to the attempts of EU institutions to solve the refugee crisis. Both decrees, 55/2015.[541] and 12/2016.,[542] argued that the resolutions and decisions of the EP and the Council regarding the emergency relocation scheme and other rules handling migration within the EU are violating Hungarian sovereignty.

[536] "11/2012. (III. 7.) OGY Határozat a Lengyel Civilek És Politikusok, Köztük Donald Tusk Miniszterelnök Állásfoglalásáról a Magyarországi Átalakulást Érő Nemzetközi Bírálatokkal Szemben - Törvények És Országgyűlési Határozatok."
[537] "12/2012. (III. 7.) OGY Határozat a Litván Civilek És Parlamenti Képviselők Állásfoglalásáról a Magyarországi Átalakulást Érő Nemzetközi Bírálatokkal Szemben - Törvények És Országgyűlési Határozatok" (Magyar Országgyűlés, March 7, 2012), https://mkogy.jogtar.hu/jogszabaly?docid=A12H0012.OGY.
[538] "2/2018. (II. 21.) OGY Határozat a Lengyelország Melletti Kiállásról Brüsszel Nyomásgyakorlásával Szemben - Törvények És Országgyűlési Határozatok" (Magyar Országgyűlés, February 21, 2018), https://mkogy.jogtar.hu/jogszabaly?docid=A18H0002.OGY.
[539] "29/2017. (XII. 13.) OGY Határozat Az Európai Parlament Soros-Terv Végrehajtásáról Szóló Határozatával Szemben" (Magyar Országgyűlés, December 13, 2017), https://mkogy.jogtar.hu/jogszabaly?docid=A17H0029.OGY.
[540] "36/2015. (IX. 22.) OGY Határozat Üzenet Az Európai Unió Vezetőinek" (Magyar Országgyűlés, September 22, 2015), https://mkogy.jogtar.hu/jogszabaly?docid=A15H0036.OGY.
[541] "55/2015. (XI. 6.) OGY Határozat Az Áthelyezési Válságmechanizmus Létrehozásáról..." (Magyar Országgyűlés, November 6, 2015), https://mkogy.jogtar.hu/jogszabaly?docid=A15H0055.OGY.
[542] "12/2016. (VI. 17.) OGY Határozat Egy Harmadik Országbeli Állampolgár Vagy Egy Hontalan Személy Által a Tagállamok Egyikében Benyújtott Nemzetközi Védelem Iránti Kérelem Megvizsgálásáért Felelős Tagállam Meghatározására Vonatkozó Feltételek És Eljárási Szabályok Megállapításáról Szóló Európai Parlamenti És Tanácsi Rendelettervezet Vonatkozásában..." (Magyar Országgyűlés, June 17, 2016), https://mkogy.jogtar.hu/jogszabaly?docid=A16H0012.OGY.

After this pattern, it should not come as a surprise that the Hungarian parliament also condemned the Sargentini Report.[543] It considered the diagnosis detailed in the report as false accusations created by speculators and migrant-friendly politicians and highlighted that these tendencies violate free political thinking, the security of Hungarian people and the sovereignty of Hungary. In these cases, Hungary took advantage of the normative deficit of the EU and pushed its agenda hard, acting as a rogue Member State.

8. Findings of the chapter

This chapter showed that some aspects of Hungary's strategy towards the EU in the past 25 years have never changed. Hungary has always been and still is an interest maximizing (or even rent-seeking) Member State, usually lacking fundamental proactive stances in the EU. However, the basic and most visible elements of the country's strategy, mainly the rhetoric and the way Hungarian politicians see the EU and project European issues to their citizens have changed. Invisibility and conformism were replaced with particularism and unilateralism in 2010, when the second Orbán-government came to power. Since then, the relationship of Hungary with the EU has been quite erratic: an openly hostile and EU-critical rhetoric was paired with general legal compliance. This chapter went through the most important recent conflicts of Hungary with the EU and revealed that while some cases can be analyzed within the liberal intergovernmentalist framework, or they can be explained by general small Member State interests, other cases with symbolic importance fall outside the scope of this framework. These exceptions can be considered as manifestations of rogue Member State behavior that cannot be effectively controlled by the EU's current normative leverage.

As proven by the Hungarian parliamentary decrees presented above, Hungary found its real voice as a European policy leader in the refugee crisis and in other areas in which national interest is deemed to be under assault by foreign powers. In these policy areas, the Hungarian government enacted changes in the domestic political arena that directly affected the EU as well (for example building a wall on the Southern border, controlling academic freedom, hampering the functioning of civil organizations etc.), and that might endanger the rule of law and the prevailing of some EU values. However, in the EU's reaction to these questionable acts, loyalty was not cited as reference by its institutions, even though the violation of Article 4(3) TEU could have been a valid argument in many cases. Of particular relevance is Hungary's treatment

[543] "20/2018. (X. 16.) OGY Határozat a Magyarország Szuverenitásának Megvédéséről És a Magyarországgal Szembeni Rágalmak Visszautasításáról" (Magyar Országgyűlés, October 16, 2018), https://mkogy.jogtar.hu/jogszabaly?docid=A18H0020.OGY.

of foreigners in certain policy areas, a behavior that could have raised questions concerning the country's loyalty. The next chapters will assess this dilemma through the cases of the migration crisis and Hungary's citizenship policy.

VI. Migration policy: Hungary and the refugee crisis of 2015/2016

1. Introduction

This chapter discusses migration and asylum policy in the EU and Hungary with a special focus on the refugee crisis of 2015/2016, which changed the landscape both on the European and Hungarian level. Finding the difference between interest-driven small state strategies and rogue Member State action manifesting in symbolic resistance against certain EU policies will be the main objective of this chapter. During the migration crisis, Hungary acted as a small, interest-maximizing Member State constrained by domestic political interest. It did not only refuse to participate in common European policy proposals to solve the crisis, but it also engaged in unilateral actions perceived as solutions, such as erecting a border wall on the Southern border of Hungary.

Presenting the events, legislative changes and discourses surrounding migration policy in the past years will show *that Hungary managed to take advantage of the refugee crisis by acting as a norm-entrepreneur, which gave the government an opportunity to articulate its own views and convictions about the right way to solve the crisis and also about the future of the EU as a whole*. Many EU Member States joined Hungary in its migration strategy, making it the leading country of the anti-immigration block in Europe. Hungary was not observing its own obligations stemming from being a member of a joint venture (the EU) and it disregarded the main principles along which Member States should act, mainly loyalty. However, it should be highlighted that the Hungarian government did not completely reject these principles. Rather, it re-interpreted them in a way that was suitable for the leadership and its interests. Hungary justified the construction of the border fence and its extreme measures to stop migration flow into the country by referring to solidarity, arguing that Hungary was in fact acting in solidarity with the EU by protecting its borders in its own way. Nevertheless, the country got criticized from many sides (international- and humanitarian organizations, EU institutions etc.) and got into serious conflicts due to its migration policy since 2015.

Confrontation between Hungary and the EU in the field of migration can be assessed on three levels. The first is the political conflict that consists of Hungary depicting 'Brussels' or 'EU decision-makers' as an irrational power-center that dictates to small EU members just as Moscow did in the times of the Soviet Union. The EU could read this as the misbehavior of a Member State that needs to be controlled or disciplined because it goes against core values of the Union. The second level of the conflict is the general opposition of priorities regarding

issues of solidarity and loyal cooperation in the field of migration and asylum policy. The third concerns the legal battles fought with the purpose of annulling a Council decision and appears in the form of infringements or the CJEU procedures.[544]

Besides acting as a norm entrepreneur in migration policy, we can detect some symbolic elements in Hungary's conduct in those areas where the EU's normative leverage is not enough to control Member State behavior. The interests of Hungary and other EU Member States overlapped from several points of view. This is proven by the fact that the EU itself made a difference between refugees and irregular migrants. What Hungary did was that it merged these two concepts and only used the term 'migrant,' thereby stepping onto the area of symbolic politics, making the Hungary-EU conflict in the area of migration policy symbolic as well, and not only interest-based. What might have motivated this decision was the anticipation that the EU's normative leverage will be weak in this area, which creates room for rogue behavior. This enabled Hungary to apply a double rhetoric. When it was criticized for not complying with EU regulations in asylum policy, the leadership argued that the country is protecting Europe from illegal immigrants. When the country was criticized for its restrictive measures on immigrants, the government claimed that it is just complying with its obligations stemming from EU or international law. This can clearly be labelled as rogue, symbolic behavior, rather than interest-based small state strategy. Therefore, it will be shown in this chapter that Hungary applied a dual strategy during the refugee crisis. It was shuffling between some interest-driven small state policy strategies (norm entrepreneurship) and symbolic, rogue behavior.

The analysis provided in this chapter will go through these levels of confrontation and try to provide conclusions about Hungary's performance as a small EU Member State in the policy area of migration and asylum. Moreover, it will also assess the extent to which Hungary respected the principle of loyal cooperation in this field. First, the EU-level regulations of migration will be presented before and after the refugee crisis of 2015/2016, and then the Hungarian regulations and their changes due to the crisis will be examined. The reactions of the EU and other international actors to the contentious Hungarian acts will be mentioned as well. Finally, the relevance of constitutional principles in the policy area of migration will be assessed and how Hungary took advantage and became a norm entrepreneur in this policy during the crisis.

[544] Boldizsár Nagy, "Renegade in the Club – Hungary's Resistance to EU Efforts in the Asylum Field," *Osteuropa Recht*, no. 4 (2017): 422.

2. Migratory and refugee regulations in the EU before the refugee crisis

The foundations of EU Member States' responsibility in handling asylum applications were laid down in the "Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities," which is called the Dublin Convention.[545] This is no longer in force as it has been replaced in 2003 by the Dublin regulation **"**establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national" (Dublin II).[546] The last reform of the so-called 'Dublin-system' happened in 2013, when regulation (EU) No 604/2013 of the European Parliament and of the Council was issued, which provided an even more refined framework for processing asylum applications (Dublin III)**.**[547] One of the most important principles outlined in the Dublin regulations, which proved to be ineffective during the 2015/2016 refugee crisis, is that the Member State responsible for examining the application for asylum of a certain individual is the country where the third-country national entered the territory of the EU.[548]

The TFEU outlines that asylum policy and refugee integration are shared competences of the EU (Article 4(2) and 79(4) TFEU.[549] It was the European Council meeting of Tampere in October 1999 that laid down the foundations of a Common European Asylum System.[550] Asylum is granted for people who flee form their country due to persecution or the danger of facing serious harm and are thus in need of international protection. Asylum as a fundamental

[545] "Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities - Dublin Convention" (Official Journal of the European Communities, June 15, 1990), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41997A0819(01)&from=HU.

[546] "Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National" (Official Journal of the European Union, February 28, 2003), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R0343&from=HU.

[547] "Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)" (June 26, 2013), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0604&from=en.

[548] "Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)," Article 13.

[549] Attila Szabó, "Quo Vadis Integration Policy?," in *Human Rights of Asylum Seekers in Italy and Hungary: Influence of International and EU Law on Domnestic Actions*, ed. Balázs Majtényi and Gianfranco Tamburelli (Torino; The Hague (NL): G. Giappichelli : Eleven International Publishing, 2019), 202.

[550] "Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy," eur-lex.europa.eu, October 1999, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52000DC0757:EN:HTML.

right was first recognized by the Convention relating to the status of refugees (Geneva, 28 July 1951),[551] and the Protocol relating to the status of refugees (New York, 31 January 1967).[552] These two documents together are called the Geneva Convention, which the EU and its Member States have to comply with. As the European Union is an economic community where the freedom of movement prevails, its Member States are bound to have a common policy on refugees. However, the EU is also a community of values, which makes crucial the application of common standards of protection for refugees.[553] This is why, since 1999, CEAS serves to guide Member State policy action when it comes to accepting third country nationals to the EU, and it also coordinates the legislative framework of this policy area.

Between 1999 and 2005 several harmonizing measures were adopted, and documents were issued for the purpose of coordinating immigration and asylum. In 2004, the Hague program was endorsed by the European Council, which declared ten priorities for the following five years within the area of freedom, security, and justice.[554] The priorities included fighting against terrorism, migration management, and establishing a common asylum area. Financial solidarity was strengthened through the European Refugee Fund,[555] and the Family Reunification Directive[556] was accepted to facilitate the reunification of families arriving to the EU. The conflicts on the territory of former Yugoslavia also triggered some action from the EU's part, because the organization had to deal with the mass influx of displaced persons from that region. Thus, the Directive on temporary protection[557] was accepted in 2001 as an exceptional measure to provide immediate and temporary protection to refugees in the name of solidarity. The provisions of this directive, however, have not been applied so far.[558]

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[551] "Convention and Protocol Relating to the Status of Refugees" (UNHCR - The UN Refugee Agency, 1951), https://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf.
[552] "Protocol Relating to the Status of Refugees" (UNHCR, October 4, 1967), https://www.ohchr.org/Documents/ProfessionalInterest/protocolrefugees.pdf.
[553] "Common European Asylum System," Text, Migration and Home Affairs - European Commission, December 6, 2016, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.
[554] "Hague Programme Ten Priorities for the next Five Years" (European Commission, May 10, 2005), http://europa.eu/rapid/press-release_MEMO-05-153_en.htm.
[555] "European Refugee Fund," European Commission website, accessed July 9, 2019, https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund.
[556] "Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification," September 22, 2003, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0086&from=en.
[557] "COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof" (Official Journal of the European Communities, July 8, 2001), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF.
[558] "Temporary Protection," European Commission website, accessed July 9, 2019, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en.

The first few years of CEAS were followed by a period of reflection and evaluation of what was achieved. In 2007, a Green paper on CEAS was presented by the Commission with the purpose of starting a consultation process on what form should CEAS take. The EU institutions were open to modifications. They understood the incoherence of the system, for example the fact that one of the most important directives of asylum policy, Council Directive 2005/85/EC ('the Asylum Procedures Directive') regulating the rules of granting and withdrawing refugee status in Member States,[559] provided "for a number of procedural standards rather than for a 'standard procedure.'"[560] The responses to this document and its evaluation formed the basis of the Commission's Policy Plan on Asylum presented in June 2008.[561] The policy plan listed three pillars responsible for the successful functioning of the CEAS: harmonizing standards of protection by a closer coordination of the Member States' asylum legislation; effective and well-supported practical cooperation; strengthened solidarity and increased responsibility among EU members, as well as between EU and non-EU countries.[562] These initiatives of the Commission have led to the reform of the Dublin-system, and eventually Dublin III in 2013.

In 2010, the Stockholm Program was accepted with the purpose of creating an open and secure Europe serving and protecting citizens. Besides outlining ways to manage the flow of migration, the document also emphasized the role of mutual trust within the area of freedom, security, and justice. "Mutual trust between authorities and services in the different Member States and decision-makers is the basis for efficient cooperation in this area. Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States will thus be one of the main challenges for the future."[563]

Regulation 562/2006/EC established the Schengen Border Code outlining the rules of movement of persons across borders within the EU.[564] This may not be directly linked to immigration or asylum, but the inherent specificities of the Schengen-zone are very important

[559] "Council Dorective 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status" (European Council, December 1, 2005), 85, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005L0085&from=EN.
[560] "Green Paper on the Future Common European Asylum System" (European Commission, June 6, 2007), 3, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0301:FIN:EN:PDF.
[561] "Policy Plan on Asylum - an Integrated Approach to Protection across the EU" (European Commission, June 17, 2008), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF.
[562] "Common European Asylum System."
[563] "The Stockholm Programme - an Open and Secure Europe Serving and Protecting Citizens 2010/C 115/01" (Official Journal of the European Union, April 5, 2010), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2010:115:FULL&from=EN.
[564] "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)" (2006), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006R0562&from=HU.

and may have huge influence on the immigration and asylum policies of Member States, as well as the EU as a whole. In 2008 the European Parliament accepted directive 2008/115/EC,[565] which regulates Member States' procedures for returning illegally staying third-country nationals from the EU to their home countries. Directive 2011/95/EU of the European Parliament and of the Council sets out standards "for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted."[566] On 26 June 2013, two directives were accepted by the EP and the Council. One of them, the Asylum Procedures Directive, establishes common procedures for granting and withdrawing international protection,[567] while the other lays down standards for the reception of applicants for international protection.[568] On the same day, the revised EURODAC regulation was also accepted,[569] which revised the mechanisms of comparing fingerprints for the effective application of the Dublin III regulation.

3. The effects of the refugee crisis on the EU migratory and asylum regulations

The most recent actions of the EU regarding asylum, refugees and migration were directly influenced by the refugee crisis of 2015/2016, when people affected by the crises and wars in the Middle East started flooding towards Europe and wanted to enter EU borders. In 2014, the number of asylum applications in the EU started growing, almost reaching the numbers of 1992,

[565] "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" (Official Journal of the European Union, December 16, 2008), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0115&from=EN.

[566] "Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted" (Official Journal of the European Union, December 13, 2011), 95, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=HU.

[567] "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)" (Official Journal of the European Union, June 26, 2013), 32, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=EN.

[568] "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)" (Official Journal of the European Union, June 26, 2013), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0033&from=HU.

[569] „Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of »Eurodac« for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person and on Requests for the Comparison with Eurodac Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes, and Amending Regulation (EU) No 1077/2011 Establishing a European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice", Pub. L. No. 32013R0603, 180 OJ L (2013), http://data.europa.eu/eli/reg/2013/603/oj/eng.

which were due to the war in Yugoslavia.[570] In 2015, this number grew even further, and according to Eurostat, 1.3 million asylum applications were filed in the EU-28 in 2015, or more than five times the average of applications in the 2000s.[571] The Member States could not handle the administrative burden of processing so many applications. By the middle of 2015, it became apparent that the Dublin system was not working properly and that a revision of the CEAS was long overdue. The regulations presented in the previous paragraphs show that the EU indeed wanted to differentiate between irregular migration and refugees and shaped its legal framework accordingly. However, Hungary could take advantage of the fact that the people arriving at the borders were completely mixed and it was hard to differentiate between them. Therefore, it was easy to refer to them as 'migrants' as a whole. This was a symbolic tactic followed by the Hungarian government that will be presented in detail later.

In May 2015, the European Commission presented a new European Agenda on Migration,[572] which aimed at providing a comprehensive approach towards handling all aspects of migration within the EU. The document was supposed to provide immediate solutions to the challenges emerging in the previous year, but it also wanted to provide medium and long-term solutions to the problems that might emerge regarding migration towards the EU in the future. The immediate actions included tripling the budget of the Frontex joint operations at sea, targeting criminal smuggling networks, facilitating the relocation of refugees reaching the EU and contributing to global resettlement activities as well.[573] Moreover, easing the burden on frontline Member States with the development of a hotspot system was also outlined.[574]

The means of achieving the long-term goals of the Agenda remained, however, quite vague: the completion of the CEAS, a shared management of the European border and a new model of

[570] "The Implementation of the Common European Asylum System" (European Parliament - Policy Department C: Citizen's Rights and Constitutional Affairs, May 16, 2016), 24, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556953/IPOL_STU(2016)556953_EN.pdf.
[571] "Asylum Statistics - Statistics Explained," Eurostat, accessed July 10, 2019, https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.
[572] "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda on Migration" (European Commission, May 13, 2015), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf.
[573] "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda on Migration," 4.
[574] "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda on Migration," 6.

legal migration.[575] Moreover, the most important contribution of the Agenda to handling the crisis was the voluntary resettlement scheme that would have provided 20.000 places for displaced persons within the EU.[576] However, the Member States were very reluctant to cooperate and it became clear that a voluntary contribution will not work. EU countries only made symbolic contributions to the system, while some of them, such as Hungary, did not contribute at all.[577] The concept of resettlement should not be confused with relocation. Resettlement is a global protection and security tool that provides safe passage for vulnerable persons to EU Member States.[578] It is conducted based on unilateral decisions of EU Member States participating in UNHCR resettlement schemes or their own humanitarian protection programs.[579] In June 2015, the European Commission proposed a European Resettlement Scheme,[580] which was adopted by the Council in July 2015.[581] The Commission manifested its intentions that this one-time pledge may be followed up by a binding and mandatory legislative approach beyond 2016.[582]

At the beginning of September 2015, the Commission issued its second implementation package for its migration agenda, which set out a range of actions and legislative proposals.[583] These commitments materialized in creating an emergency relocation mechanism based on two Council decisions. First, on 9 September 2015, the Commission proposed a numerical target for asylum applicants to be relocated from Italy, Greece and Hungary: 15 600, 50 400, and 54 000, respectively.[584] However, the Hungarian government refused the suggestion to participate

[575] "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda on Migration," 17.
[576] "Conclusions of the Representatives of the Governments of the Member States Meeting within the Council on Resettling through Multilateral and National Schemes 20 000 Persons in Clear Need of International Protection" (Council of the European Union, July 22, 2015), http://data.consilium.europa.eu/doc/document/ST-11130-2015-INIT/en/pdf.
[577] Gábor Vető, "Az EU Új Migrációs Stratégiája És Ami Utána Történt," *MTA TK Lendület-HPOPs Kutatócsoport* (blog), September 2015, https://hpops.tk.mta.hu/blog/2015/09/az-eu-uj-migracios-strategia-es-ami-utana-tortent.
[578] "The Implementation of the Common European Asylum System," 62.
[579] "The Implementation of the Common European Asylum System," 63.
[580] "Commission Recommendation of 8.6.2015 on a European Resettlement Scheme" (European Commission, June 8, 2015), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/general/docs/recommendation_on_a_european_resettlement_scheme_en.pdf.
[581] "Conclusions of the Representatives of the Governments of the Member States Meeting within the Council on Resettling through Multilateral and National Schemes 20 000 Persons in Clear Need of International Protection."
[582] "The Implementation of the Common European Asylum System," 63.
[583] "Refugee Crisis: European Commission Takes Decisive Action," European Commission website, September 9, 2015, http://europa.eu/rapid/press-release_IP-15-5596_en.htm.
[584] "Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy, Greece and Hungary" (European Commission, September 9, 2015), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-

in the system as a beneficiary and in December 2015 it even challenged the finally accepted relocation mechanism decision before the CJEU (this case will be analyzed later on).[585] This relocation conflict highlighted the problems of mixing refugees and irregular migrants in the Hungarian rhetoric. Hungary refused to participate in this mechanism because it was not only concentrating on assisting refugees, but also concerned irregular migration (for instance because some countries, such as Germany, did not filter who they let in their country). Refusing to participate in this mechanism can already be evaluated as a rogue, symbolic move from Hungary.

On 14 September 2015, EU ministers established provisional measures in the area of international protection for the benefit of Italy and Greece. This decision outlined the temporary and exceptional relocation of 40.000 persons in need for international protection.[586] This was complemented a week later by another decision about the distribution of 120.000 refugees across EU Member States in order to release the pressure from the two countries struggling with accommodating the inflow of displaced persons.[587] These two Council decisions form the basis of the relocation mechanism of the EU established in 2015. The relocation scheme of this decision was based on a mandatory quota, which was opposed by Slovakia, Romania, Hungary and the Czech Republic, who voted against it.[588] The possibility of refusal was in a way even institutionalized by the safeguard clause, which provided an opportunity for Member States to make a financial contribution to the EU budget if they cannot fully take part in the emergency relocation mechanism. Moreover, the Council maintained the temporary safeguard close by permitting that in exceptional circumstances Member States may notify the EU institutions that they are unable to participate in the relocation process of up to 30% of the applicants allocated to them.[589]

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package/docs/proposal_for_council_decision_establishing_provisional_measures_in_the_area_of_international_protection_for_it_gr_and_hu_en.pdf.

[585] Boldizsár Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," *German Law Journal*, Special Issue: Constitutional Dimensions of the Refugee Crisis, 17, no. 6 (2016): 1070.

[586] "Council Decision (EU) 2015/1523 of 14 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece" (Council of the European Union, September 14, 2015), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1523&from=EN.

[587] "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."

[588] "The Implementation of the Common European Asylum System," 56.

[589] "Refugee Crisis – Q&A on Emergency Relocation," European Commission website, September 22, 2015, http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm.

By the end of 2015, it became apparent that the capacity of even those Member States that were willing to cooperate in the voluntary resettlement scheme reached their respective limits. First, the Scandinavian countries announced that they cannot accept more refugees. They were followed by Austria that decided to cut their acceptance to a minimum. This has basically led to the closing of the refugee trail of the Western Balkans. Moreover, it has put an extreme burden on Greece, as tens of thousands of refugees became stuck at its borders.[590] In March 2016, the EU signed a deal with Turkey in order to end irregular migration from Turkey to the EU, which included returning irregular migrants crossing from Turkey to the Greek islands. In exchange for resettling many of these migrants, Turkey's accession procedure was sped up along with the visa liberalization between the EU and Turkey.[591] Although this deal can be seen as an effort by the EU to handle the crisis, one might also argue that it just pushed the venue of solution outside the EU, or that it even weakened the fundamental values of the EU. As Ziegler argues, it is not a proper international treaty, the EP was not involved in its adaptation and sending back refugees to Turkey might even violate the Geneva Convention.[592] Although several asylum seekers asked for the annulment of the deal, the CJEU refused as it argued that the Member States have created the deal, not the EU itself, thus it does not have the jurisdiction to hear and determine cases against it. This might be a dangerous precedent because it could legitimize Member States to act unilaterally in their migration policy, thus undermining common EU policy reforms and goals.[593]

The Commission was a fierce advocate not only of completing the reform of CEAS,[594] but also of the introduction of a resettlement quota of 160.000 refugees. However, this was unacceptable to some Member States, unless it was voluntary.[595] In November 2016, the Visegrad Group

[590] Gábor Vető, "Hogyan Oldható Meg a Menekültválság?," *MTA TK Lendület-HPOPs Kutatócsoport* (blog), 2016, https://hpops.tk.mta.hu/blog/2016/03/hogyan-oldhato-meg-a-menekultvalsag.
[591] "EU-Turkey Statement" (Council of the European Union, March 18, 2016), https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf.
[592] Dezső Tamás Ziegler, "EU Asylum Law: Disintegration and Reverse Spillovers," in *Human Rights of Asylum Seekers in Italy and Hungary. Influence of International and EU Law on Domestic Actions*, ed. Balázs Majtényi and Tamburelli Giuanfranco (Torino; The Hague (NL): G. Giappichelli : Eleven International Publishing, 2019), 27.
[593] Ziegler, 28.
[594] "Completing the Reform of the Common European Asylum System: Towards an Efficient, Fair and Humane Asylum Policy," European Commission website, July 13, 2016, http://europa.eu/rapid/press-release_IP-16-2433_en.htm.
[595] Gábor Vető, "Az Európai Menekültpolitika a Pozsonyi Csúcs És a Magyar Kvótanépszavazás Után," *MTA TK Lendület-HPOPs Kutatócsoport* (blog), 2016, https://hpops.tk.mta.hu/blog/2016/10/az-europai-menekultpolitika-a-pozsonyi.

even adopted a joint statement that outright rejected the compulsory distribution mechanism.[596] The final and official refusal of the 'quota system' took place in Bratislava, in September 2016. Twenty-seven Member States issued a declaration in which they set out a roadmap for handling migration in the future.[597] The main message of the summit was clear. The EU countries realized that they cannot let the refugee crisis happen again, so they need concrete measures to prevent such a chaos in the future. They pledged to take concrete measures for the protection of EU external borders. Moreover, they emphasized the importance of cooperating with third countries in order to facilitate the readmission of displaced persons to their countries of origin.[598] However, the declaration also implicitly admitted the failure of EU solidarity, as processing asylum requests remained the prerogative of Member States.

In the autumn of 2016, there was a decrease in the influx of refugees, easing the burden on Member States as well. However, the preceding two years posed a so far unprecedented challenge to the EU in the area of migration and revealed many problems in the system that needed urgent attention. The main problem lied in the inherent nature of CEAS. The system was not able to handle the flow of a million people to the EU because the laws and rules are carried out by Member States, who were often reluctant to help. The inefficiency of the EU-wide migratory regulations did not help either. EU law in the area of migration increasingly spreads into policy areas that used to belong to national competence, but now the domestic legislation is shaped by the EU. However, the implementation from the part of the EU is weak and lacks its own apparatus, whereas the national administration is expected to apply European laws.[599] The ineffectiveness of this system became apparent in the refugee crisis. For instance, the poor wording of the Geneva convention is a problem, as it leaves many questions unsolved. This is not very surprising, given that the text was made to arrange the status of refugees after World War II.[600] Another problem with the European refugee system that surfaced during the crisis is the lack of a unified list of safe states.[601] It will be shown in the next sub-chapter that the lack of regulation in this area gave an opportunity to Hungary to unilaterally issue a list of

[596] "Joint Statement of V4 Interior Ministers on the Establishment of the Migration Crisis Response Mechanism," text, www.visegradgroup.eu, November 21, 2016, http://www.visegradgroup.eu/calendar/2016/joint-statement-of-v4.
[597] "Bratislava Declaration and Roadmap," Website of the European Council, September 16, 2016, https://www.consilium.europa.eu/en/press/press-releases/2016/09/16/bratislava-declaration-and-roadmap/.
[598] Vető, "Az Európai Menekültpolitika a Pozsonyi Csúcs És a Magyar Kvótanépszavazás Után."
[599] Nora Dörrenbächer, "Europe at the Frontline: Analysing Street-Level Motivations for the Use of European Union Migration Law," *Journal of European Public Policy* 24, no. 9 (September 24, 2017): 1328, https://doi.org/10.1080/13501763.2017.1314535.
[600] Ziegler, "EU Asylum Law: Disintegration and Reverse Spillovers," 22.
[601] Ziegler, 25.

safe states. In addition, in the case of a crisis, shared responsibilities and solidarity should be a must have, none of which can be effectively enforced by the EU.[602] The Member States took advantage of such loopholes in the EU's migration regulations and did not perform well when it came to contributing to the common migration agenda.

4. Migratory and refugee regulations in Hungary: before and after the refugee crisis

4.1 Pre-crisis legislation

Hungarian migration policy was defined already in the 1990s. It was based on the general argument that Hungary was never a target, only a transit country, which meant that the policy should be dealt with from a security point of view. This view disregarded, however, the fact that many refugee waves justified the transition in the migratory role of Hungary. First, it became a buffer zone, then it became the periphery of the European center.[603] The primary document determining Hungary's refugee law is the 1950 Geneva Convention as it is outlined by regulation 101/1989 about the recognition of refugee status (101/1989. (IX. 28.) *MT rendelet a menekültként való elismerésről*).[604] The rules about who can get asylum and refugee status in Hungary were then refined by Act CXXXIX. of 1997 about refugee law,[605] and Act XXXVIII. of 2001, which modified this law.[606] Hungary's EU membership required changes and refinements in the Hungarian migration legislation as an important distinction entered the system between migration law and the law of 'foreign persons' (a special area of the latter is refugee law).[607] The former refers to the regulations about the free movement of people within the EU, as well as the emigration of Hungarian citizens. These procedures were defined in Act I. of 2007, which set out the rules of entering and staying in Hungary for people who have the right of free movement and residence.[608] The implementation of this law is set out in decree

[602] Vető, "Az Európai Menekültpolitika a Pozsonyi Csúcs És a Magyar Kvótanépszavazás Után."
[603] Judit Tóth, "Migrációs Jogi Környezet Magyarországon," *Magyar Tudomány*, no. 3 (2013): 249.
[604] "101/1989. (IX. 28.) MT Rendelet," September 28, 1989, 10/19/2019, http://jogiportal.hu/index.php?id=5cugztq97xfxt2jop&state=19971101&menu=view.
[605] "1997. Évi CXXXIX. Törvény a Menedékjogról" (Magyar Országgyűlés, December 15, 1997), https://mkogy.jogtar.hu/jogszabaly?docid=99700139.TV.
[606] "2001. Évi XXXVIII. Törvény a Menedékjogról Szóló 1997. Évi CXXXIX. Törvény Módosításáról" (Magyar Országgyűlés, June 21, 2001), https://net.jogtar.hu/getpdf?docid=a0100038.TV&printTitle=2001.%20%C3%A9vi%20XXXVIII.%20t%C3%B6rv%C3%A9ny&targetdate=ffffffff4&referer=lawsandresolutions.
[607] Zoltán Hautzinger, "A Magyar Idegenjog Rendszere És Az Idegenjogi (Szak)Igazgatás," *Pro Publico Bono - Magyar Közigazgatás*, no. 2 (2014): 70.
[608] "2007. Évi I. Törvény a Szabad Mozgás És Tartózkodás Jogával Rendelkező Személyek Beutazásáról És Tartózkodásáról" (Magyar Országgyűlés, January 5, 2007), https://net.jogtar.hu/getpdf?docid=A0700001.TV&targetdate=20180101&printTitle=2007.+%C3%A9vi+I.+t%C3%B6rv%C3%A9ny.

113/2007.[609] Moreover, the main source of law for free movement is Article XXVII. of the Fundamental Law of Hungary, which defines that all persons legally staying in Hungary have the right for free movement and for choosing their place of residence.[610]

Refugee law deals with the regulations of foreign nationals which were incorporated in Act II. of 2007, which regulated the rules of entering and staying in the country for third country citizens.[611] The implementation of this Act was incorporated in government decree 114/2007.[612] The circumstances of entering Hungary for third country nationals are also defined by the Schengen border code. Act LXXX. of 2007, also referred to as the Asylum Act, defines the rules of asylum in Hungary in recognition of the country's international commitments, the generally accepted values of international law and the migration policy of the EU.[613] It became incorporated into Hungarian law by government decree 301./2007.[614] In addition, it clarifies the difference between certain types of refugees and asylum seekers (*menekült, menedékes, oltalmazott*). The Hungarian judiciary practice in refugee case law was able to show significant results prior to the refugee crisis.[615] Hungarian courts have requested a preliminary ruling from the Court of Justice of the EU in two important cases. One of them was the *El-Kott*-case,[616] in which case the ruling came out in 2012, the other was the *Bolbol*-case from 2010.[617] Other important cases were that of the ECtHR in the *M.S.S v Belgium and Greece*-case, which offered a harsh critique of the Dublin system,[618] and the *N.S.* judgement of the CJEU.[619]

[609] "113/2007. (V. 24.) Korm. Rendelet a Szabad Mozgás És Tartózkodás Jogával Rendelkező Személyek Beutazásáról És Tartózkodásáról Szóló 2007. Évi I. Törvény Végrehajtásáról" (Magyar Országgyűlés, June 24, 2007), https://net.jogtar.hu/jogszabaly?docid=A0700113.KOR.
[610] Hautzinger, "A Magyar Idegenjog Rendszere És Az Idegenjogi (Szak)Igazgatás," 75.
[611] "2007. Évi II. Törvény a Harmadik Országbeli Állampolgárok Beutazásáról És Tartózkodásáról" (Magyar Országgyűlés, January 5, 2007), https://net.jogtar.hu/jogszabaly?docid=A0700002.TV.
[612] "114/2007. (V. 24.) Korm. Rendelet a Harmadik Országbeli Állampolgárok Beutazásáról És Tartózkodásáról Szóló 2007. Évi II. Törvény Végrehajtásáról - Hatályos Jogszabályok Gyűjteménye" (Magyar Országgyűlés, June 24, 2007), https://net.jogtar.hu/jogszabaly?docid=A0700114.KOR.
[613] "2007. Évi LXXX. Törvény a Menedékjogról" (Magyar Országgyűlés, June 25, 2007), https://net.jogtar.hu/jogszabaly?docid=A0700080.TV.
[614] "301/2007. (XI. 9.) Korm. Rendelet a Menedékjogról Szóló 2007. Évi LXXX. Törvény Végrehajtásáról" (Magyar Országgyűlés, September 9, 2007), https://net.jogtar.hu/jogszabaly?docid=a0700301.kor.
[615] Anita Nagy, "A Menekültgyi Bíráskodás Sosem Lehet Állóvíz," *Fundamentum*, no. 2 (2013): 72.
[616] "Judgement of the Court in Case C-364/11 El-Kott" (Court of Justice of the European Union, December 19, 2012).
[617] "Judgement of the Court in Case C-31/09 Bolbol" (Court of Justice of the European Union, June 17, 2010).
[618] "ECtHR - M.S.S. v Belgium and Greece [GC], Application No. 30696/09 | European Database of Asylum Law".
[619] "Judgment of the Court (Grand Chamber) of 21 December 2011. N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform," Court of Justice of the European Union, December 21, 2011.

The broadness of Hungarian legislation about migration is demonstrated by the fact that laws can be put into many groups based on who they apply to. The first group of laws applies to all foreigners arriving to Hungary. These are, for example, besides the relevant paragraphs of the Hungarian Fundamental Law mentioned above, the law granting equal treatment (2003), the act prohibiting the illegal employment and trafficking of foreigners (2012), or even the law regulating acquiring Hungarian citizenship (1993). The second group of legislation regulates the rights of EU citizens and focuses mainly on entering conditions, registration and longer stays (e.g. Act I. of 2007). The third group of laws (e.g. Act II. of 2007) refers to third country nationals who are refugees, do not have EU citizenship, are stateless, are foreign employees, students, investors, short-term visitors or illegal immigrants. The fourth group of regulations applies to those who are of Hungarian descent or have any ethnic ties to Hungary and would like to or are in the process of acquiring legal status in Hungary.[620] Hungary introduced a comprehensive refugee integration system in January 2014, which involved the introduction of the integration contract, a two-year scheme that provides a certain amount of money allocated to refugees.[621] The next paragraphs will show how the general asylum policy of Hungary changed as a reaction to the refugee crisis.

4.2 Post-crisis legislation

EU Member States acted differently in response to the influx of immigrants in 2015/2016. This difference was based on, first of all, the amount of people they had to handle at the borders. Hungary, for instance, especially overwhelmed in this respect. Some Member States, such as Germany, considered it a humanitarian issue and emphasized that refugees are welcome. Others considered the question of migration to be only a security concern and initiated a process of securitization in this policy area. This security-oriented approach in Hungary's migration policy was not completely new, as it was mentioned before. "Securitization refers to a set of speech acts and practices which posit a phenomenon or process as threatening the well-being of the society and calls for extraordinary reaction on behalf of the securitizing agent."[622] In the context of the EU and migration, it was Jef Huysmans who used the securitization narrative and found out years before the migration crisis that migrants are understood as aliens, and a threat

[620] Tóth, "Migrációs Jogi Környezet Magyarországon," 247.
[621] Ágota Scharle, "Labour Market Integration of Asylum Seekers and Refugees Hungary" (European Commission, April 2016): 1-8.
[622] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1041.

to society and are handled by actors without taking humanitarian aspects into consideration.[623] Based on the way Hungarian authorities handled the migration crisis the government can be identified as the securitizing actor together with the government-controlled public media, and commercial outlines close to the governing party.[624]

Securitization does not only appear in the politics of the Hungarian government, but in its rhetoric as well,[625] as it will be demonstrated in the following paragraphs. Some researchers argue that despite the fact that the Hungarian migration narrative stemmed from Western European discursive structures, the Hungarian securitization campaign is unique in a way, due the conditions underlying its inception and its rapid evolution.[626] Securitization is not a new phenomenon in asylum law, but the tone the Hungarian government used while applying it, was new.[627] Using one term (migrant) to refer to all the people who wanted to cross the borders during the crisis years instead of differentiating between irregular migrants, refugees or asylum seekers, stems from the tendency of securitization, but it takes it to a whole new level and can be considered a symbolic, rogue Member State act from Hungary that the EU could not control.

The new Hungarian migratory framework was based on certain provisions of the Hungarian Fundamental Law (formerly Constitution) and several legal acts that modified the pre-crisis migration system of the country. The Fundamental Law of Hungary outlined that Hungary was obliged to provide asylum to displaced persons (Article XIV. (3)), and it was prohibited to expel anyone to a country where they would be in danger.[628] Thus, Hungary fulfils its obligations stemming from international law about providing asylum. However, the 7th modification of the Hungarian Fundamental Law enacted some changes and assessed that those citizens who arrived in Hungary through safe states were not eligible for asylum (paragraph (4)). Moreover, the Fundamental Law also declared that "foreign people cannot be resettled into Hungary"

[623] Jef Huysmans, "The European Union and the Securitization of Migration," *JCMS: Journal of Common Market Studies* 38, no. 5 (December 2000): 751–777, https://doi.org/10.1111/1468-5965.00263.
[624] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1042.
[625] Attila Juhász and Edit Zgut, "Recent Changes in Refugee-Related Policies in Hungary," *Migration Politics and Policies in Central Europe - GLOBSEC Policy Institute*, May 2017, 14.
[626] András Szalai and Gabriella Gőbl, "Securitizing Migration in Contemporary Hungary" (CEU CENS working paper, November 30, 2015), 2, https://cens.ceu.edu/sites/cens.ceu.edu/files/attachment/event/573/szalai-goblmigrationpaper.final.pdf.
[627] Ziegler, "EU Asylum Law: Disintegration and Reverse Spillovers," 29.
[628] "Magyarország Alaptörvénye" (2011), https://net.jogtar.hu/jogszabaly?docid=A1100425.ATV.

(paragraph (1)).[629] These changes were enacted in 2018 and raise questions about Hungary's compatibility with international law and European migratory standards.

The refugee crisis of 2015/2016 did not only result in a general hostility towards immigrants from the Hungarian government and the general population, but the previously well-functioning Hungarian migration system was also modified.[630] The rules regulating migration were drastically changed and created a hostile environment for refugees. The most frequent decision of the Hungarian authorities regarding asylum applications between 2013 and 2016 was either rejection or termination. This means that there was hardly any substantive decision-making in the system, and that in the majority of the cases the evaluation of asylum applications was left to another Member State.[631] The unusually low recognition rates were alarming, compared to the previous years.[632] The government decree (No. 301 of 2007, November 9) dealing with the procedure and the support of applicants, has been amended 17 times between 2014-2019.[633] The possibility for potential refugees to acquire international protection was decreased both through physical and administrative tools. Illegal border crossings became criminalized, the circumstances of those who were let in the country and detained in Hungary did not fit the minimum humanitarian standards. As a result, solidarity and cooperation with the EU in the matter were reduced to a minimum.[634] In 2015, the Hungarian government spent 84 billion HUF on migration control and more than 100 billion HUF in 2016.[635]

The Hungarian Helsinki Committee, in its paper analyzing the Hungarian way of handling the refugee crisis and providing suggestions for an effective and sustainable refugee system, argues that the re-calibration of the Hungarian refugee system served three purposes. First, it was meant to prevent the entry of refugees in the country; second, to stop the refugees from applying for asylum; and third, to urge the refugees to move towards Western Europe as soon as possible. The Committee claims that the Hungarian legislation and government actions are contrary to

[629] "T/332. Számú Javaslat - Magyarország Alaptörvényének Hetedik Módosítása" (Magyarország Kormánya, 2018), 2, https://www.parlament.hu/irom41/00332/00332.pdf.
[630] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre" (Magyar Helsinki Bizottság, 2017).
[631] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1037.
[632] Nagy, 1039.
[633] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 130.
[634] Gábor Vető, "Összeegyeztethető-e a Magyar Kormány Újabb Menekültügyi Reformja Az Európai Menekültjoggal?," *MTA TK Lendület-HPOPs Kutatócsoport* (blog), 2017, https://hpops.tk.mta.hu/blog/2017/02/osszeegyeztetheto-e-a-magyar.
[635] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 131.

international law, and they neglect their obligations stemming from EU membership and the Schengen zone.[636] In 2015, a record number of asylum claims were filed in Hungary (177.135 applications), four times higher than the number of asylum seekers in 2014. This increase was not accompanied by an increase in financial assistance to this policy area. Instead, Hungary tried to handle the situation by a physical barrier first, and then by legal boundaries.[637] The following pages will present the most important actions of the Hungarian authorities to stop migration: creating a list of safe third states, erecting a border wall, and the creation of transit zones.

4.2.1 Safe third states

Two major overhauls and several minor changes were introduced in Hungary's asylum legislation in 2015, including amendments to the Asylum Act and to many other laws (i.e. the Penal Code).[638] The first change was induced by Act CVI. Of 2015 on the amendment of Act LXXX of 2007 on Asylum.[639] This law allowed the government to adopt a list of safe third states. In July 2015, government decree 191/2015 promulgated the list of safe third countries and the list of safe countries of origin. The two lists were identical.[640] The first major change of the refugee status determination procedure came in July 2015, through Act CXXVII 2015, on the establishment of a temporary security border-closure and on the amendment of laws relating to migration.[641] This law aimed at accelerating and simplifying the asylum procedure in general, but the more significant aspect of it was the construction of a physical barrier at the Serbian-Hungarian border. Moreover, the act shortened deadlines for the authorities to decide an asylum-seeker's case and for the applicants' right to remedy. It also expanded possible places of detention, and allowed for the authorities to remove persons from the country before the first judicial review of their applications even started.[642] It is important to note here that these acts

[636] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 7.
[637] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 8.
[638] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1045.
[639] "2015. Évi CVI. Törvény a Menedékjogról Szóló 2007. Évi LXXX. Törvény Módosításáról" (Magyar Országgyűlés, June 30, 2015), https://mkogy.jogtar.hu/jogszabaly?docid=A1500106.TV.
[640] "191/2015. (VII. 21.) Korm. Rendelet a Nemzeti Szinten Biztonságosnak Nyilvánított Származási Országok És Biztonságos Harmadik Országok Meghatározásáról - Hatályos Jogszabályok Gyűjteménye" (Magyarország Kormánya, July 21, 2015), https://net.jogtar.hu/jogszabaly?docid=a1500191.kor.
[641] "2015. Évi CXXVII. Törvény Az Ideiglenes Biztonsági Határzár Létesítésével, Valamint a Migrációval Összefüggő Törvények Módosításáról" (Magyar Országgyűlés, July 13, 2015), https://mkogy.jogtar.hu/jogszabaly?docid=A1500127.TV.
[642] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1046.

were not new to the EU *acquis*, and it was within the right of the country to promulgate them. However, Hungarian legislators chose the options least favorable to asylum seekers. They also put a huge burden on Serbia by considering it a safe country, forcing it to process hundreds of thousands of applications.[643]

Boldizsár Nagy argues that the adoption of lists of safe third countries and countries of origin did not violate EU law per se. Nevertheless, the subsequent application of the issued list, such as Serbia being a safe third country, violated some of the criteria of the Procedures Directive.[644] In this case, it is very hard to define where the division lies between fulfilling the country's commitments to Schengen, by protecting the EU's borders, and making the lives of refugees harder. As mentioned earlier, the list of safe states was not a violation of EU law, which means it falls within the category of interest-based Member State action. However, if we consider the burden this imposed on Serbia and the effects it had on refugees together with other acts of the Hungarian government, it already falls within the category of rogue Member State action. In March 2020, the first Chamber of the CJEU found in a preliminary ruling procedure that refusing to process an asylum seeker's application for international protection because they arrived to Hungary through a safe state is contrary to Directive 2013/32/EU.[645] The previously mentioned 'Stop Soros' law enabled the Hungarian authorities to refuse to process such an application.

4.2.2 Border wall along the Serbian and Croatian border

In autumn 2015, the construction of a wall on the Southern borders of Hungary commenced. This action was followed by certain legislative steps aiming at reducing the number of immigrants without taking humanitarian aspects into consideration. In 2016, a second line of the fence was built in order to stop immigrants coming from the Wester Balkans route and to keep the problem out from Hungary by pushing it towards Serbia and Romania.[646] The wall, stretching along more than 170 kms of the Serbian and Croatian border, was intended to prevent refugees from entering the country and crossing the wall was declared a crime by authorities. These measures resulted in a dramatic drop in asylum applications between October 2015 and

[643] Nagy, 1046.
[644] Nagy, "Renegade in the Club – Hungary's Resistance to EU Efforts in the Asylum Field," 414.
[645] "Judgement of the Court in Case C-564/18 LH v Bevándorlási És Menekültügyi Hivatal. Request for a Preliminary Ruling from the Fővárosi Közigazgatási És Munkaügyi Bíróság." (Court of Justice of the European Union, March 19, 2020).
[646] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 129.

January 2016, which clearly show the impact of the fences.[647] This strategy is called the externalization of migration controls by the academic literature.[648]

It is important to highlight that Hungary was a policy promoter in erecting a fence (or a norm entrepreneur small state, as it will be explained later). As Hungary did not violate EU law with these actions, the country basically got the opportunity to go against mainstream EU policies and became a leader of anti-immigrant voices in the EU because. This happened by, on the one hand, refusing to participate in the mandatory relocation mechanism, and, on the other, by erecting the fence along the Southern border of Hungary. These activities indeed served as examples to fellow EU Member States. The former attitude was followed by some of the V4 countries, the latter by many more EU countries. By the end of 2018, ten out of the twenty-eight (now twenty-seven) EU members have erected different kinds of border walls.[649] It is important to highlight that no legal criticism can come up against the fence itself, as it is defined as a tool to protect the border of the EU in a crisis situation.

4.2.3 Transit zones

Act. CXL 2015 On the amendment of certain acts in connection with the mass migration,[650] was the second major change introduced to Hungarian asylum law in the period of the refugee crisis. It adopted an overarching legal framework that amended and affected several different other acts (Asylum Act, Criminal Code, Borders Act etc.). The purpose of the acts was to declare a "crisis situation caused by mass immigration" through which the government could justify its unusually strict policy against asylum seekers. Some forms of illegal entry into Hungary were made a felony, instead of a minor misdemeanor as before, by introducing new Articles (352 A, B, C) into the Criminal Code. A maximum of three years imprisonment threatened those who crossed the fence illegally, while damaging the fence could result in five years of imprisonment.[651] Transit-zones have been established with the purpose of hosting public officials responsible for refugee status determination procedures. However, access to the

[647] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1040.
[648] Bill Frelick and Ian M. Kysel, "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants," *Journal on Migration and Human Security* 4, no. 4 (2016): 190–220.
[649] "The EU Has Built 1,000km of Border Walls since Fall of Berlin Wall," The Independent, November 9, 2018, https://www.independent.co.uk/news/world/europe/eu-border-wall-berlin-migration-human-rights-immigration-borders-a8624706.html.
[650] "2015. Évi CXL. Törvény Egyes Törvényeknek a Tömeges Bevándorlás Kezelésével Összefüggő Módosításáról" (Magyar Országgyűlés, September 7, 2015), https://mkogy.jogtar.hu/jogszabaly?docid=A1500140.TV.
[651] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1047.

zones was limited, and it was the authority of the officials to decide how many people they allow to enter a container.[652] A new border procedure was introduced that was only applicable in the transit zone. It combined detention without court control with a very fast procedure giving no real access to legal assistance and making the use of legal remedies almost impossible.[653] In addition, a number of criminal procedural rules have been changed in a way that removes the protection of immigrants accused of crimes related to the irregular crossing of the fence.[654] It could be argued that, as surprising as it may seem, from a legal point of view these acts could be done because both the Geneva Convention and UNHCR are unclear on this area.

Unfortunately, the CJEU case law is of no particular help either, as it does not give much guidance in the interpretation of the relevant articles of the above mentioned documents.[655] As a result, refugees often received serious penalty for minor offences and some of them, who protested for better conditions or for entry into Hungary, were treated as terrorists,[656] e.g. *Ilias and Ahmed v. Hungary*-case.[657] This happened even though EU law does not oblige Member States to detain illegal migrants or asylum seekers, and the range of alternatives to detention is quite significant.[658] In the *Ilias*-case, the ECHR declared that the Hungarian detention of refugees as well as their being sent back to Serbia did not include appropriate guarantees, and hence the applicants were exposed to a risk of inhuman treatment in breach of Article 3 of the Convention.[659] Thus, the Strasbourg court ordered financial compensation from Hungary to the applicants. In April 2018, a public hearing was convened by the ECHR on the Hungarian Transit Zone, which was considered by the Court to be prison detention in relation to the two Bangladeshi asylum seekers.[660] The non-final judgement of the ECHR came in March 2017, which ruled that keeping the refugees in transit zones constitutes unlawful detention that violates their human rights. The Hungarian government appealed, inviting the Grand Chamber to address the complaints of the asylum seekers.[661] In November 2019, the ECHR ruled that although the Hungarian authorities violated some rules in the case of the two asylum seekers,

[652] Nagy, 1064.
[653] Nagy, 1048.
[654] Nagy, 1049.
[655] Ziegler, "EU Asylum Law: Disintegration and Reverse Spillovers."
[656] Ziegler, 31.
[657] "Case of Ilias and Ahmed v. Hungary," ECHR website, September 18, 2017, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-172091%22]}.
[658] Tamás Hoffmann and Dezső Tamás Ziegler, "A Menekültügy Jogi Szabályozása," in *Az Európába Irányuló És 2015-Től Felgyorsult Migráció Tényezői, Irányai És Kilátásai* (Budapest: MTA, 2015), 5.
[659] Nagy, "Renegade in the Club – Hungary's Resistance to EU Efforts in the Asylum Field," 416.
[660] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 138.
[661] Tóth, 139.

their confinement to the transit zone did not violate the European Convention of Human Rights, and it cannot be considered illegal detention.[662] The Hungarian government considered this ruling as a victory and as proof that Hungary has been acting according to EU and international law in its migration policy during the refugee crisis.

In May 2020, the CJEU's decision in two joint cases about the transit zones came out. It stated that "the placing of asylum seekers or third-country nationals who are the subject of a return decision in the Röszke transit zone at the Serbian-Hungarian border must be classified as 'detention.'"[663] The Court held that the persons seeking international protection can be detained, but only for a maximum time of four weeks. Moreover, the body also had remarks about the conditions in the transit zones, namely Röszke. The CJEU found that the conditions prevailing in the Röszke transit zone qualified as deprivation of liberty, primarily because the persons concerned cannot lawfully leave the zone in any direction. As a result of the judgement, the Hungarian government decided to close transit zones on the Hungarian-Serbian border.[664] With this decision, although the government decided to comply with the CJEU ruling, it also made asylum applications more difficult. Since then, asylum seekers were only able to submit their applications at Hungary's foreign missions. The closing of transit zones might also be problematic from the perspective of the Asylum Procedures Directive, which outlines that asylum applications should be handed in at the border of the given country.[665] If Hungary continues to "outsource" this task to its foreign missions, it might even face another legal procedure for violating EU law.

The European Commission launched an infringement procedure about the new Hungarian asylum law in December 2015, referring Hungary to the CJEU in July 2018.[666] In his opinion delivered in June 2020, Advocate General Priit Pikamäe argued that "there has been a failure to fulfil obligations for breach of ensuring effective access to the asylum procedure, and for breach of the procedural safeguards relating to applications for international protection, to the

[662] "Ilias and Ahmed v. Hungary, Grand Chamber Judgment of 21 November 2019" (European Court of Human Rights, November 19, 2019).
[663] "Judgement of the Court in Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság" (Court of Justice of the European Union, May 14, 2020).
[664] "About Hungary - Government to Close Transit Zones on the Hungarian-Serbian Border," About Hungary, May 22, 2020, http://abouthungary.hu/news-in-brief/government-to-close-transit-zones-on-the-hungarian-serbian-border/.
[665] "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)," 32.
[666] "Migration and Asylum: Commission Takes Further Steps in Infringement Procedures against Hungary."

unlawful detention of applicants for that protection in transit zones and to the unlawful removal of illegally staying third-country nationals."[667] Some researchers claim that "punishing asylum seekers for having crossed the border irregularly (with or without a fence) does violate Article 31 of the Geneva Convention, provided the criteria found in the article concerning direct arrival and contact with the authorities without delay, as presently interpreted, were fulfilled."[668] Moreover, the UNHCR 2016 country paper concluded that it "considers that Hungary's law and practice in relation to the prosecution of asylum- seekers for unauthorized crossing of the border fence [is] likely to be at variance with obligations under international and EU law."[669]

The Hungarian government first initiated measures in the name of the crisis situation only in two counties (from September 2015 to March 2016). Later, these measures were extended to four more counties, and finally to the whole of Hungary until September 2016. The application of extreme measures was extended until March 2020, even though the criteria for a crisis situation were not met (the situation is defined based on the number of applicants and the threat they pose to the border).[670] As a result, almost 3000 people were detained and submitted to judiciary procedures between September 2015 and September 2016.[671] Act CLXXV of 2015 is called "Protection of Hungary and Europe against the introduction of a compulsory implemented quota," even though it concerns the reception of asylum seekers and the burden sharing of a common European refugee policy. This is part of the government's deception campaign towards its citizens, which targets refugees and blames the EU's migration policy, both of which are clear manifestations of symbolic, rogue behavior. This law entrusted the government to turn to the CJEU for the annulment of Council decision 2015/1601, pursuant to Article 263 TEU, as it will be discussed later.[672]

The rhetoric behind the government's actions was that the country wants to stop illegal migration, all the while providing proper treatment to those people who have legal

[667] "Advocate General's Opinion in Case C-808/18 Commission v Hungary" (curia.europa.eu, June 25, 2020), https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-06/cp200079en.pdf.
[668] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1075.
[669] "Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016" (UNHCR, May 2016), https://www.refworld.org/docid/57319d514.html.
[670] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 134.
[671] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 8.
[672] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 136.

documentation to apply for asylum. However, this standpoint did not take into consideration that many refugees could not possibly have the necessary papers due to the conditions under which they were forced to flee from their home country. Moreover, the criminalization of refugees is contrary to the Geneva Convention.[673] By June 2016, several legislative changes entered into force.[674] These amendments basically abolished the integration of refugees and forced them to leave Hungary maximum 30 days after they were granted refugee status. The so-called 'integration contract' facilitating housing and education for two years was also abolished.[675] These were basically the only genuine instruments of integration for refugees. This change is not in line with the Migration Strategy of the Hungarian government adopted in 2013.[676] Although this strategy was prepared for accessing EU funds, it was adopted by a parliamentary decree,[677] which makes it a key part of the Hungarian migratory legal framework. Moreover, based on the Geneva Convention, all state parties are obliged to facilitate the integration of recognized refugees. Therefore, whatever integration effort would have been needed, this legal package completely abolished it.[678]

Act XCIV of 2016,[679] which entered into force in July 2016, legalized the push-back of refugees to the non-Hungarian side of the wall without any legal procedure or remedy. Everyone caught within an 8 km radius of the fence was 'escorted' back to the Southern side of the wall. This practice, according to the Helsinki Committee, violates Hungarian, European and international refugee law, [680] and detention during the border procedures might be considered to be a "legally indefensible punishment."[681] In light of the October 2017 judgment of the ECHR in the *N. D.*

[673] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 9.
[674] "2016. Évi XXXIX. Törvény Egyes Migrációs Tárgyú És Ezekkel Összefüggésben Más Törvények Módosításáról" (Magyar Országgyűlés, May 20, 2016), https://mkogy.jogtar.hu/jogszabaly?docid=A1600039.TV.
[675] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 9.
[676] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 139.
[677] "Az 1698/2013. (X.4.) Kormányhatározattal Elfogadott Migrációs Stratégia És Az Azon Alapuló, Az Európai Unió Által a 2014-2020. Ciklusban Létrehozásra Kerülő Menekültügyi És Migrációs Alaphoz Kapcsolódó Hétéves Stratégiai Tervdokumentum" (Magyar Országgyűlés, October 4, 2013), http://belugyialapok.hu/alapok/sites/default/files/MMIA_.pdf.
[678] Szabó, "Quo Vadis Integration Policy?," 200.
[679] "2016. Évi XCIV. Törvény a Határon Lefolytatott Menekültügyi Eljárás Széles Körben Való Alkalmazhatóságának Megvalósításához Szükséges Törvények Módosításáról" (Magyar Országgyűlés, June 27, 2016), https://mkogy.jogtar.hu/jogszabaly?docid=A1600094.TV.
[680] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 9.
[681] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1065.

and N. T. v. Spain,[682] concluding that the returns by the Spanish authorities from Melilla to Morocco constitutes a breach of the prohibition of collective expulsion, one could argue that the Hungarian practice of sending back migrants through the fence without any prior administrative, judicial or identification procedure breaches Protocol 4, Article 4 of the European Convention of Human Rights, which prohibits collective expulsion, and Article 13 of the Convention (together with the Art. 4 of Protocol 4), which requires effective remedy.[683]

4.3 International reactions to the Hungarian border conditions

The Hungarian authorities were not very proactive in improving the capacities of the asylum system. On the contrary, the country's biggest receiving point for refugees in Debrecen was closed at the end of 2015.[684] In spring 2016, the Nagyfa reception center was closed and the tent camp at Körmend initially built as a temporary solution was made permanent.[685] In December 2016, the oldest and relatively well-equipped open receiving point of Hungary was closed in Bicske, and some of the refugees were sent to camps where the living conditions were not satisfactory poor. According to some reports from humanitarian organizations, the conditions in camps and transit zones were far from adequate, and the Hungarian police authorities did not shy away from violence against detainees, in some cases. Moreover, Hungarian borders were often raided by paramilitary organizations who arbitrarily involved in keeping 'discipline' in the area.[686]

In October 2017, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment returned to Hungary in order to examine "the treatment and conditions of detention of foreign nationals detained under aliens legislation." Although the Committee has found that the situation compared to its 2015 report improved to a certain extent, it still urged the Hungarian authorities to act regarding the ill-treatment of refugees by the police. It also considered the material conditions in the transit zones to be inadequate for the accommodation of asylum-seekers and noted that specialist care was insufficient.[687] During

[682] "ECtHR - N.D. and N.T. v. Spain, Application Nos. 8675/15 and 8697/15, 3 October 2017," European Database of Asylum Law, October 3, 2017, /en/content/ecthr-nd-and-nt-v-spain-application-nos-867515-and-869715-3-october-2017.
[683] Nagy, "Renegade in the Club – Hungary's Resistance to EU Efforts in the Asylum Field," 418.
[684] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 9.
[685] Attila Juhász, Csaba Molnár, and Edit Zgut, "Menekültügy És Migráció Magyarországon" (Heinrich-Böll-Stiftung e.V. és Political Capital, 2017), 23.
[686] Juhász, Molnár, and Zgut, 23.
[687] "Report to the Hungarian Government on the Visit to Hungary Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 26 October

his visit to Hungary in September 2017, UN High Commissioner Filippo Grandi also urged "to improve access for people seeking asylum and to do away with its so-called border 'transit zones,' which he said are in effect detention centers."[688]

As a result, some Member States' National courts (e.g. Germany, Austria, Luxembourg) have decided to not return asylum seekers to Hungary because of the lack of reception capacities and their poor quality, according to the Dublin regulation.[689] In the context of non-refoulment, the decision of the High Court of England and Wales offers guidance in *Ibrahimi and Abasi v SSHD*.[690] The case dealt with two Iranian nationals who refused to return to Hungary from the UK, after Hungary had accepted responsibility for their cases, using the Dublin regulation as reference. In August 2016, the judge delivering the issue established that the question was "whether removal from the UK to Hungary gives rise to a risk of indirect refoulement to Iran." The judgement established with regards to Hungary that "there are systemic flaws in the system of a substantial nature which create a real risk of refoulement."[691] This case is valuable in assessing the situation of asylum procedures in Hungary because the judgement came from an impartial 'third party.' The judgement observes that Hungary is a "…state that is prepared to adopt an asylum regime which is deliberately designed to deter immigrants and to weaken judicial supervision with a view to removing those who are temporarily present in Hungary to third countries. In these circumstances […] the presumption that Hungary *qua* EU Member State adheres to the *acquis communautaire* and can be relied upon to respect relevant international law and ECHR rights of the Claimants cannot carry much weight."[692]

The situation emerging by the end of 2016 was far from under control. The *ad hoc* solutions of the Hungarian authorities achieved just the opposite of what they intended: they increased security risks and organized crime.[693] The compatibility of the new legal constellation introduced in 2015–2016 with EU and international law raised questions from the Commission.

2017" (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), September 18, 2018), https://rm.coe.int/16808d6f12.

[688] "UNHCR Chief Visits Hungary, Calls for Greater Access to Asylum, End to Detention and More Solidarity with Refugees," UNHCR, September 12, 2017, https://www.unhcr.org/news/press/2017/9/59b809d24/unhcr-chief-visits-hungary-calls-greater-access-asylum-end-detention-solidarity.html.

[689] "The Implementation of the Common European Asylum System," 83.

[690] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1075.

[691] "Mr Husain Ibrahimi and Mr Mohamed Abasi v. The Secretary of State for the Home Department" (EWHC, August 5, 2016), https://www.refworld.org/cases,GBR_HC_QB,57a87cca4.html.

[692] "Mr Husain Ibrahimi and Mr Mohamed Abasi v. The Secretary of State for the Home Department."

[693] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 12.

In October 2015, the body addressed a letter to the Hungarian government sharing its concerns about the compatibility of the new rules with EU law. The latter mentioned the possible violation of the rules of international protection, the lack of possible safeguards in the asylum procedure implemented at the Hungarian border, the severity of the criminal sanctions, and the possible lack of specific procedures or safeguards for children.[694] Boldizsár Nagy argues that the changes presented above, the factual elements of the modifications introduced to Hungarian asylum law, can be put into six organizing categories: denial (denying that those who arrive at the borders are asylum seekers), deterrence (from entering Hungary or from applying for asylum), obstruction (putting physical and legal barriers on the route to safety), punishment (responding to migration challenges with the toolkit of criminal law), free riding constituting lack of solidarity (measures that shift the responsibility of protection to other states and a refusal to participate in the collective responses suggested by the EU), and breaching the law (international, European, domestic).[695]

After the summer of 2016, only 600-1000 could submit their asylum claims every month, whereas around 3500 people arrived at the borders with the probable intention of filing for refugee status. This decrease was a result of the systematic disintegration of the Hungarian refugee system enabled by the Hungarian government's actions. New actions were implemented by the government in November 2016, which introduced that asylum applications may only be filed in the Röszke and Tompa transit zones, only during public offices' opening hours, meaning weekdays.[696] Declaring Serbia to be a safe country, erecting a border fence, criminalizing crossing the fence, declaring a state of emergency in the country, limiting the capacity of the transit zones to ten people/day and legalizing push-back all contributed to the erosion of the system and these actions can be seen to violate Hungary's commitments towards the Geneva Convention and the European migration system.[697] The integration of refugees and asylum seekers is not supported by the state, only by EU, UN and civil resources. This is contrary to Article 34 of the 'qualification Directive' (2011/95/EU), which requires Member States to have actions facilitating integration. Based on the Geneva Convention and the

[694] "Ref. Ares(2015)4109816" (European Commission, October 6, 2015), http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf.
[695] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1052–1053.
[696] Juhász and Zgut, "Recent Changes in Refugee-Related Policies in Hungary," 14.
[697] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 16.

European Convention on Nationality,[698] Hungary is obliged to facilitate the naturalization of refugees. However, it does not fulfil this obligation, as refugees have a lower chance of receiving Hungarian citizenship than any other foreign citizen staying in Hungary.[699] The integration of refugees would be important, as it would have positive effects both on the sending state as well as on the receiving country.[700]

In February 2017, the Hungarian government introduced a new migratory reform. It did so by emphasizing that the reforms were compliant with international law as well as the relevant directives of CEAS. This was true in the sense that these directives provide a huge leeway for Member States to act as long as they keep certain minimum standards and guarantees to the refugees (e.g. access to administrative procedures, non-refoulment, adequate conditions of acceptance, right to appeal).[701] Act XX. of 2017 was one of the most important laws that enacted modifications in the Hungarian migratory system after the refugee crisis.[702] The main implication of the law was that it introduced procedural legislation about the state of emergency, which enabled lawmakers to justify certain dubious acts concerning asylum seekers. One of the main elements of the reform was putting irregular migrants under the competence of the aliens policing authority instead of asylum detention which was introduced in 2013. This would mean keeping the immigrants in closed container camps until their claims are processed.[703] Moreover, Act CXLIII of 2017 tightened the remedy system, the right to legal aid, social assistance, medical care and dignity.[704] This is how the authorities intended to stop the movement of the refugees to other countries. This reform goes against ECtHR case law and also the directives of CEAS because no-one can be detained only for the reason of requesting an asylum claim.[705] Before 2013, Hungary was condemned by ECtHR in some cases (*Lokpo, Said, Nabil*) for detaining refugees, which was unjustified as refugees should be considered persons seeking

[698] "European Convention on Nationality" (Council of Europe, November 6, 1997), https://www.refworld.org/pdfid/3ae6b36618.pdf.
[699] "A Menekültvédelem Jövője Magyarországon - Javaslatok Egy Embersésges, Fenntartható És Hatékony Menekltügyi Rendszerre," 35.
[700] OECD and International Labour Organization, *How Immigrants Contribute to Developing Countries' Economies*, Párizs (OECD Publishing, 2018), https://doi.org/10.1787/9789264288737-en.
[701] Vető, "Összeegyeztethető-e a Magyar Kormány Újabb Menekültügyi Reformja Az Európai Menekültjoggal?"
[702] "2017. Évi XX. Törvény a Határőrizeti Területen Lefolytatott Eljárás Szigorításával Kapcsolatos Egyes Törvények Módosításáról" (Magyar Országgyűlés, March 20, 2017), https://mkogy.jogtar.hu/jogszabaly?docid=A1700020.TV.
[703] "Kormányinfó 75 - Vissza Kell Állítani Az Idegenrendészeti Őrizetet," kormany.hu, January 12, 2017, https://www.kormany.hu/hu/miniszterelnokseg/videok/kormanyinfo-75-vissza-kell-allitani-az-idegenrendeszeti-orizetet.
[704] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 137.
[705] Vető, "Összeegyeztethető-e a Magyar Kormány Újabb Menekültügyi Reformja Az Európai Menekültjoggal?"

protection, not potential criminals.[706] The Hungarian authorities knew that the reform was incompatible with European norms, but they argued that the increasing risk of national security justifies these measures.

In the summer of 2018, the Hungarian Parliament adopted a bill, which made possible the legal prosecution of persons facilitating migration.[707] Act VI. of 2018, if interpreted strictly, basically criminalized activities that help the procedures of asylum seekers or the integration of refugees in Hungary. In other words, together with the anti-NGO bill of 2017, it was part of the campaign targeted specifically against NGOs that work in helping refugees. The Commission launched an infringement procedure and referred Hungary to the CJEU for criminalizing activities in support of asylum applicants.[708]

Besides the ones already mentioned above (infringements concerning the 2015 and 2018 acts on asylum), there are several infringement cases open against Hungary, and many of them are related to migration. Infringement 2013/4062 was launched against Hungary based on the "Unacceptable treatment of Dublin refugees in Hungary - Violation of the Dublin II regulation." The case concerned non-compliance with the Asylum Procedures Directive, the Reception Conditions Directive and Article 47 of the Charter, and it was closed in 2018.[709] Infringement 2017/2093 was initiated by the Commission due to the failure to implement Council decision 2015/1601 on relocation and is currently in its Court phase.

The Hungarian government's most important measures and the reaction of the international community to them proves that Hungary's policy-making during the refugee crisis can be evaluated in two distinct ways. In some cases, Hungary acted within its sovereign Member State rights and was even protected by EU or international law to do so (such as erecting the border wall). However, in other cases, it took advantage of the ineffectiveness of EU normativity and conducted a rule-breaking behavior that violates common EU values and principles (for example the way Hungary put a burden on Serbia by declaring it a safe state, or the rhetoric it used against 'migrants' during the crisis). Although the CJEU acted in some cases and urged Hungary to change its policies, for example in its judgement about the transit zones leading to

[706] Vető.
[707] "Magyarország Kormányának Javaslata a Stop Soros Törvénycsomagról."
[708] "Commission Takes next Step in Infringement Procedure against Hungary for Criminalising Activities in Support of Asylum Applicants," Europa.eu, 24 2019, https://europa.eu/rapid/press-release_IP-19-469_EN.htm.
[709] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 144.

their closing, such a judgement might not be enough to provide an effective legal protection of asylum seekers, nor it is strong enough to address rogue Member State behavior. Closing the transit zones might have stopped the detention of refugees, but it did not make their asylum applications easier. This is further proof that the legal toolkit of the EU to stop violations of EU law might be limited.

5. Principles prevailing in migration policy within the EU

Evaluating the kind of principles prevailing in the EU's migration policy is essential because it reveals the dividing line between regular Member State conduct and symbolic, rogue country politics. To summarize the above detailed modifications in Hungary, we can come to the conclusion that even though the changes in asylum law were framed to be necessary by the government due to a lack of resources and capacities, they were rather part of the deliberate, long-term deterrence policy of the Hungarian government.[710] The reason behind the drastic changes enacted by the Hungarian authorities was, coupled with societal pressures and economic reasons, the lack of solidarity and trust both towards the EU and refugees.[711] Although EU law defines fairly clear rules about the reception of refugees and the responsibility of Member States in the matter, it also invokes constitutional principles that became especially significant during the refugee crisis.[712] Most of the principles outlined by CEAS are of a humanitarian nature. The Geneva Convention already contains most of them, such as the principle of non-refoulment, non-discrimination, freedom of religion and conscience, while others have evolved together with human rights, such as the unity of family or the rights of children.

The Member States can be sanctioned if they do not follow these principles introduced either by the ECtHR or the CJEU. Several asylum seekers have won cases against Member States who did not respect these principles (the already mentioned *M.S.S.* case is an example for this). However, even the court judgements have only a limited effect on Member State policies in the area of migration, as they have a wide array of no-entry policies they can apply if they want to keep refugees out of their borders.[713] The Lisbon Treaty mentioned two principles tied to this policy area: solidarity and the just distribution of responsibility among Member States,

[710] Szabó, "Quo Vadis Integration Policy?," 208.
[711] Szabó, 209.
[712] Gábor Vető, "A Közös Európai Menekültügyi Rendszer Elvei," *MTA TK Lendület-HPOPs Kutatócsoport* (blog), 2015, https://hpops.tk.mta.hu/blog/2015/12/a-kozos-europai-menekultugyi-rendszer-elvei.
[713] Vető.

including the latter's financial aspects.[714] Moreover, the 2013 Dublin regulation also outlined some principles that should be observed by Member States in their migration policies. These are: mutual trust, solidarity and balance between responsibility criteria in a spirit of solidarity.[715] These principles are supposed to balance the overload that some Member States might experience due to the regulation of the Dublin-system, which determined the responsibility of the states of entry in processing asylum claims. However, these principles are hard to keep if they are not, or cannot be, enforced. The enforceability of these principles is not only weak from the EU's part, but also from that of the UN, as neither of them can force Member States to accept refugees in the name of solidarity.[716]

One might argue that the unilateral national defense policy of Hungary manifesting in Hungary's asylum policy actions clearly rejects European solidarity.[717] However, if we look more into the case, we can see that the rhetoric of the Hungarian government does not outright reject EU values, but provides a different explanation and interpretation for them. A good example for this is that in August 2017 Prime Minister Orbán asked Commission President Juncker to pay half of the expenditures connected to the border wall in the name of solidarity. In his letter, the Prime Minister referred to solidarity as an important principle of the EU, but he highlighted that Hungary exercised it in an unconventional way. The construction of the fence and the training and placing of border-hunters into active service does not only protect Hungary, but also the whole of the EU "against the flood of illegal immigrants."[718] As a response to his letter, Juncker reminded Orbán that solidarity is a two-way street, not an *à la carte* menu.[719] Hungary's attitude is closely related to the idea of 'flexible solidarity' promoted by the V4 in the Joint Statement of the Heads of Governments and adopted in Bratislava in September 2016.[720] The main message of the statement was that the concept of flexible solidarity should enable Member States to decide on their own specific ways of contribution

[714] Vető.
[715] "Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)," 604.
[716] Vető, "A Közös Európai Menekültügyi Rendszer Elvei."
[717] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 136.
[718] "Letter of Viktor Orbán to Jean-Claude Juncker," August 31, 2017, https://www.kormany.hu/download/a/e9/21000/JunckerJeanClaude%2020170831.pdf.
[719] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 131.
[720] "Joint Statement of the Heads of Governments of the V4 Countries," text, www.visegradgroup.eu, September 19, 2016, http://www.visegradgroup.eu/calendar/2016/joint-statement-of-the-160919.

based on their potentials and experience. Moreover, any distribution mechanism in the future can only be voluntary.[721] The term solidarity has also been used in relation to the fence, saying that Hungary is actually acting in the name of solidarity and protecting the southern borders of the EU.

As Judit Tóth argues, "Hungary is not alone in eradicating the already achieved level of international protection and destroying EU values, but here it is accompanied by a militant language, anti-refugee campaign ad several security measures."[722] Shared competence in the area of refugee policy means that Member States cannot do whatever they want, but they have the means to expand the limits outlined by EU- and international law.[723] It is easy to argue that the asylum policy and law developed by Hungarian authorities starting in 2015 "defies all requirements of loyal cooperation as put in Article 4(3) TEU. They certainly do not assist the Union in carrying out its goal of responding in the spirit of solidarity to the extraordinary situation entailing the arrival of more than 1.6 million asylum seekers and other migrants until mid-2016."[724]

"Discipline and loyalty derive from inner conviction and the desire to co-operate for the benefit of all."[725] These virtues, however, are no longer present in Hungary's attitude towards the EU. As Nagy argues convincingly: "Mutual trust between Member States and trust in the EU institutions on which the EU is built are crumbling. This is the cumulative result of the inability and occasional reluctance to perform by the EU Member States at the external borders combined with the free-riding attitudes and restrictive practices of others, including Hungary and some other Visegrad countries."[726]

[721] Boldizsár Nagy, "Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees," *Global Turkey in Europe* Working Paper 17 (May 2017): 11.
[722] Tóth, "From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary," 129.
[723] Szabó, "Quo Vadis Integration Policy?," 203.
[724] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1079.
[725] Nagy, "Renegade in the Club – Hungary's Resistance to EU Efforts in the Asylum Field," 413.
[726] Nagy, "Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees," 15.

6. Hungary and the refugee crisis: the strategy of the Hungarian government

As already mentioned above, throughout the refugee crisis of 2015-2016, Europe had to deal with the largest influx of refugees since World War II.[727] The countries standing at the borders of the EU (both naval and continental) became extremely strained by the huge wave of refugees trying to enter. The significant pressure this created was partly due to the Dublin regulations, which determine that those countries should process the claims of the asylum seekers in which they first entered.[728] Hungary, being a transit, source and destination country of regular and irregular migration,[729] was among the first Member States to respond with strict measures in order to stop immigrants (all of them detailed above). These included building a fence on its southern borders, modifying the applicable criminal and administrative laws, linking the phenomenon of immigration directly to terrorist activities, and arguing that it will protect its borders (and those of the EU as well) at all costs.[730] Moreover, the anti-immigration stance also appeared in Prime Minister Orbán's rhetoric. In a speech delivered to the assembly of the Hungarian diplomatic corps in August 2014, he promised "rock-hard official and domestic policy not supporting immigration at all."[731]

6.1 Hungary as a norm entrepreneur in the area of migration

The refugee crisis provided a great opportunity for the Hungarian government to stick to its 'thematized realism.' This is a kind of realism that appears only in certain, strategically important policies. While Hungary aspires to stand up as a defender of its national policies and interests in cases like immigration, in other, less significant policies that do not have much of an external aspect, it sticks to compliance with EU rules and values. This strategic game, although a constant part of Hungary's EU strategy, can occasionally be tied to political events, such as the European Parliamentary elections. During the 2019 EP elections, for instance, Orbán emphasized his dissatisfaction with the liberal ideologies infiltrating Europe and campaigned for restoring and protecting the Christian values of Europe.

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[727] Sandra Lavenex, "'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System," *JCMS: Journal of Common Market Studies* 56, no. 5 (July 2018): 1196, https://doi.org/10.1111/jcms.12739.
[728] Lavenex, 1197.
[729] "Migration Issues in Hungary," International Organization for Migration, accessed January 27, 2019, http://www.iom.hu/migration-issues-hungary.
[730] "Hungary Builds New Fence to Keep out Refugees," Euronews, October 26, 2016, https://www.euronews.com/2016/10/26/hungary-builds-new-fence-to-keep-out-refugees.
[731] "Józan Ésszel És Bátorsággal Kell Képviselni Az Országot," kormany.hu, August 25, 2014, https://www.kormany.hu/hu/a-miniszterelnok/hirek/a-leggyorsabban-novekvo-eu-s-orszagok-koze-fogunk-tartozni.

Disputes may occur inside Member States, but governments adopt their own, independent view on foreign politics. Thus, the EU itself cannot implement any major changes without the consent of Member States (see for example to failure of the compulsory quota system). Liberal intergovernmentalist EU decision-making is not completely independent of domestic politics, as the EU strategy of a Member State stems from its domestic interests and dynamics at home.[732] Confronting the EU can be easily done by ignoring the *acquis* and the enforcement steps in the domestic context,[733] thus analyzing the level of domestic policy-making is indispensable in explaining the policy of a country towards the EU.

Based on the above analysis, it is apparent that Hungary became a norm entrepreneur in the years of the European refugee crisis. According to Björkdahl, norm entrepreneurship, as a constructivist understanding of state behavior within the EU, is an activity through which actors "successfully convince others of their own normative convictions, thereby creating an ideational basis for changing the institutional environment and/or specific policies." Norm promotion does not require the same hard power resources that great powers possess, thus "norm advocacy is a strategy to gain influence often used by otherwise powerless actors."[734] Grøn and Wivel argue that when small states decide which policy areas they are going to focus on they should take into consideration the dominant discourses in the EU.[735] In this case, the discourse focused on the crisis situation the refugee influx caused in Europe and the apparent incapability of the Dublin system to regulate migratory flows in Europe. Björkdahl also argues that norm advocacy becomes even more convincing if the advocate acts as a forerunner in the given policy area and complies with the norms it propagates.[736] During the refugee crisis, the 'right' or 'desirable' behavior that Hungary tried to promote was the utmost protection of national sovereignty and the European borders through stopping 'illegal' migrants from entering the EU through Hungary. Some experts even talk about the 'Orbanization of Asylum Law' because the attitude of Hungary in handling the migration crisis was spreading to other EU Member States as well. S. Peers argued in relation to the EU-Turkey deal in 2016 that certain policies of the EU "copy and entrench across the EU the key elements of the Hungarian government's policy, which was initially criticized: refusing essentially all asylum-seekers at the external border and treating them as harshly as possible so as to maintain the Schengen open

[732] Ziegler, "EU Asylum Law: Disintegration and Reverse Spillovers," 37.
[733] Nagy, "Renegade in the Club – Hungary's Resistance to EU Efforts in the Asylum Field," 413.
[734] Björkdahl, "Norm Advocacy," January 2008, 138.
[735] Grøn and Wivel, "Maximizing Influence in the European Union after the Lisbon Treaty," 534.
[736] Björkdahl, "Norm Advocacy," January 2008, 137.

borders system."[737] It is interesting to add here, that although the Visegrad countries seemingly acted similarly in the handling of the refugee crisis, and they rejected the idea of compulsory relocation, in general the group is not homogenous. Hungary and Poland are quite different from the Czech Republic and Slovakia. Moreover, Hungary stands out in its "total denial of the fact that irregularly arriving persons may need protection within the EU."[738]

6.2 The defense of Member State sovereignty as the Hungarian key card

It is interesting to add that while before January 2015, asylum seekers and 'illegal' migrants were not yet mixed up in the rhetoric of Hungarian government officials, the Charlie Hebdo attack brought a change in this regard. Following the attack, everyone, regardless of whether they are protection-seekers or not, was considered an undesirable 'migrant.'[739] The anti-immigrant campaign of the Hungarian government was accompanied with the so-called 'National Consultation' several times, a practice that consisted of sending out letters accompanied with a questionnaire to Hungarian citizens about 'immigration and terrorism.'[740] Moreover, a billboard campaign was also started in May 2015, through which giant posters alongside Hungarian main roads portrayed immigrants as criminals. The billboards also showed messages or notes to immigrants such as "if you come to Hungary, you should respect our culture," or "if you come to Hungary, you cannot take our jobs." The language of the billboards was Hungarian, a clear indicator of who the campaign's intended audience really was.[741] In June 2017, Viktor Orbán compared the flow of refugees to the Ottoman invasion,[742] and emphasized that "No nation may be given orders on who it should live alongside in its own country, as that can only be a nation's sovereign decision."[743] These rhetorical elements, however, were highly unfounded, as it was shown by some data in the previous pages. Hungary was mainly a transit country, and most of the asylum seekers did not want to stay in the country

[737] Steve Peers, "EU Law Analysis: The Orbanisation of EU Asylum Law: The Latest EU Asylum Proposals," *EU Law Analysis* (blog), May 6, 2016, http://eulawanalysis.blogspot.com/2016/05/the-orbanisation-of-eu-asylum-law.html.
[738] Nagy, "Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees," 2.
[739] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1053.
[740] "National Consultation on Immigration to Begin," kormany.hu, April 24, 2015, https://www.kormany.hu/en/prime-minister-s-office/news/national-consultation-on-immigration-to-begin.
[741] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1054.
[742] "Hungary's Orban Invokes Ottoman Invasion to Justify Keeping Refugees out," The Washington Post, September 4, 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/09/04/hungarys-orban-invokes-ottoman-invasion-to-justify-keeping-refugees-out/?noredirect=on&utm_term=.a154eb51f296.
[743] "Prime Minister Viktor Orbán's Speech at the Closing Event for the National Consultation," The Hungarian Government's website, kormany.hu, June 27, 2017, http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-closing-event-for-the-national-consultation.

but wished to continue their way to other parts of Europe. Moreover, most of the asylum claims were not properly processed, due to the newly introduced Hungarian measures throughout 2015. One could thus argue, as does Boldizsár Nagy, that immigration was actually a "total non-issue" in Hungary.[744] However, the use of the concept of sovereignty combined with the hostile rhetoric towards refugees was a deliberate decision from the Hungarian government, as it served the purpose of covering its rogue, symbolic politics. The government could easily argue that what Hungary did was not going against EU values and norms, but the protection of national identity and sovereignty.

Hungary's particularist stance in the question of European migration policy did not only manifest in a hostile rhetoric and domestic actions against the refugees. The country also tried its best to withhold the EU's attempts to reform its migration and refugee policy, and it did so most intensively in relation to the so-called 'quota system.' On its Justice and Home Affairs Council meeting on 22 September 2015, EU ministers adopted the decision to distribute 120.000 persons in clear need of international protection among twenty-six Member States of the EU.[745] The Hungarian government had serious doubts about the legitimacy of the content of the Council decision, mostly because it considered the whole idea of the quota system to be senseless and dangerous. Moreover, leading Hungarian politicians considered the decision to be against EU law because it was not approved through a just legal process, leaving national parliaments out of it.[746] On the day of the contentious Council meeting, the Hungarian Parliament adopted a decree with the title 'Message to the leaders of the European Union.' It was meant as a symbolic message to the leaders of Europe about the extreme threat that immigration poses to the continent. [747] On 6 November 2015, due to the motion of Fidesz, the Hungarian Parliament accepted a decree that considered the Council's decision to be illegitimate and in breach of the principle of subsidiarity.[748]

On 17 November 2015, the Parliament enacted the already mentioned Act CLXXV "about acting against the compulsory settlement quota in defense of Hungary and Europe." The law

[744] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1040.
[745] "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."
[746] "Törvényjavaslat a Kötelező Betelepítési Kvóta Ellen," Fidesz.hu, June 11, 2015, http://www.fidesz.hu/hirek/2015-11-06/torvenyjavaslat-a-kotelezo-betelepitesi-kvota-ellen/.
[747] "36/2015. (IX. 22.) OGY Határozat Üzenet Az Európai Unió Vezetőinek" (Magyar Országgyűlés, September 22, 2015), https://mkogy.jogtar.hu/jogszabaly?docid=A15H0036.OGY.
[748] "55/2015. (XI. 6.) OGY Határozat Az Áthelyezési Válságmechanizmus Létrehozásáról..."

confirms the illegitimacy of the September Council decision based on the principle of subsidiarity and calls on the Hungarian government to launch a legal proceeding in front of the Court of Justice based on Article 263 TFEU.[749] This Article of the Treaty outlines that

> "…the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. (...) It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."[750]

The newly accepted Hungarian law argued that the EU's quota plan would increase crime, spread terrorism, and endanger Hungary's cultural values. Hungary's Minister of Justice László Trócsányi emphasized that "although Member States have agreed to give up their sovereignty to a certain extent in return for EU membership, they still kept some rights to themselves, such as regulating who they allow to enter their country and who they want to keep out."[751]

As a result, on 3 December 2015, Hungary filed a lawsuit against the Council before the CJEU (*Hungary v Council Case C-647/15*).[752] In the motion Hungary claimed that the Court should annul the contested Council decision, or as an alternative, annul it in so far as it refers to Hungary. The Hungarian motion referred to several legal backgrounds in its argumentation, such as Article 78(3) TFEU, which "does not provide the Council with an adequate legal basis for the adoption of the contested decision,"[753] or Article 293(1) TFEU, which the Council also violated by departing from the Commission's proposal without reaching unanimity. Hungary also found it worrying that "after consulting the European Parliament, the Council substantially amended the text of the proposal, despite which it did not consult the European Parliament

[749] "2015. Évi CLXXV. Törvény Magyarország És Európa Védelmében a Kötelező Betelepítési Kvóta Elleni Fellépésről" (Magyar Országgyűlés, November 26, 2015), http://mkogy.jogtar.hu/?page=show&docid=A1500175.TV.
[750] "Consolidated Version of the Treaty on the Functioning of the European Union" (Official Journal of the European Union, October 26, 2012), 326/162, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.
[751] "Pert Indítunk a Kvótarendszer Ellen," Magyar Idők, November 18, 2015, http://magyaridok.hu/belfold/trocsanyi-precedenserteku-perre-keszulunk-155890/. in VB.
[752] "Hungary v Council Case C-647/15" (Court of Justice of the European Union), accessed January 27, 2019.
[753] "Hungary v Council Case C-647/15."

again."[754] Moreover, the motion considered the September 2015 Council decision to be contrary to the Conclusions of the European Council meeting of 25-26 June 2015. With choosing to turn to the CJEU, Hungary wished to set a precedent in protecting an EU Member State's sovereignty and affirm "its position as a Member State which regards the Union primarily as an arena for vindicating its national interests, and which is not hesitant to prioritize its own interests, mainly in areas which fall within competences retained by the Member States, over those of other Member States and of the Union."[755]

By bringing this case before the CJEU, Hungary also wanted to set a precedent in the defense of Member State sovereignty and interests.[756] Thus, the Hungarian government participated before the EU court based on two motivations: defense of the domestic national interest and promotion of national visions in Europe (with the aim of influencing EU law or practices).[757] In addition, the government's hard stance on immigration was part of a consciously built political campaign based on Member State unilateralism, themed under the broad rhetorical umbrella of national self-defense, and also coupled with providing a 'Hungarian solution' to the migration crisis in the European political agenda.[758] As Varju and Czina make clear, "[w]hile pleasing the domestic electorate was also on the agenda, the adoption of the parliamentary decree and the act calling for the government to act before the EU Court of Justice was a calculated step towards making out the case to establish that fatal legal deficit of the contested Council decision of violating the rights of national parliaments and the principle of subsidiarity."[759]

In October 2016, Hungary conducted a referendum about the 'quota system' of the EU, asking Hungarian citizens whether they agree with the obligatory settlement of foreigners to Hungary by the EU without the consent of the Hungarian Parliament.[760] The referendum was mainly symbolic and part of the Hungarian anti-immigration campaign, not least because the question itself had been outdated by that time. The referendum was held on the 2nd of October, weeks after the Bratislava Summit, which basically rejected the compulsory relocation system based

[754] "Hungary v Council Case C-647/15."
[755] Márton Varju and Veronika Czina, "Hitting Where It Hurts the Most: Hungary's Legal Challenge against the EU's Refugee Quota System," *Verfassungsblog*, February 17, 2016, http://verfassungsblog.de/hitting-where-it-hurts-the-most-hungarys-legal-challenge-against-the-eus-refugee-quota-system/.
[756] Varju and Czina.
[757] Granger, "When Governments Go to Luxembourg…: The Influence of Governments on the European Court of Justice," 10–13.
[758] Varju and Czina, "Hitting Where It Hurts the Most."
[759] Varju and Czina.
[760] Vető, "Az Európai Menekültpolitika a Pozsonyi Csúcs És a Magyar Kvótanépszavazás Után."

on country quotas. The referendum at the end was invalid because the rate of participants did not reach the 50% threshold. However, 98% of the participants voted no for the question.[761] Despite the low turnout and invalidity of the results, the Hungarian government inserted the prohibition of compulsory settlement in the Hungarian Fundamental Law during its seventh amendment. Undoubtedly, the referendum goes against the principle of loyal cooperation as outlined in article 4(3) TEU.[762]

Hungary was not the only EU Member State that chose the path of law to contest an EU decision regarding the refugee crisis. Robert Fico, Slovakian Prime Minister announced already in October 2015 that his country would file a complaint against the Council on the subject of handling the migration crisis. The Slovak politician claimed that the Council decision should have been taken unanimously.[763] Finally, Slovakia initiated legal action before the CJEU on 3 December (*Slovakia v Council, Case C-643/15*), which also called for the annulment of the September Council decision.[764] The CJEU handled the Slovak case together with the Hungarian one. In July 2017, Advocate General Yves Bot issued his Opinion on the two cases and proposed that the Court should dismiss both actions.[765] In September 2017, the Court dismissed both cases in their entirety and declared that relocation is lawful and obligatory.[766] After this failure, Hungary still continued its anti-immigrant campaign and launched a National Consultation on the 'Soros-plan,' which asked citizens in questionnaires whether support the compulsory relocation of immigrants among EU Member States.[767] In December 2018, the Global Compact for Safe, Orderly and regular Migration[768] was accepted by 152 UN Member States. Several EU Members stayed away from the pact. Slovakia did not vote, Hungary, the

[761] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1073.
[762] Nagy, 1074.
[763] "Hungary Prepares to Back Slovak Legal Challenge against EU Refugee Deal," Euractiv, June 11, 2015, http://www.euractiv.com/section/europe-s-east/news/hungary-prepares-to-back-slovak-legal-challenge-against-eu-refugee-deal/.
[764] "Slovak Republic v Council of the European Union (Case C-643/15)," Court of Justice of the European Union, January 2, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CN0643&qid=1454605269456.
[765] "Opinion of Advocate General Bot Delivered on 26 July 2017 (1) - Cases C-643/15 and C-647/15 (Slovak Republic, Hungary v Council of the European Union)," curia.europa.eu, July 26, 2017, http://curia.europa.eu/juris/document/document.jsf;jsessionid=F62A501E6C63B4577A46ABE84925F91B?text=&docid=193230&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9838201.
[766] "Judgement in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council" (Court of Justice of the European Union, September 6, 2017).
[767] Juhász, Molnár, and Zgut, "Menekültügy És Migráció Magyarországon," 22.
[768] "Global Compact for Migration," International Organization for Migration, accessed January 27, 2019, https://www.iom.int/global-compact-migration.

Czech Republic and Poland voted against, and Austria, Bulgaria, Estonia, Italy, Latvia and Romania abstained from the vote.[769]

In December 2017, the Commission referred Hungary, Poland and the Czech Republic to the CJEU for non-compliance with their legal obligations on relocation.[770] The infringement procedures that started against these Member States were escalated to Court level because the replies provided by the countries were not found satisfactory by the Commission. The Council decisions regarding this matter required all EU countries "to pledge available places for relocation every three months to ensure a swift and orderly relocation procedure."[771] However, none of the three Member States relocated any refugees either ever or for more than a year, and they did not pledge to do so. Therefore, the Commission forwarded the case to the CJEU. The hearings of the so-called 'quota-case' have started in May 2019. In April 2020, the Court came out with its judgement in these joint cases,[772] and ruled that "[b]y refusing to comply with the temporary mechanism for the relocation of applicants for international protection, Poland, Hungary and the Czech Republic have failed to fulfil their obligations under European Union law."[773] There was much more at stake in this procedure than just enforcing compliance with EU law, and the three Member States in question must have been aware of this when they failed to fulfil their obligations. The CJEU's condemning judgement can be considered a strong message to Member States, because adherence to EU values, such as the rule of law were confirmed. However, it should also be mentioned that the principle of loyalty was not mentioned in the judgement.

7. Findings of the chapter

To sum up the findings of this chapter, the Hungarian refugee policy after 2015/2016 is a dangerous precedent for Member State unilateralism, as not only asylum law, but several rules of the Single European Market were also violated.[774] In this policy area, liberal intergovernmentalism came to our rescue in explaining some of the Hungarian governments interest-based acts during the refugee crisis. However, the chapter also showed that small state

[769] "Nine EU Members Stay Away from UN Migration Pact," Euractiv, December 20, 2018, https://www.euractiv.com/section/global-europe/news/nine-eu-members-stay-away-from-un-migration-pact/.
[770] "Relocation: Commission Refers the Czech Republic, Hungary and Poland to the Court of Justice," Europa.eu, December 7, 2017, http://europa.eu/rapid/press-release_IP-17-5002_EN.htm.
[771] "Relocation: Commission Refers the Czech Republic, Hungary and Poland to the Court of Justice."
[772] "Judgement of the Court in Joined Cases C-715/17, C-718/17 and C-719/17 Commission v Poland, Hungary and the Czech Republic" (Court of Justice of the European Union, February 4, 2020).
[773] "Court of Justice of the European Union PRESS RELEASE No 40/20" (Court of Justice of the European Union, February 4, 2020), https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200040en.pdf.
[774] Ziegler, "EU Asylum Law: Disintegration and Reverse Spillovers," 33.

behavior did not always prevail, but where the normative leverage of the EU was weak, it gave way to rogue, symbolic Member State conduct (such as referring to the people in need as migrants in general and thus invoking a hostile environment towards them in Hungary).

Although the principle that is most frequently mentioned in relation to migration is solidarity, loyalty is also highly relevant because it may entail a collective duty to perform in a case in which another member of the collective group fails to perform according to its obligation. In this sense, this means that every participant's contribution to a cooperative venture is expected. This understanding of solidarity can easily be linked to the duty of loyalty or sincere co-operation, which requires each Member State to perform according to the requirements of the relevant *acquis*.[775]

The potential breaches of EU and international law prove the lack of willingness from the part of Hungary to take appropriate measures and ensure the fulfilment of obligations stemming from the Treaties, secondary legislation and other acts, like the relocation decision.[776] The essence of being a member of an organization is the understanding of its members that they form an alliance for pursuing a common endeavor. However, discipline and loyalty are virtues no longer present in Hungary's attitude towards the EU, especially not in the area of migration policy. As the small state studies showed us, norm entrepreneurship exercised from Hungary's side was a conscious interest-driven strategy through which Hungary became a trend setter, and other countries, such as the V4, followed its example.

These countries' refusal to participate in a fair sharing of responsibility through offering protection to asylum seekers, as well as their poor performance in returning those not in need of protection undermines the efforts of those countries that have been seeking an EU-wide solution based on loyalty and solidarity.[777] This writing agrees with Nagy who argues that Hungary once was an eminent member of the European club in the field of asylum, but it made a U-turn and became a renegade not only by destroying its own asylum system, but also by blocking measures of solidarity from the EU's side.[778]

[775] Nagy, "Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees," 3.
[776] Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 1080.
[777] Nagy, "Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees," 15.
[778] Nagy, "Renegade in the Club – Hungary's Resistance to EU Efforts in the Asylum Field," 413.

VII. Citizenship policy in the EU and Hungary

1. Introduction

The following chapter examines the topic of citizenship policy. This is an area in which *the conflict between Hungary and the EU stemmed from an interesting combination of national interest-driven and symbolic politic*s. The policy of *citizenship and nationality is, and has been, a political priority for Hungary due to some historic, geographical and, more lately, political reasons*. The current government considers the situation of Hungarians living outside the country's borders to be of crucial importance. It has amended the Hungarian Citizenship Act several times since 2010, which created favorable conditions for them. The changes, for instance, provided the opportunity of preferential naturalization for Hungarians living outside the country's borders. Moreover, the country is very generous in facilitating the acquisition of Hungarian citizenship to third (non-EU and non-Hungarian) country nationals as well. In this domain, EU leverage is not particularly strong, mainly due to competence reasons. However, there is a web of legal provisions that constrain Hungarian particularism.

By contrasting the Hungarian way of regulating citizenship and nationality policies with the EU's perception about these concepts, this chapter will examine the problems stemming from citizenship policy that emerge between the EU and Hungary. The chapter is structured as follows. First, the concept of citizenship is introduced as applied in the EU, including the most important policy documents regulating citizenship. The second part will present the jurisprudence of the CJEU determining the fundamental principles of EU practice in the area, and some different Member State practices. The third part of the chapter focuses on the case of Hungary and introduces the concept of citizenship in the country, as well as its historical and ideological background. This part also examines the most recent regulations the country introduced in the area of citizenship and their effects on obtaining Hungarian nationality. This is where the main conflicts between the Hungarian citizenship regulations and EU membership will be analyzed. The chapter intends to reveal the extent to which citizenship and nationality can be seen as crucial political priorities of the Hungarian government and indicators of Hungarian particularism within the European Union. Similarly to the previous case study, not all aspects of Hungary's citizenship policy can be examined on the basis of national preference formation and small state studies, because the conflict has symbolic and rogue elements as well.

2. Citizenship policy in the EU

Examining the question of citizenship in the case of one EU Member State is an interesting and fruitful analytical endeavor. Even though one might argue it is apparent from EU law that countries can decide unilaterally about their citizenship policies,[779] one Member State's citizenship regulations directly affect other Member States. Therefore, even if the EU's competence in this question is questionable, there might be real collisions between autonomous Member State intentions and the interests of the EU or other Member States. In the EU, the questions of dual-nationality, preferential naturalization and granting citizenship to third country nationals are all practices adopted differently in many countries, resulting in a cacophony of citizenship regulations all across the continent.[780] Member States usually fail to consult each other before inserting changes to their citizenship policies, despite the fact that most of the national citizenship regulations have direct consequences to other Member States' citizens (just like it was the case with Hungary and its bordering countries at the time of the introduction of preferential naturalization). Thus, some experts argue that even in subjects of national competence, EU countries have to take into consideration the interests of their fellow Member States and the EU as a whole in the spirit of loyalty and/or good faith.[781] Moreover, due to the phenomenon of intra-EU migration that can be an important source of conflict threatening EU unity, Member States' citizenship policies can also have direct and indirect effects on the EU's labor market, which makes this topic not only sensitive but also economically important. This chapter claims that particularist state action in this policy area might be detrimental, on the one hand, to the collective unity of the EU, and, on the other hand, to the constitutional principles in question. This is so primarily because of the underlying risk of misuse and the previously mentioned downward spiral of unilateralism.

[779] María Margarita Mentzelopoulou and Costica Dumbrava, "Acquisition and Loss of Citizenship in EU Member States - Key Trends and Issues" (European Parliamentary Research Service, July 2018), http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf.

[780] See for example: Maarten Peter Vink and Rainer Bauböck, "Citizenship Configurations: Analysing the Multiple Purposes of Citizenship Regimes in Europe," *Comparative European Politics* 11, no. 5 (September 2013): 621–648, https://doi.org/10.1057/cep.2013.14.

[781] See for example: Dimitry Kochenov, 'Double Nationality in the EU: An Argument for Tolerance', *European Law Journal* 17, no. 3 (May 2011): 323–43; Constantin Iordachi, 'Dual Citizenship in Post-Communist Central and Eastern Europe: Regional Integration and Inter-Ethnic Tensions', in *Reconstruction and Interaction of Slavic Eurasia and Its Neighboring World*, ed. Osamu Ieda and Uyama Tomohiko (Sapporo: Slavic Research Center, Hokkaido University, 2004), 105–39; Imre Vörös, 'Néhány Gondolat Az Uniós Polgárság Intézményéről' Jogelméleti Szemle, no. 2012/2 (2012), http://jesz.ajk.elte.hu/voros50.pdf; Sergio Carrera and Gerard-René de Groot, 'European Citizenship at a Crossroads: Enhancing European Cooperation on Acquisition and Loss of Nationality', *CEPS Papers in Liberty and Security in Europe*, no. No. 72 (November 2014): 1–7.

The tendencies discovered by the small state literature are highly relevant when examining Hungary's citizenship/nationality policy. Due to Member State competence in this policy area, a small state can effectively make an impact (vindicate its interests) in the EU and produce results through the benefits offered by EU membership. However, as this policy area has symbolic importance to most EU Member States, it contains symbolic elements as well. Therefore, a country might not refrain from rogue or unilateral actions that fall out of the scope of analysis of national preference formation or small state studies. In this area, Hungary clearly takes advantage of the EU framework in order to represent its own national interests in a locally highly relevant issue, which is creating closer relations with Hungarian minorities living across the border. This is an opportunist Member State practice, which maximizes national benefits under the EU's watch, because EU institutions do almost nothing to prevent these types of Member State actions in the name of maintaining diversity and respecting Member State competences.

2.1 The concept of citizenship in the EU

In order to be able to work with the concept of citizenship, the first necessary step is to define it. This is not an easy task if the focus is on the European Union. Even though there are documents regulating and defining the nature of citizenship, the interpretation of the concept itself may vary according to Member States. The situation is even more complicated due to the fact that the concept of citizenship is closely related to that of 'nation' or 'nationality,' which again can be understood in many different ways across the European Union.

The interpretation of these related concepts might be problematic, as Zoltán Kántor points out. He argues that European organizations "define the concept of nation as coterminous with that of the state or with citizenship," an approach that is clearly not ideal because their meanings are different.[782] According to Carlos Closa, the concept of 'people' and 'nation' both have a political meaning, and they are indeterminate. They refer to a collective entity, but "they do not distinguish who are the individuals composing the nation or people."[783] This is why the Western constitutional tradition has developed their legal equivalent: the concept of citizenship or citizens. In this sense, "citizens are the persons entitled to form the political subject, different from those who enjoy protection and/or rights granted by the state (i.e. social rights as well as

[782] Zoltán Kántor, "The Concept of Nation in the Central and East European „Status Laws," in *Beyond Sovereignty: From Status Law to Transnational Citizenship?*, ed. Osamu Ieda et al. (Sapporo: Slavic Research Center, Hokkaido University, 2006), 44.
[783] Carlos Closa, "The Concept of Citizenship in the Treaty on European Union," *Common Market Law Review*, no. 29 (1992): 1138.

human rights)."[784] Therefore, the main distinguishing and defining element of citizenship is the enjoyment of political rights.[785]

The first observation to note concerning citizenship in the European Union is that it is a *sui generis* concept. It cannot be considered equal or completely parallel with national citizenship because it is only additional to it. EU citizenship is a 'reduced' concept, which means that it does not exist on its own and can be considered less specific than Member State citizenship. In order to support the validity of these arguments, it is crucial to present the documents in which the concept first appeared and the way it evolved during the past decades. In the European Communities, it was the Maastricht Treaty that introduced the systematic concept of citizenship for the first time. However, some aspects, characteristics and even rights attached to citizenship have already appeared in previous Treaty regulations, such as the Treaties of Rome (the EURATOM and the EEC treaties) and the Single European Act (SEA).[786] The Treaties of Rome make a reference to several peoples. Some scholars take this as indication that it does not recognize a "constitutional right to European citizenship" because this area remains a prerogative of Member States.[787] In the early years of the European Communities, EU citizenship was constructed through the rights that EC Member States' citizens enjoyed, due to the completion of the internal market, as opposed to non-Member State nationals.[788]

Article 48 and 52 of the Treaty establishing the European Economic Community codify the rights connected to EU citizenship, such as the free movement of workers, the abolition of discrimination based on nationality, the rights to public order, health and safety and freedom of establishment.[789] However, certain categories of individuals were excluded from these rights. The European Commission attempted to fix the omission through a directive proposal in 1979.[790] The proposal, which aimed at achieving a general freedom of movement, was not backed by other EU institutions, and was followed by other similar proposals in the subject. This period of EU legislation shows that citizenship in the European Communities was strictly tied to economic activity,[791] and European citizenship, "as stemming from the Rome Treaty did

[784] Closa, 1138.
[785] Closa, 1139.
[786] Closa, 1137.
[787] G. Federico Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review*, no. 26 (1989): 595–614; In: Closa, 'The Concept of Citizenship in the Treaty on European Union', 1139.
[788] Closa, "The Concept of Citizenship in the Treaty on European Union," 1140.
[789] "Treaty Establishing the European Economic Community," March 25, 1957, Article 48 and 52.
[790] "Commission Proposal for a Directive on the Right of Residence of Nationals of the Member States on the Territory of Another Member State. COM (79) 215 Final" (European Commission, 1979).
[791] Closa, "The Concept of Citizenship in the Treaty on European Union," 1142.

not imply the existence of a political relationship between individual and Community akin to those existing between Member States and their nationals."[792] This was true even if according to a certain interpretation, constitutional principles would demand the development of 'one citizenship' connecting the Community and the individuals living in it.[793]

The concept of 'European citizenship' first appeared in the Tindemans Report on European Union in 1974.[794] The Tindemans Report established that "citizenship is basically a political concept which was substituted by the term national, which always is used in Community texts."[795] Later on, more Community documents started to draw attention and strengthen the political nature of EU citizenship, such as the Adonnino Report about the voting rights of individuals living in the territory of the European Communities.[796] Through some political developments, such as the direct election of the MEPs to the European Parliament, Community law has started to grant more and more political rights to the nationals of EC Member States, which were similar to the rights they can practice in their home countries. However, 'European political participation' was still tied to nationality, and some gaps in national legislation have resulted in the exclusion of certain groups of citizens from participating in the EP elections.[797] A few years later, the entry into force of the SEA put the whole issue on new legal grounds. In a Commission report to the EP, the institution argued that political elections are determinants of national sovereignty, upon which the Community is not entitled to impinge, or to replace nations and states. Such a federalist practice cannot be executed based on the existing Treaties.[798]

The Treaty on European Union, however, brought fundamental changes to the Community's interpretation of citizenship as it "has formalized or constitutionalized certain already existing rights within the Community ambit; it has introduced certain new rights and, above all, it has provided a solid basis for further enlargement of the catalogue of rights attached to citizenship."[799] Although the question of citizenship was not on the agenda of the IGC

[792] Guido van den Berghe, *Political Rights for European Citizens* (Aldershot, Hants: Gower, 1982), 3; Closa, "The Concept of Citizenship in the Treaty on European Union," 1143.
[793] A. C. Evans, "European Citizenship: A Novel Concept in EEC Law," *The American Journal of Comparative Law* 32, no. 4 (1984), https://doi.org/10.2307/840374; Closa, "The Concept of Citizenship in the Treaty on European Union," 1143.
[794] Leo Tindemans, "Report on European Union," December 29, 1975.
[795] Closa, "The Concept of Citizenship in the Treaty on European Union," 1143.
[796] Closa, 1143.
[797] Closa, 1146.
[798] Closa, 1147.
[799] Closa, 1168.

preceding the political reform of the EU, eventually it was incorporated in the preparatory work of the COREPER. In June 1990, the European Council decided to include citizenship in the framework of the "overall objective of political Union."[800] Later on, several proposals were made by certain Member States to reform the notion of EU citizenship and move on from the Treaty of Rome regulations (e.g. Spanish and Danish Memorandums). These proposals included the more preferential treatment of 'foreigners,' meaning citizens of a European Community country living in another Member State, and the extension of political rights.[801]

Already the Preamble of the Maastricht Treaty contained a reference to EU citizenship, in so far as the signing parties "resolved to establish a citizenship common to nationals of their countries." Citizenship of the Union became inserted in the "Provisions Amending the Treaty establishing the European Economic Community with a view to establishing the European Community." Under these provisions, Part Two of the Treaty was named "Citizenship of the Union." In this part, citizenship was regulated under six articles. Article 8-8e contained the definition of the concept, the catalogue of rights attached to the condition of citizenship and a procedure for further development to the concept as EU integration evolves.[802] Article 8 declared that "every person holding the nationality of a Member State shall be a citizen of the Union." This means that EU citizenship does not 'exist on its own,' but it is supplementary and additional to national citizenship.[803]

This Union citizenship confers both rights and duties on its holders: right to free movement and establishment, right to vote and stand as candidate at municipal elections and EP elections in any Member State where a citizen resides, diplomatic protection in third Member States, and right to petition the EP and apply to the European Ombudsman.[804] This outright inclusion of citizenship in the Treaty implied that "some citizenship rights will be governed mainly by Community law and through the involvement of Community institutions. Furthermore, legislation may be directly applicable and the jurisdiction of the CJEU will cover it."[805] To conclude the implications of the Maastricht Treaty, its new references to citizenship clearly helped the Union to move away from a citizenship that was strictly restricted to economic rights. It is interesting to add here that as EU citizenship is additional to national citizenship, it does

[800] Closa, 1154.
[801] Closa, 1154–55.
[802] Closa, 1158.
[803] Closa, 1160.
[804] "Maastricht Treaty" (1992), Article 8-8e.
[805] Closa, "The Concept of Citizenship in the Treaty on European Union," 1158.

not entail an effective relationship between a person and the Union, meaning it does not possess the obligation of loyalty or good faith alone.[806] However, it will be demonstrated in this chapter later that these constitutional principles are still relevant and should be followed by Member States in the area of citizenship, as it is frequently argued by EU institutions.

In 1997, the Amsterdam Treaty re-numbered the six Articles introduced by the Maastricht Treaty as Articles 17-22.[807] In addition to keeping the EC Treaty provisions, the Amsterdam Treaty inserted that "citizenship of the Union shall complement and not replace national citizenship." This cannot be considered a new declaration, just a clarification of what the text already implied. Moreover, it "added the right to use any recognized Community language and to have an answer in the same language" in contacts with EU institutions.[808] This 'nationality-based' description of citizenship has raised some questions and criticisms from academic circles about the nature of EU citizenship. Rainer Bauböck, for example, asked "how can fifteen different procedures of admission lead to a single and common status of membership."[809] He argued that in order to create a "more relevant, more equal and more inclusive citizenship within the Union" certain structural features of the citizenship regime have to be corrected. The options he came up with as possible answers included replacing national citizenships with EU citizenship,[810] making a direct access to EU citizenship for third country nationals or to turn EU citizenship into the motor of "the transnational dynamics of liberal citizenship."[811] Later, he offered three alternative approaches for strengthening democratic citizenship within the EU. The statist approach aims at transforming the EU into a federal state, the unionist one would strengthen EU citizenship *vis-à-vis* member state nationality, and the pluralist approach allocates citizenship norms for all levels and balances them with each other based on the current state of federal integration.[812]

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[806] Judit Tóth, "Miért Nem Lehet, Ha Szabad - A Többes Állampolgárság a Nemzetközi És Az Európai Közösségi Jog Felől (Az EU Tagállamainak Viszonya a Többes Állampolgársághoz)," *Beszélő* 8, no. 10 (October 2003): 7, http://beszelo.c3.hu; Mónika Ganczer, *Az állampolgárság és államutódlás* (Budapest; Pécs: Dialóg Campus :, 2013), 38.
[807] Francis G. Jacobs, "Citizenship of the European Union—A Legal Analysis," *European Law Journal* 13, no. 5 (October 2007): 592.
[808] Jacobs, 592.
[809] Rainer Bauböck, "Citizenship and National Identities in the European Union," in *Integration Durch Demokratie. Neue Impulse Für Die Europäische Union*, ed. Eugen Antalosvky, Josef Melchoir, and Sonja Puntscher-Riekmann (Marburg: Metropolis, 1997), 307.
[810] Bauböck, 309.
[811] Bauböck, 310.
[812] Rainer Bauböck, "Why European Citizenship? Normative Approaches to Supranational Union," *Theoretical Inquiries in Law* 8, no. 2 (2007): 453.

Neither the Treaty of Nice nor the Treaty of Lisbon exerted any significant changes to the concept of citizenship in the EU. Nevertheless, the Lisbon Treaty put a great emphasis on strengthening democracy within the EU, and one of the major components of this agenda was to bring the EU and its citizens closer together. A major step in this process was the introduction of the citizens' initiative, which enables EU citizens to participate directly and more actively in building Europe through proposing issues for the Commission's agenda.[813]

3. Legal boundaries of Member State action under the law on EU citizenship

Besides the Treaty provisions regulating EU citizenship, 'Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' should also be mentioned as a primary regulatory document for Member States' citizenship policies. However, unsurprisingly, the goals set out in this Directive have been achieved through very different methods by Member States in the past years, and the CJEU has also interpreted these practices variably. What is a common tendency in the CJEU practice is that the Court is mainly active in cases in which there is no other legal act to rely on. As already mentioned before, for a very long time, the concept of citizenship in the EU has been closely related to other basic (mainly economic) rights, such as the free movement of persons, the prohibition of discrimination on grounds of nationality and the protection of fundamental rights. It was the CJEU jurisprudence that "has given EU citizenship a content going beyond the express Treaty provisions."[814] Most CJEU cases related to the area of citizenship or nationality are connected to free movement rights linked to EU citizenship.

3.1 CJEU cases

When examining EU case law on citizenship (in 2007), Francis G. Jacobs classified the most significant cases before the CJEU based on the different CJEU jurisprudential techniques and the restrictions (discrimination and non-discrimination) provided by the Treaty. He categorized the CJEU's jurisprudential techniques into three groups. The first is when the CJEU uses citizenship to broaden the scope of the non-discrimination principle. As the second group, he identified those CJEU jurisprudential techniques in which citizenship was used to broaden the scope of the non-discrimination principle in the context of market freedoms.[815] The third group of cases considers the use of citizenship as an independent source of rights. In the following paragraphs, I will apply a different kind of grouping in analyzing different CJEU cases related

[813] "Consolidated Version of the Treaty on European Union," Article 11. 326/21.
[814] Jacobs, "Citizenship of the European Union—A Legal Analysis," 591.
[815] Jacobs, 593.

to citizenship and nationality in the EU. First, the cases confirming Member State competence will be mentioned, then CJEU rulings limiting Member State action in regulating national citizenship will be analyzed. Last but not least, Court activity related to the principle of non-discrimination and discrimination will be examined.

3.1.1 Citizenship and nationality policy as strictly Member State competence

The most important principle laid down early on by the CJEU is citizenship policy, which regulates that the loss and acquisition of citizenship belongs under the competence of Member States. One of the most delicate scenarios of the area of citizenship within the European Union concerns the naturalization of third country nationals. Several problems might arise when a citizen of a third country receives citizenship from a Member State (due to the generous national methods of providing citizenship), becomes an EU citizen, and then moves to a different Member State.[816] The CJEU tried to solve these issues in its ruling in the *Micheletti*-case (1992). In this case, the Court investigated the right of establishment of an Italian-Argentinian citizen in Spain. Spain denied the right of establishment from *Micheletti* based on the fact that his last place of residence was in Argentina. In his decision, the CJEU ruled that it is not the place of residence that decides the nationality of a person, arguing that EU citizenship cannot be denied from an EU citizen based on the fact that they have another, non-EU citizenship as well.[817] Moreover, this case also confirmed that determining nationality is still a Member State competence, which should be exercised with due regard to Community law requirements.[818] The *Micheletti*-case is also significant from the point of view of the basis of granting citizenship. The fact that the CJEU affirmed that no Member State can overrule the citizenship policy of another, not even if the practices of the Member State are based on ethnic preferentialism (in this case that of Italy), means that the EU does not challenge the notion of giving citizenship based solely on ethnic attributes.[819] A similarly basic principle of EU citizenship was laid down by the Court in case *Kaur*,[820] in which the CJEU stated that "it is for each Member State, having

[816] Laura Gyeney, "Kettős Állampolgárság Az Európai Unió Erőterében," *Iustum Aequum Salutare* 9, no. 2 (2013): 165.
[817] Gyeney, 166.
[818] Dora Kostakopoulou, "European Union Citizenship: Writing the Future," *European Law Journal* 13, no. 5 (September 2007): 628, https://doi.org/10.1111/j.1468-0386.2007.00387.x.
[819] Mária M. Kovács, "The Politics of Non-Resident Dual Citizenship in Hungary," *Regio : Minorities, Politics, Society*, no. 2005/1 (50-72): 67.
[820] "Judgement of the Court in Case C-192/99The Queen and Secretary of State for the Home Department, Ex Parte: Manjit Kaur" (Court of Justice of the European Union, February 20, 2001).

due regard to Community law, to lay down the conditions for the acquisition and loss of nationality."[821]

3.1.2 Limiting Member State competence and enforcing EU law

Although, as it was established earlier in this chapter, "the EU has no legal competences in the area of acquisition or loss of national (and thus EU) citizenship, the Court of Justice of the EU has gradually broadened the scope of EU citizenship in relation to national citizenship by imposing certain limits to the power of Member States to regulate national citizenship."[822] In *Baumbast,*[823] the CJEU confirmed the direct effect of Article 18 EC. This Article "confers on all EU citizens the rights of free movement and residence, but subject to the limitations and conditions laid down in the Treaty and the implementing legislation."[824] Moreover, in *Baumbast* the CJEU derived "a new right of residence for a parent who is the primary carer of a child studying in a host Member State."[825] On the other hand, in *Chen,*[826] which considered a case on abuse of rights, it held that "a maneuver designed to create a right of residence for a baby and her Chinese mother in the UK did not preclude the recognition of that right."[827] In this case, the Court criticized the restrictive impact of some additional regulations adopted by Member States imposing new conditions for the recognition of the nationality of a Member State. "It ruled that the United Kingdom had an obligation to recognize a minor's Union citizenship status even though her Member State nationality had been acquired in order to secure a right of residence for her mother Chen, a third country national, in the United Kingdom."[828] This interpretation introduced by the CJEU signals the flexible and dynamic nature of EU citizenship.[829] Moreover, the CJEU highlighted circumstances under which the basic rights of EU citizenship need to be asserted against the status of national citizenship.[830]

[821] Kostakopoulou, "European Union Citizenship," 628.
[822] Mentzelopoulou and Dumbrava, "Acquisition and Loss of Citizenship in EU Member States - Key Trends and Issues," 8.
[823] "Judgement of the Court in Case C--413/99 Baumbast and Secretary of State for the Home Department" (Court of Justice of the European Union, October 17, 2002).
[824] Jacobs, "Citizenship of the European Union—A Legal Analysis," 595.
[825] Kostakopoulou, "European Union Citizenship," 645.
[826] "Judgement of the Court in Case C-200/02 Kunqian Catherine Zhu, Man Lavette Chen, Secretary of State for the Home Department" (Court of Justice of the European Union, October 19, 2004).
[827] Jacobs, "Citizenship of the European Union—A Legal Analysis," 596.
[828] Kostakopoulou, "European Union Citizenship," 628.
[829] Kostakopoulou, 646.
[830] Mentzelopoulou and Dumbrava, "Acquisition and Loss of Citizenship in EU Member States - Key Trends and Issues," 8.

In general, it is evident that CJEU jurisprudence forces legal forums to take into consideration the existence of a second citizenship.[831] This notion has been illustrated in the *Garcia Avello*-case as well, in which Belgium was notified to take into account the second, Spanish citizenship of the people affected.[832] Due to the fact that the children affected in the case "were Union citizens and lawfully resident in (another) Member State, the situation in question was not an internal situation which had no link with Community law. As a consequence, the children could rely on the principle of non-discrimination on grounds of nationality under Article 12 EC."[833] The *Hadadi*-case,[834] which considered the separation of a Hungarian couple residing in France (thus possessing French citizenship as well), is also a good example for the prohibition of making an order, or a ranking, between the two nationalities of an EU citizen.[835]

In 2010, in the *Rottmann*-case, the CJEU confirmed national competence in the question of citizenship as it considered it "legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals."[836] In this case, the German court of appeal asked from the CJEU whether leaving a person stateless (due to the loss of citizenship in two countries) falls solely within national competence, or it is contrary to EU law. Despite the Court's powerful statement confirming Member State competence in the area of citizenship, the Court ruling also implied that Member States must have due regard to EU law when exercising powers in the field of citizenship or nationality. Thus, the case of Dr Rottmann falls within the ambit of EU law. The CJEU also stated that the German Court did not violate EU law by withdrawing the naturalization of the person who acquired citizenship through deception.[837] The *Rottmann*-case meant a big step forward from the other crucial case defining the nature of EU citizenship, the previously mentioned *Micheletti*. Whereas *Micheletti* declared citizenship regulations to belong in national sovereignty, *Rottmann* added that there should be a real relationship between a Member State and its citizen, expecting that the reciprocity of rights and duties stemming from Member State nationality should be observed. The principle

[831] Gyeney, "Kettős Állampolgárság Az Európai Unió Erőterében," 160.
[832] "Judgement of the Court in Case C-148/02 Garcia Avello and État Belge" (Court of Justice of the European Union, February 10, 2003).
[833] Jacobs, "Citizenship of the European Union—A Legal Analysis," 601.
[834] "Judgement of the Court in Case C-168/08 Laszlo Hadadi and Csilla Marta Mesko" (Court of Justice of the European Union, July 16, 2009).
[835] Gyeney, "Kettős Állampolgárság Az Európai Unió Erőterében," 161.
[836] "Judgement of the Court in Case C-135/08 Janko Rottmann v Freistaat Bayern" (Court of Justice of the European Union, February 3, 2010).
[837] "Withdrawal of the Naturalisation While Not Recovering the Nationality of Another Member State Falls within the Ambit of European Union Law – Rottmann Case," *Case Law of EU* (blog), May 20, 2013, http://www.caselawofeu.com/withdrawal-of-the-naturalisation-while-not-recovering-the-nationality-of-another-member-state-falls-within-the-ambit-of-european-union-law-rottmann-case/.

of proportionality was also recognized as a basic principle to be observed in EU citizenship policy.

3.1.3 The non-discrimination principle

In this context, the basis of the non-discrimination principle is Article 12 EC: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." Article 17 EC on citizenship can be interpreted as adding up to this principle. An example for the broad interpretation of these provisions is, for example, the *Bickel and Franz*-case, in which an Austrian and a German citizen requested that their judicial proceedings taking place in Italy be conducted in German. The Court ruled that their request was legitimate based on Article 12.[838] Nevertheless, the CJEU invoked Article 17 EC as well, in order to support a broad interpretation of the scope of the Treaty for the purposes of the prohibition of discrimination.

It did not only do so in *Bickel and Franz*, but even more significantly in *Martinez Sala*[839] and in *Grzelczyk*.[840] In *Martinez Sala*, the Court held on the basis of the citizenship provisions that the claimant, a Spanish national, was entitled to a child-raising allowance in Germany. With this approach "the CJEU broadened the scope of application of the non-discrimination principle under (now) Article 12 EC also in the context of 'financial benefits.'"[841] This was the first time that the CJEU "used the Community citizenship in order to circumvent the specific limitations in secondary Community law on access to social benefits, although such conditions and limitations had been recognized by Article 18 EC."[842] In *Grzelczyk*, the CJEU held that a French national could qualify for a minimum subsistence allowance (assistance for students) in Belgium.[843] Moreover, the Court ruled that Article 12 EC needed to be read together with the provisions on citizenship.[844] In the *Bidar*-case,[845] the Court turned to the notion of citizenship in order to justify a departure from earlier case-law and to bring some grants within the scope

[838] "Judgment of the Court in Case C-274/96 Criminal Proceedings against Horst Otto Bickel and Ulrich Franz" (Court of Justice of the European Union, November 24, 1998).
[839] "Judgement of the Court in Case C-85/96 Martínez Sala v Freistaat Bayern" (Court of Justice of the European Union, December 5, 1998).
[840] "Judgement of the Court in Case C-184/99 Rudy Grzelczyk and Centre Public d'aide Sociale d'Ottignies-Louvain-La-Neuve" (Court of Justice of the European Union, October 20, 2001).
[841] Jacobs, "Citizenship of the European Union—A Legal Analysis," 599.
[842] Kay Hailbronner, "Union Citizenship and Access to Social Benefits," *Common Market Law Review*, no. 42 (2005): 1247.
[843] Jacobs, "Citizenship of the European Union—A Legal Analysis," 594.
[844] Jacobs, 600.
[845] "Judgement of the Court in Case C-209/03 The Queen (on the Application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills" (Court of Justice of the European Union, March 15, 2005).

of the Treaty.[846] The CJEU ruled that as EU citizens, "students who have demonstrated 'a certain degree of integration into the society of the host state' can claim maintenance grants."[847] All these cases prove that the CJEU started to give more and more significance to EU citizenship at the end of the 1990s, beginning of the 2000s. In his evaluation of these cases, Jacobs argues that it is "desirable that there should be equal treatment in relation to social benefits of a financial character, there may be circumstances in which entitlement legitimately depends on conditions such as residence."[848]

Discrimination based on nationality between workers of the Member States has been protected since the EEC Treaty (first Article 48 EEC, then Article 39 EC). Here as well, the Court used the concept of citizenship to broaden the scope of these articles.[849] In *Collins*,[850] for instance, which concerned a claim to a job-seeker's allowance in the UK, the CJEU held that the "interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect the development of citizenship."[851] This also means that "the absence of a genuine link between a jobseeker and the employment market of the host state invalidates an entitlement to a jobseeker's allowance."[852] In *Ioannidis*, which concerned a claim to a "tide-over allowance" in Belgium, the Court has reached a similar conclusion.[853] When it comes to some restrictions prohibited by the Treaty, more precisely discrimination and non-discriminatory restrictions, "it can be argued that the Treaty goes beyond prohibiting discrimination on grounds of nationality and also prohibits, under certain conditions, non-discriminatory restrictions."[854] This was confirmed by, for example the *Pusa*-case. In a subsequent judgement, in the *Schempp*-case, "the Court examined the question of an 'obstruction' of the right to move and reside in another Member State independently of any discrimination."[855] This approach of the Court aligned the right to freedom of movement or residence to other fundamental freedoms.[856]

[846] Jacobs, "Citizenship of the European Union—A Legal Analysis," 594.
[847] Kostakopoulou, "European Union Citizenship," 654.
[848] Jacobs, "Citizenship of the European Union—A Legal Analysis," 594.
[849] Jacobs, 495.
[850] "Judgement of the Court in Case C-138/02 Brian Francis Collins v Secretary of State for Work and Pensions" (Court of Justice of the European Union, March 23, 2004).
[851] Jacobs, "Citizenship of the European Union—A Legal Analysis," 495.
[852] Kostakopoulou, "European Union Citizenship," 645.
[853] "Judgement of the Court in Case C-258/04 Office National de l'emploi v Ioannis Ioannidis" (Court of Justice of the European Union, October 15, 2005).
[854] Jacobs, "Citizenship of the European Union—A Legal Analysis," 597.
[855] Jacobs, 597.
[856] Christian Joppke, *Citizenship and Immigration*, Immigration & Society (Cambridge ; Malden, MA: Polity, 2010), 145–173.

In the *Dano*-case, a Romanian citizen was refused the German social assistance for jobseekers on the basis of her being a jobseeker of foreign nationality.[857] The question whether this refusal was in line with EU law was referred to the Court for a preliminary ruling. The CJEU ruled that the EU Citizenship Directive does not oblige the host Member State to grant social assistance during the first three months of residence.[858] Thus, the CJEU found that competent national authorities should consider the financial situation of the person concerned, and not the social benefits available.[859] The significance of this case lies in the fact that it defined in a way that restricted the borders of social benefit distribution. By doing so, it narrowed down the previous understanding represented in *Martinez Sala*. Thym argues that by failing to apply the application of the non-discrimination guarantees to citizens without residence rights, the CJEU established a class of "illegal migrants" who live unlawfully in other Member States, or the economically inactive citizens that automatically lose their residence rights.[860] After analyzing the *Dano*-judgement, one may come to a conclusion that Union citizenship remained incomplete because "its promise of equality does not embrace all those holding the status."[861] The Court confirmed its more restrictive approach in *Alimanovic*.[862] In this case, the Grand Chamber referred to its decision in *Dano*, and held that the right to remain in a Member State arising solely due to seeking employment for EU citizens does not create the right to equal treatment with Member State nationals in respect of social assistance payments.[863]

To put it in a nutshell, this short assessment of the CJEU jurisprudence regarding citizenship shows that the interpretation of the Court about the nature of EU citizenship may vary in every situation. On many occasions, the CJEU applies a much broader understating of EU citizenship than what is explicitly stated in the Treaties. However, more recent case law represents a stricter understanding of EU citizenship and attempts of the CJEU to support an EU citizenship that "moves towards fulfilling its destiny to become the fundamental status of EU citizens."[864]

[857] "Judgement of the Court on Case C-333/13 Elisabeta Dano, Florin Dano v Jobcenter Leipzig" (Court of Justice of the European Union, November 11, 2014).
[858] Vonk Gijsbert, "EU-Freedom of Movement: No Protection for the Stranded Poor," European Law Blog, November 25, 2014, http://europeanlawblog.eu/?p=2606.
[859] "Judgement of the Court on Case C-333/13 Elisabeta Dano, Florin Dano v Jobcenter Leipzig."
[860] Daniel Thym, "When Union Citizens Turn into Illegal Immigrants: The Dano Case," *European Law Review*, no. 40 (2015): 248.
[861] Thym, 260.
[862] "Judgement of the Court in Case C-67/14 Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others" (Court of Justice of the European Union, September 15, 2015).
[863] Ronan McCrea, "Forward or Back: The Future of European Integration and the Impossibility of the Status Quo," *European Law Journal* 23, no. 1–2 (March 2017): 80, https://doi.org/10.1111/eulj.12207.
[864] McCrea, 81.

3.2 EU constitutional principles in the area of citizenship

Besides Treaty regulations outlining the different rights and obligations connected to EU citizenship, there are some other implications of the Treaties that indirectly set out the principles along which this policy area in the EU is supposed to be coordinated. It is not an unfounded argument that as the EU is built upon the principles of rule of law, democracy, and non-discrimination, it is essential to try to preserve these values. Every Member State practice going against this attempt can be understood as a denial of these principles, thus damaging solidarity between the peoples of Europe.[865] Moreover, the main purpose of EU citizenship is to "re-affirm the linkage between belonging, rights and participation within the Member States."[866] Solidarity also enforces the prevailing of these values within the EU. Putting these arguments in the context of this thesis, we can argue that contradicting Member State practices in the area of citizenship policy might have a negative effect, even if we do not forget the fact that EU citizenship is only additional to national citizenship, the regulation of which remains a prerogative of Member States.[867] Such a detrimental practice, for instance, is the introduction of preferential naturalization without consulting other (affected) Member States, selling national citizenship, but also denying dual-citizenship.

One of the constitutional principles frequently mentioned in the context of EU citizenship is the loyalty clause set out in Article 4(3) TEU. Even if the CJEU case law (such as the *Micheletti*-formula) confirms that Member States have to lay down the conditions of acquiring and losing nationality, some possible limitations on free Member State practice might derive from the loyalty clause. According to Casolari, this case holds "when national naturalization measures may affect or perturb the implementation of the EU citizenship regime."[868] This constitutional principle imposes mutual duties of loyal cooperation on the EU and its Member States, and such duties are not fulfilled when Member State practices lower the standards set by EU values and objectives. As Advocate General Maduro argues in his Opinion in *Rottmann*, the principle of loyal cooperation "could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalization of nationals of non-Member

[865] Gyeney, "Kettős Állampolgárság Az Európai Unió Erőterében," 168.
[866] Richard Bellamy, "Evaluating Union Citizenship: Belonging, Rights and Participation within the EU," *Citizenship Studies* 12, no. 6 (December 2008): 598, https://doi.org/10.1080/13621020802450676.
[867] G. Federico Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review* 26, no. 4 (1989): 596 *Cited in:* Closa, 'The Concept of Citizenship in the Treaty on European Union', 1139.
[868] Federico Casolari, "EU Citizenship and Money: A Liaison Dangereuse?* International and EU Legal Issues Concerning the Selling of EU Citizenship," *Biblioteca Della Libertà, L (2015)* gennaio-aprile (October 2014): 57.

States."[869] Along this train of thought it can be argued that Member States may be violating EU law, for example, with their investor and citizenship schemes.

Investor and citizenship-based practices have been adopted in some Member States in order to use the EU citizenship regime as a tool to help them face some budget constraints brought on by the crisis.[870] Practices in several countries can be good examples for this, such as the Hungarian "settlement bonds" presented in the next sub-chapter. However, probably the most famous case mentioned in this context is that of Malta, a country that introduced its Individual Investor Program (IIP) in 2013, which fueled immediate discussions and reactions from European institutions. The program based the acquisition of Maltese citizenship (for non-citizens) on primarily economic and financial conditions. Granting citizenship has been tied to financial donations, investments in the countries or stock and bonds in certain sectors sanctioned by the government.[871] The European Commission criticized the Maltese scheme for not requiring applicants to have any substantive ties to either the EU or the Member State.[872] The European Parliament accepted a resolution in January 2014 in which an overwhelming majority of MEPs voted against the Maltese scheme and the outright sale of citizenship of the Union.[873] The resolution criticized the Maltese program for treating citizenship like a tradeable commodity, for not requiring any ties between the applicants and the EU and for discriminating against poor people.[874]

One of the main aspects of this case is that the Commission actually referred to Article 4(3) TEU and called on Malta to "act in good faith in carrying out the tasks that flow from the founding Treaties."[875] Former Vice-President Viviane Reading also mentioned the loyalty clause and warned that one should not put a price tag on EU citizenship.[876] The Commission allegedly considered opening an infringement proceeding against Malta.[877] However, the Maltese government reacted constructively to the criticisms. It was open to discussions and

[869] Casolari, 55.
[870] Casolari, 47.
[871] Casolari, 48.
[872] Casolari, 49.
[873] Sergio Carrera, "How Much Does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union?" CEPS Papers in Liberty and Security in Europe, no. 64 (April 2014): 2.
[874] Carrera, 7.
[875] Casolari, "EU Citizenship and Money: A Liaison Dangereuse?* International and EU Legal Issues Concerning the Selling of EU Citizenship," 49.
[876] Carrera, "How Much Does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union?," 6.
[877] Carrera, 7.

their result was that the acquisition of Maltese citizenship became tied to some resident requirements as well, "establishing a 'genuine link' to Malta through the introduction of 'an effective residence status in the country' before acquiring Maltese nationality."[878]

The European Parliament did not only deal with the Maltese case specifically. By intervening in the Maltese IIP, it has also opened a general discussion about the selling of EU citizenship in January 2014. This was and still is a relevant problem in the EU, because by 2014 some Member States were considering introducing similar measures (e.g. Austria, Portugal or Bulgaria have already adopted similar techniques), while others already had a similar fast-track naturalization system for investors (Cyprus, Greece, Italy, Ireland, Portugal, Spain, UK).[879] The EP's previously mentioned resolution criticized these schemes of selling citizenship. The EP highlighted that such practices discriminated against third country nationals on the basis of their wealth. Moreover, as EU citizenship can be seen as one of the major achievements of EU law, the institution argued that it should not become a tradeable commodity, as it would undermine the very concept of EU citizenship. Such practices are clearly inconsistent with EU values, and with the principle of sincere cooperation.[880] The Parliament also "called on the European Commission to state clearly whether these schemes respect the letter and spirit of the EU treaties and the Schengen Borders Code, as well as EU rules on non-discrimination. It asked the Commission to issue recommendations to prevent such schemes from undermining the EU's founding values, as well as guidelines on granting access to EU citizenship via national schemes."[881] After this call from the EP, the Commission responded stating that Member States should "use their prerogatives to award citizenship in a spirit of sincere cooperation with the other Member States and the EU," and that "the existence of a genuine link between the applicant and the country or its people should be a prerequisite for obtaining naturalization."[882]

In January 2019, the Commission released a report concerning the 'Investor Citizenship and Residence Schemes in the European Union' addressed to the European Parliament, the Council,

[878] Carrera, 8.
[879] Casolari, "EU Citizenship and Money: A Liaison Dangereuse?* International and EU Legal Issues Concerning the Selling of EU Citizenship," 49.
[880] "European Parliament Resolution of 16 January 2014 on EU Citizenship for Sale (2013/2995(RSP))" (European Parliament, January 16, 2014), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2014-0038+0+DOC+PDF+V0//EN.
[881] "EU Citizenship Should Not Be for Sale at Any Price, Says European Parliament," European Parliament, January 16, 2014, http://www.europarl.europa.eu/news/en/news-room/20140110IPR32392/EU-citizenship-should-not-be-for-sale-at-any-price-says-European-Parliament.
[882] "Answer given by Mrs Reding on Behalf of the Commission to Parliamentary Questions" (European Parliament, March 28, 2014), http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-000061&language=EN.

the European Economic and Social Committee and the Committee of the Regions. In this document, the Commission makes an assessment about the situation of investor programs in Europe, and lists twenty Member States where investor residence schemes were initiated.[883] The main risks these schemes pose to the EU are listed (i.e. money laundering, tax evasion, security concerns, circumvention of EU rules) and the body expresses its "concerns about the risks inherent in investor citizenship and residence schemes and about the fact that the risks are not always sufficiently mitigated by the measures taken by Member States."[884] This can be seen as a clear attempt from an EU institution to take a more firm stance on this issue.

Nevertheless, not everyone agrees with the necessity of regulating these investor programs or at least with the contents of this report. Dimitry Kochenov,[885] for instance, claims that the Commission does not have the power to regulate this area and the report is biased in a way that it does not mention the benefits of investment programs. He also finds it outrageous that the Commission argues that a genuine link is needed between a country and an individual in order for the latter to acquire citizenship, whereas this view has been cancelled by the CJEU's judgement in *Micheletti*. Kochenov argues that to present the affected countries "as breaching the fundamental principles of EU law would be too much: they use their legal competence to naturalize third country nationals in strict accordance with the law." Most importantly, he claims that with this report, and by failing to mention the benefits that investor programs might bring to the EU, the Commission is actually trying to undermine the internal market. It also goes against the established case-law on free movement of persons and the rule of EU law established in *Micheletti*. Therefore, the body knowingly misleads the other EU institutions that are the addressees of the report.

The European Commission actually referred to Article 4(3) TEU in the above-mentioned report,[886] and rightly did so. As the Treaty of Lisbon "has clarified the nature of loyalty as a

[883] "Report from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region. - Investor Citizenship and Residence Schemes in the European Union" (European Commission, January 23, 2019), 7, https://ec.europa.eu/info/sites/info/files/com_2019_12_final_report.pdf.
[884] "Report from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region. - Investor Citizenship and Residence Schemes in the European Union," 23.
[885] Dimitry Kochenov, "Investor Citizenship and Residence: The EU Commission's Incompetent Case for Blood and Soil | Verfassungsblog," *Verfassungsblog*, January 23, 2019, https://verfassungsblog.de/investor-citizenship-and-residence-the-eu-commissions-incompetent-case-for-blood-and-soil/.
[886] "Report from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region. - Investor Citizenship and Residence Schemes in the European Union," 6.

general principle of the EU legal order, and (...) it has codified the existence of mutual duties of loyal cooperation between the Union and its Member States,"[887] these Member State practices are more than questionable, even if they do not violate EU law as it explicitly defines the nature of EU citizenship. (See Maduro's previous argument in *Rottmann*.) However, it can also be argued that the applicability of 4(3) TEU should be treated on a case-by-case basis. Shaw, for example, argued that Article 4(3) TEU cannot be applicable in the case of the Maltese IIP because "the effects of the Maltese provisions will be marginal in terms of number and thus have little impact on other Member States."[888] It is interesting to note that the EU institutions have not made a reference to Article 7 TEU in relation to the investor citizenship schemes so far, which means that these Member State practices do not pose 'a clear risk of a serious breach' of the values referred to in Article 2 TEU. The EU institutions' reactions to the Maltese case can be evaluated as a legal precedent in this policy area, however, it can also be argued that by insisting on a genuine link between countries and their citizens, "the European institutions may paradoxically fuel nationalistic misuses by Member States of the 'genuine link' as a way to justify restrictive integration policies on the acquisition of nationality."[889] The Maltese example also revealed the increasing relevance of a set of European and international legal principles "limiting Member States' discretion over citizenship matters and providing a supranational constellation of accountability venues scrutinizing the impact of their decisions over citizenship of the Union." Moreover, it has placed the principle of sincere cooperation at the forefront in nationality matters.[890] It also meant a step forward in the Union's role in the changing relationship between citizenship of the Union and nationality.[891]

Loyalty is a principle with the potential to raise many questions, including in the cases of granting dual citizenship. On the one hand, some Member State practices on preferential naturalization may raise the question of loyalty. This may become an issue if the Member State issuing the preferential naturalization fails to consult or inform the affected Member States in advance about the changes to come (this happened, for example, in the case of Hungary and its neighboring countries). On the other hand, the reaction of the affected Member States, such as the prohibition of dual nationality, might equally be considered to be dubious from the

[887] Casolari, "EU Citizenship and Money: A Liaison Dangereuse?* International and EU Legal Issues Concerning the Selling of EU Citizenship," 55.
[888] Carrera, "How Much Does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union?," 20.
[889] Carrera, 27.
[890] Carrera, 25.
[891] Carrera, 3.

perspective of loyal cooperation and good faith between Member States of the EU. The relationship between national and EU citizenship is quite complex due to their complementary nature. According to Dimitry Kochenov, Member State nationalities mostly serve as "access points to the status of EU citizenship." This means that there are twenty-eight (now twenty-seven) different approaches to acquiring the same status.[892] However, as there are only a limited number of rights provided solely on the basis of nationality, he argued in 2011 that the requirement enforced in ten Member States to have only one nationality (denying the institution of dual nationality) was an outdated and misplaced practice.[893] Giving up one's previous nationality is an imperative part of the naturalization procedure[894] in twelve Member States of the European Union (such as Slovenia, Estonia, German, Spain or Austria) as of 2019.[895] Although this practice is not contrary to international or EU law, it can be criticized based on EU constitutional principles as well as common EU goals, such as the idea of an ever-closer Union.[896] In addition to all the normative considerations, investor citizenship schemes raise also valid concerns about tax evasion, corruption, extradition and security as well.[897]

When it comes to country regulations in naturalization, there are many different trends to observe within the EU. This also means there are only a few trends towards common standards. Residence conditions for ordinary naturalization in European states vary between three years (Belgium) and twelve years (Switzerland). As of 2010, a minority of fifteen states still required renunciation of a previously held citizenship as a condition for naturalization. Four of these either do not enforce renunciation (Spain), or make many exceptions (Germany, the Netherlands and Poland). There is a growing trend to introduce formal tests of language and civic knowledge as a prerequisite for obtaining citizenship. In 1998, six states had tests of either kind, while in 2010 the number of these countries grew to eighteen. In 2010, sixteen states offered "preferential naturalization not only to close relatives of citizens, but also to persons who are perceived as ethnically or linguistically related to the majority population."[898]

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[892] Kochenov, "Double Nationality in the EU: An Argument for Tolerance," 336.
[893] Kochenov, 321.
[894] Kochenov, 321.
[895] Mentzelopoulou and Dumbrava, "Acquisition and Loss of Citizenship in EU Member States - Key Trends and Issues," 4.
[896] Kochenov, "Double Nationality in the EU: An Argument for Tolerance," 321.
[897] Mentzelopoulou and Dumbrava, "Acquisition and Loss of Citizenship in EU Member States - Key Trends and Issues," 8.
[898] Rainer Bauböck and Sara Wallace Goodman, "Naturalisation," *EUDO Citizenship Policy Brief No. 2* (Florence: Robert Schuman Centre for Advanced Studies, European Union Institute, 2010), 1, http://eudo-citizenship.eu/docs/policy_brief_naturalisation.pdf.

The above-mentioned cases show that there are many different interpretations of the applicability of Article 4(3) TEU in the case of citizenship policy. The Maltese case stirred such a big wave because what was at stake was the spirit of the internal market and sacrificing its coherence for economic purposes.[899] De Groot argued that the principle of sincere cooperation might be violated by such schemes, while d'Oliveira stated that the lack of consultation with other Member States or Brussels would not imply a violation in this policy area, given the nature of the citizenship policy of the EU.[900] The main conclusion to be drawn is that a "clearer EU guidance is (...) needed on the kinds of restrictions Member States must respect in granting citizenship, based on their duty of sincere cooperation in EU law."[901] The above analysis also showed that EU law and Member State citizenship policies can often collide, but despite the EU's limited competence in this policy area, it can still provide some guidelines for Member States on how to conduct national policies. The major trend-setter here is the Court of Justice of the EU, but we saw that some EU wide challenges might urge other EU institutions to issue guidelines and call for sincere cooperation and respecting EU values (see for example the investor citizenship schemes). Therefore, we can conclude that symbolic/rogue Member State behavior in the area of citizenship might not be forbidden by EU law, but it is undesirable according to the EU institutions.

4. Citizenship policy in Hungary

4.1 The concept of citizenship in Hungary

The idea of citizenship in the Central Eastern European region has to be looked at through different lenses than in other, mainly Western parts of Europe. Historical and geographical elements, such as transitions from communism/socialism to liberal market economy or frequent border modifications resulting in territorial losses, must be taken into account. Each of these factors contributed to the development of nationalism as well as to the specific values a particular society holds. After the breakdown of dictatorial regimes, organizing the society on a national basis and defining the state in national terms became possible again, after a long time.[902] According to Kántor, there are two periods to be distinguished in CEE states "when politics deal with the issue of the nation." The first comes right after the totalitarian regime loses power, and the second is later, when the already consolidated democracies refine their

[899] Carrera, "How Much Does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union?," 26.
[900] Carrera, 24-25.
[901] Carrera, 31-32.
[902] Kántor, "The Concept of Nation in the Central and East European „Status Laws," 38–39.

national politics. In the first period, laws are created to set out the definition, goals, and boundaries of 'nation.' The Hungarian constitution enacted in 1989 said in this respect: "The Republic of Hungary bears a sense of responsibility for what happens to Hungarians living outside of its borders and promotes the fostering of their relations with Hungary" (Article 6(3)).[903]

If we want to differentiate between the concept of nationality and citizenship in Hungary, we can argue that the word 'nationality' and 'nationality policy' (*nemzetiségi politika*) refer to an entity of Hungarians and the policy regulating the rights of ethnic Hungarians (and other peoples). In contrast, the word 'citizenship' (and citizenship policy – *állampolgársági politika*) is used when referring to those people who are officially citizens of the Hungarian state. Citizenship policy is also what covers the way of losing and acquiring Hungarian citizenship. So, the term 'nationality policy' covers all the relations the country has with the cross-border regions inhabited by people of Hungarian origin as well as the financial support going to them. The distinction between citizenship policy and nationality policy is officially recognized and applied by the Hungarian public administration working in this policy area. Experts of the field confirmed during interviews that nationality policy is a broader concept, which, as a matter of fact, is getting more and more financial or economic as part of the rapprochement between Hungarian foreign and economic policy. The interviewees also highlighted that this is an area in which the EU has no competence and legitimacy at all. According to the official understanding of the government, this is entirely the internal affair of the country.[904]

On the other hand, citizenship policy considers the allocation of Hungarian citizenship and the legal regulations surrounding the way of granting Hungarian citizenship to foreign individuals. This policy area in principle belongs to national competence within the EU. However, as shown in the previous sub-chapter, the EU can, or could, make some guidelines about what kind of regulations it expects from its Member States due to the fact that national citizenship regulations have an effect on several aspects of internal EU policies, i.e. intra-EU migration, labor conditions, social welfare etc.

The separation of citizenship policy and nationality policy applied by Hungary can be easily criticized, because it makes the concept of 'nation' hard to understand and define, moreover

[903] Kántor, 40.
[904] Interview with government official 1, May 6, 2016; Interview with government official 2, May 26, 2016.

this approach also abolishes the ethno-cultural aspect of citizenship.[905] In addition, the Hungarian definition of nation completely excludes the political community aspects of the term,[906] which are the basis of the European understanding of citizenship. It is interesting to note that some experts working in the field claimed that in principle the EU could make suggestions to Member States about its preferred way of regulating citizenship policies (it can even be considered to belong under the scope of Hungary's European policies),[907] whereas others deny this competence of the EU, and argue that Hungary handles this policy area completely separately from its European issues.[908] Scholars and legal academics usually agree with the first opinion.

Hungarian governments after the 1989 regime change had different standpoints in their politics on nationalities and citizenship. After the first democratic parliamentary elections took place in 1990, the main aim of the Antall-government was to create Hungary's stability not only in Europe and the world, but in the region as well. A part of this process was keeping a strong connection with Hungarians living outside the borders. Prime Minister József Antall declared that in a legal sense he was the Prime Minister of ten million Hungarians, but in spirit and emotionally he was governing fifteen million Hungarians,[909] referring to the Hungarian communities living across the borders. The Hungarian Constitution's previously cited Article 6(3) is a manifestation of this standpoint as well.[910] The Hungarian Citizenship Act was accepted in June 1993 (*1993. évi LV. törvény*), and it regulates the ways of acquiring and losing Hungarian citizenship.[911] This means that the question of national minorities in Hungary was regulated on the highest possible level. The socialist-liberal government led by Gyula Hom in power between 1994 and 1998 represented a fundamentally different standpoint. Its policy-making was strictly focused on the territory of Hungary and promoting the rights of Hungarians outside the borders was not a political priority. On the other hand, the bilateral relations with Hungary's bordering countries were peaceful, and so-called 'basic treaties' on good neighborly

[905] Interview with researcher, June 16, 2016.
[906] Survey interview with researcher, e-mail, July 4, 2016.
[907] Interview with government official 1.
[908] Interview with government official 2.
[909] Zsolt Kéri Nagy, "A Magyar Nemzetpolitika Szerepe a Térség Stabilitása Tükrében," *Nemzetpolitikai Szemle*, 223-256, 3, no. 3 (2004): 234.
[910] The Article says: „A Magyar Köztársaság felelősséget érez a határain kívül élő magyarok sorsáért, és előmozdítja a Magyarországgal való kapcsolatuk ápolását." Which translates to "The Republic of Hungary feels responsible for Hungarians living outside the borders and facilitates their relationship with Hungary."
[911] "1993. Évi LV. Törvény a Magyar Állampolgárságról" (Magyar Országgyűlés, June 15, 1993), http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99300055.TV#lbj0ide8ed.

relations were signed with more than one of these states (Slovakia, Romania, Ukraine) during its reign.[912]

The citizenship- policy of the first Orbán-government (1998-2002) was more similar to that of the Antall-era than to the Horn-government. The Act on Benefits for Ethnic Hungarians living in Neighboring States of Hungary (usually called the Hungarian Status Law – HSL) was accepted in 2001, providing Hungarians living outside the borders of Hungary with certain rights and benefits. Together with laws on citizenship, status laws are set out to "create a distinction between citizens of other states on a national/ethnic basis wherein people considered co-nationals or co-ethnics ('kin' in ethno-cultural terms) gain favorable treatment from their kin-state."[913] Status laws are usually aimed at settling the status of kin minorities living abroad. Based on ethno-cultural preferences, they extend the borders of the nation beyond the borders of the state.[914] The Hungarian Status Law has a lot to reveal about how a nation is defined. While the framers of the law perceived 'nation' on the basis of an ethno-cultural definition, the domestic opposition that time (and to a certain extent, international organizations as well) emphasized the political conception of the nation.[915] As already mentioned before, European organizations usually define nation as a synonym of state or citizenship, which does not concur with the Hungarian definition. This might be one of the reasons why this policy area can cause problems between Hungary and the EU. Several CEE states, including Hungary and Slovakia, take an individualistic approach in defining who belongs to the nation.[916] As Kántor claims, the Hungarian Status Law is most likely "a tool for supporting minorities abroad and an instrument for strengthening the boundaries of targeted voters, thus deepening the cleavage between the political sides."[917]

The Hungarian Status Law had a mixed reception from international organizations. The Venice Commission, for instance, recognized the right of kin-states to support their co-nationals living in other countries, whereas the European Parliament's rapporteur on the HSL had some critical remarks and approached the concept of nation as a political term (contrary to the HSL).[918] Some neighboring states also had an angry response to the Status Law, accusing Hungary of

[912] Kéri Nagy, "A Magyar Nemzetpolitika Szerepe a Térség Stabilitása Tükrében," 241.
[913] Kántor, "The Concept of Nation in the Central and East European „Status Laws," 39.
[914] Kántor, 44–45.
[915] Kántor, 43.
[916] Kántor, 46.
[917] Kántor, 47.
[918] Kántor, 49.

irredentist nationalism. The EU itself criticized Hungary for the unilateral adoption of the law, for its extraterritorial aspects, and for not having consulted the states affected by the new regulation.[919] The Hungarian socialist government elected in 2002 modified the Status Law, and made it a bit less controversial (mainly due to the reaction of international organizations) by referring to Hungarian cultural heritage instead of emphasizing that Hungarians living outside the borders form part of the Hungarian nation as a whole.[920] In general, status laws in the CEE region, and in Hungary in particular, can be evaluated as essential parts of post-communist state-building because they symbolically extend the borders of the nation. A solution to end the dispute between a political or an ethno-cultural definition of the nation, which can be seen as the main difference between the Hungarian and the European perception of citizenship, could be to replace the term political nation with citizenship.[921]

In 2004, a referendum was held in Hungary about the introduction of preferential naturalization to ethnic Hungarians living outside the borders. The governing socialist party was campaigning against the bill, which would have introduced dual-citizenship to many ethnic Hungarians not residing in Hungary, whereas the opposition mainly supported it during the referendum. However, the referendum was not successful, as the participation rate did not exceed the necessary level. The failure of this referendum resulted in a crisis of confidence between Hungary and Hungarian communities living abroad.[922] Csergő and Goldgeiger label the nation building strategy of the Hungarian government after 1990 as "transsovereign," meaning that the Hungarian nation reaches beyond current state boundaries but rejects the idea of border changes, primarily because it would be too costly to realize in contemporary Europe.[923] It was finally the Fidesz government elected in 2010 that amended the Hungarian Citizenship Act with the institution of preferential naturalization, thus introducing the possibility of dual-citizenship for Hungarians living outside the borders. After the new government took power, nationality policy and citizenship policy immediately became flagship initiatives.

[919] Judit Tóth and Mária M. Kovács, "Country Report: Hungary" (EUDO Citizenship Observatory, November 2009), 11, http://eudo-citizenship.eu/docs/CountryReports/Hungary.pdf.
[920] Kántor, "The Concept of Nation in the Central and East European „Status Laws," 50.
[921] Kántor, 51.
[922] Iordachi, "Dual Citizenship in Post-Communist Central and Eastern Europe: Regional Integration and Inter-Ethnic Tensions," 133.
[923] Zsuzsa Csergő and James M. Goldgeier, "Nationalist Strategies and European Integration," *Perspectives on Politics* 2, no. 1 (2004): 281.

The modification of the Hungarian Citizenship Act was among the first law amendments initiated in front of the newly elected parliament.[924] Later on, in 2013 the Act was amended again, and besides the rights and preferential treatment minorities already received due to the introduction of dual-citizenship, voting rights on the Hungarian parliamentary elections were also extended to them, even if they have never lived in the territory of Hungary (Cardinal Act CCIII of Hungary on the Elections of Members of Parliament (CDL-REF(2012)003).[925] This is a sign that Hungary considers Hungarian citizens living outside the borders to be parts of the Hungarian political community.[926] Moreover, the amendments of the Citizenship Act introduced a system that does not require the person naturalized to identify herself as Hungarian.[927] It is not hard to evaluate this act as an attempt from the part of the government to increase its electoral base.[928] This goal was not even a hidden one. Public officials admit that the government communicated to interested ministries that its objective with the introduction of preferential naturalization was to recruit 1 million new Hungarian citizens by 2017 (both from the neighboring countries and from further away as well).[929] To be more specific, granting half a million new citizenships was the goal by the time of the 2014 parliamentary elections, and the 1 million threshold was extended to 2018 (another election cycle later).[930]

In light of this, it is easy to conclude that the changes exerted to the Hungarian citizenship-regime were politically motivated: their main goal was to increase the electorate. These immense changes were brought in without any consultation with the European Union, because they have 'no EU relevance' according to the government.[931] Some bilateral consultation, or information sharing, was happening, but it was kept to a minimum, and mainly done in an *ex post facto* basis. The affected neighboring countries were formally informed about the changes only after they had been implemented.[932] Besides the underlying political motivations, there are other reasons why the new Hungarian regulations might be problematic. Pogonyi argues that "offering citizenship to nonresident trans-border kin-minorities and distant diasporas is

[924] Interview with government official 2.
[925] "Act CCIII. of 2011. on the Election of Members of Parliament," 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100203.TV.
[926] Boldizsár Nagy, "Nationality as a Stigma: The Drawbacks of Nationality (What Do I Have to Do with Book-Burners?)," *Corvinus Journal of Sociology and Social Policy* 5, no. 2 (December 20, 2014): 37, https://doi.org/10.14267/cjssp.2014.02.02.
[927] Nagy, 36.
[928] Survey interview with researcher.
[929] Interview 1 with government official.
[930] Interview 2 with government official.
[931] Interview 2 with government official.
[932] Interview 1 with government official.

normatively problematic for several reasons," one of them being ethnically framing non-resident citizenship that can actually be used to limit the claims of internal minorities for recognition and cultural rights.[933]

Hungary's Fundamental Law accepted in April 2011 also expresses the specific Hungarian way of understanding the concept of nation, and the importance of citizenship policy for the country. The Preamble of the Fundamental Law, which is called 'National Avowal,' recalls the stormy history of the country and its willingness to keep the 'spiritual and emotional unity' of the fractured Hungarian nation.[934] This is a clear reference to the people of Hungarian descent living in the neighboring countries. The Preamble also emphasizes the importance of the protection of the Hungarian heritage, unique language, and culture. The National Avowal itself has been vastly analyzed by constitutional lawyers and has been evaluated as a separate piece of writing almost of literary nature, the aim of which is to define the national identity of Hungary.[935] Article D of the Fundamental Law confirms that Hungary considers itself responsible for the faith of Hungarians living outside the borders and supports the efforts of the Hungarian communities to preserve their 'Hungarian nature' and favors their cooperation among each other and with Hungary.[936]

Another manifestation of the importance of this policy area for the country is the Hungarian Strategy on Nationality Policy (*Magyar Nemzetpolitika: A Nemzetpolitikai Stratégia Kerete*), which was accepted in November 2011. The document is similar to Hungary's strategy on foreign policy or security policy in a sense that it outlines the country's strategic priorities in the area of citizenship. The purpose of the Strategy is to enlarge the community of Hungarians living outside the borders. Among others, it outlines that Hungary supports the territory-based and/or individual autonomy of the Hungarian communities living abroad, and supports

[933] Szabolcs Pogonyi, "Europeanization of Kin-Citizenship and the Dynamics of Kin-Minority Claim-Making: The Case of Hungary," *Problems of Post-Communism* 64, no. 5 (September 3, 2017): 243, https://doi.org/10.1080/10758216.2017.1329630.
[934] The Article says: „Ígérjük, hogy megőrizzük az elmúlt évszázad viharaiban részekre szakadt nemzetünk szellemi és lelki egységét."
[935] Balázs Fekete, "Az Alaptörvény Preambulumának Szövegközi Dimenzióiról," *Jogi Iránytű* 2012, no. 2 (July 15, 2012): 22–23.
[936] The Article says: „Magyarország az egységes magyar nemzet összetartozását szem előtt tartva felelősséget visel a határain kívül élő magyarok sorsáért, elősegíti közösségeik fennmaradását és fejlődését, támogatja magyarságuk megőrzésére irányuló törekvéseiket, egyéni és közösségi jogaik érvényesítését, közösségi önkormányzataik létrehozását, a szülőföldön való boldogulásukat, valamint előmozdítja együttműködésüket egymással és Magyarországgal."

extending the possibility of education in Hungarian language for them.[937] Budapest also has a Research Center for Nationality (*Nemzetpolitikai Kutatóintézet*), which is charged with conducting research, organizing events, and preparing publications on the topic of Hungarian nationalities and minorities within Hungary.

This short review of the most important Hungarian regulations on citizenship served to provide a glimpse on Hungary's stance on citizenship, its deep-rooted nationalism, and some signs of how this standpoint might contradict the European one. On the next pages, the chapter will present an evaluation of these acts, mainly the regulations that are currently in effect, and the way some countries affected by the Hungarian measures reacted to them. These introductory remarks on the concept and nature of citizenship in the EU and Hungary not only provide a basis for understating the developments in the policy area, but they also reveal the importance of citizenship policy and nationality policy. An immense bureaucracy and body of experts have been working in this policy area since 2010.[938] Moreover, the Hungarian regulations already demonstrated the historical and ideological importance of the concept to the country.

4.2 The conflicts of Hungarian citizenship policy with EU norms

Several aspects of the above-mentioned Hungarian citizenship regulations are symbolic and driven by national interests, which are not always compatible with EU membership obligations. Although the most important legal regulations applied in Hungary in the area of citizenship have already been presented, it is also indispensable to assess their practical implications and the international reactions to these laws, as well as some measures that serve to grant Hungarian citizenship to citizens from abroad.

Let us first give a brief evaluation of the amendments made to the Hungarian Citizenship Act. It is usually the practice of extending voting rights for Hungarians living outside the borders that stirs the most heated academic and political discussion. Some experts claim that "the Hungarian law on nationality and elections does not lead to any reasonable conclusion concerning who constitutes the Hungarian political community, as millions of Hungarian nationals are practically excluded – but an ever increasing crowd of people who have never lived in Hungary but are descendants of nationals of the Hungarian Kingdom (and who are

[937] "Magyar Nemzetpolitika - A Nemzetpolitikai Stratégia Kerete" (Közigazgatási és Igazságügyi Minisztérium - Nemzetpolitikai Állampolgárság, November 2011), http://www.nemzetiregiszter.hu/download/9/a2/00000/Magyar%20nemzetpolitika%20A4.pdf.
[938] Interview with government official 1; Interview with government official 2.

therefore entitled to preferential naturalization and rewarded with voting rights), are included."[939] This regulation can be seen as a result of an ethno-cultural nationalist discourse that serves the purpose of increasing the potential voter base for the government. Experts argue that instead of this understanding, nationality in Hungary should be reformulated along Bauböck's and Shachar's thinking. Their approach claims that nationality should derive from the attachment to a given community and from the fact that the decision of the political body directly affects the person.[940]

Back in 2001, the government stressed that the benefits granted by the Status Law to Hungarians living in the neighboring territories cannot be compared to dual nationality granted on an ethnic basis because the latter would have irredentist overtones.[941] Yet, ten years later, the government led by the same Prime Minister not only introduced dual nationality, but extended voting rights for the affected people as well. The underlying logic is that the Hungarian government wants cross-border Hungarians to be members of the Hungarian political community, even if they are directly not affected by the political events and decisions taken in the Hungarian Parliament. The preamble of the Act on the election of members of parliament proves this argument with the following statement: "Hungarian citizens living beyond the borders of Hungary shall be a part of the political community."[942]

If we consider the institution of dual nationality, it can be observed that even though several international agreements reacted to the spreading of the practice of dual citizenship, none of them questioned the sovereignty of Member States in regulating their citizenship policies. Despite this unanimous consent about national competence in citizenship, it should be highlighted that sources of international law, such as the Hague Agreement (1930) or the Agreement of the Council of Europe (1963), also added the obligation of countries to abide international law. Thus, we cannot talk about an absolute sovereignty of Member States in this area.[943]

Naturalization is a process for obtaining nationality, which is recognized by international and EU law as well. In Hungary, between 1993 and 2010, 134.887 people acquired Hungarian

[939] Nagy, "Nationality as a Stigma," 31.
[940] Nagy, 31.
[941] Nagy, 34.
[942] "Act CCIII. of 2011. on the Election of Members of Parliament."
[943] Tóth, "Miért Nem Lehet, Ha Szabad - A Többes Állampolgárság a Nemzetközi És Az Európai Közösségi Jog Felől (Az EU Tagállamainak Viszonya a Többes Állampolgársághoz)."

citizenship through naturalization. The ratio of preferential naturalization processes was 95-97%. Since 2011, due to the amendments of the Hungarian Citizenship Act, the number of preferential naturalization processes increased. Between 2011 and 2013, there were around 500.000 such processes (dual-nationality), and 32% of the people involved were non-EU nationals.[944] The most important changes that might have initiated such an increase include the loss of the importance of the citizenship exam in the system, the introduction of only formal elements focusing on proving the Hungarian ethnicity of the applicant, and the lack of the requirement to reside in Hungary.[945] Judit Tóth criticizes the fact that the latest Hungarian Citizenship Act regulations resulted in such a mass naturalization of applicants without residence, which basically increased the number of unfounded citizenship acquisitions. Moreover, she claims that non-resident dual nationals might pose security risks (due to the accelerated, not sophisticated enough naturalization procedure), which "may disturb the regional connections of Hungary as well as the country's loyalty to the EU law."[946] Looking at the total number of acquisitions of citizenship between 2009-2017, the Hungarian data show that the highest number of acquisitions happened in 2011, and that there was a gradual decrease since then.[947]

These data prove that the changes exerted in the Hungarian citizenship regulations had significant effects on the system of granting citizenship in Hungary, which might have posed a challenge for the relevant Hungarian administrative system after 2010. Already before the referendum of 2004, there were some studies about the effects of the possible introduction of dual-nationality. In 2010, the government tried to avoid chaos and exert a smooth transition with conducting studies and surveys measuring the possible number of naturalization requests, as well as assessing the different administrative, HR and IT upgrades made necessary by the modifications.[948] However, as already briefly mentioned before, there were no significant bilateral negotiations prior to the modifications, and there was no consultation with EU bodies at all. This was all the more puzzling as Hungary's bilateral agreements with its neighbors

[944] Népszava 2013 April Cited in: Judit Tóth, "A Honosítás Jogintézményének Alakulása Az Elmúlt Húsz Évben," *Regio* 22, no. 1 (2014): 78.
[945] Tóth, 82–83.
[946] Judit Tóth, "Is It Possible to Lose the Hungarian Nationality?," in *European Citizenship at the Crossroads: The Role of the European Union on Loss and Acquisition of Nationality*, by Sergio Carrera Nuñez and Gerard-René de Groot (Oisterwijk, the Netherlands: Wolf Legal Publishers (WLP), 2015), 248–249.
[947] "Acquisition of Citizenship Statistics," European Commission website, 2017, https://ec.europa.eu/eurostat/statistics-explained/index.php/Acquisition_of_citizenship_statistics#EU-28_Member_States_granted_citizenship_to_825.C2.A0400_persons_in_2017.
[948] Interview with government official 2.

would have obliged the country to negotiate with the affected countries. Besides the principle of loyal cooperation, even the principle of horizontal coordination would require a Member State to negotiate with its partners in the question of citizenship regulations.[949]

4.3 Reactions from neighbors and international organizations to Hungary's citizenship regulations

Dual nationality is a sensitive issue in the case of Hungary. As opposed to the Western European traditions, in East-Central Europe, questions of who does and does not belong to the nation touch upon sensitive issues of state sovereignty and even revive problems of historically disputed borders and trans-border ethnic kin minorities.[950] Problems might arise when countries have some methods to provide privileged access to citizenship for co-ethnics living abroad, but these methods actually collide or contradict each other. Regarding the Hungarian citizenship regulations, Romania was one of the most vocal neighboring countries. Concerning the Status Law, for example, Romania "sought to undermine Budapest's claim that it was acting as a defender of minority rights by pointing to perceived deficiencies in Hungary's treatment of its Romanian minority."[951] Romania also criticized the fact that Hungary missed the opportunity to negotiate with Romania about the extension of similar privileges to the Romanian minority living in Hungary.[952]

The amendment of the Hungarian Citizenship Act in 2010 was not received enthusiastically by neighboring Slovakia, which was the only country to respond to the Hungarian amendment by legal means. It changed its former practice and joined the group of states that refuse dual nationality.[953] The amendment to the Slovak Citizenship Act meant that persons who would voluntarily acquire Hungarian citizenship would automatically lose their Slovakian citizenship (except for those who gain it through birth or marriage).[954] Although the CJEU case law confirms that it is the Member States' competence to regulate the acquisition and loss of their country's nationality, the Slovak reaction might raise some questions, for instance because of

[949] Survey interview with researcher.
[950] M. Kovács, "The Politics of Non-Resident Dual Citizenship in Hungary," 54.
[951] Brigid Fowler, "Fuzzing Citizenship, Nationalising Political Space: A Framework for Interpreting the Hungarian 'Status Law' as a New Form of Kin-State Policy in Central and Eastern Europe," in *The Hungarian Status Law: National Building and/or Minority Protection*, 21st Century COE Program, Slavic Eurasian Studies, No.4 (Sapporo, 2004), 199.
[952] Fowler, 199.
[953] Mónika Ganczer, "Sarkalatos Átalakulások: Az Állampolgársági Jog Átalakulása," *MTA Law Working Papers* 2014/63 (n.d.): 73.
[954] Mónika Ganczer, "International Law and Dual Nationality of Hungarians Living Outside the Borders," *Acta Juridica Hungarica* 53, no. 4 (December 2012): 322, https://doi.org/10.1556/AJur.53.2012.4.4.

national constitutional concerns. It is interesting to note that the EU completely stayed out of this dispute and did not try to act even as a mediator between the two parties. Among the neighboring countries of Hungary, four countries, Romania, Slovenia, Serbia and Croatia, recognize dual nationality and allow the acquisition of another nationality for citizens living outside their borders.[955]

Despite mentioning the different Member State reactions, it is indispensable to assess how European bodies reacted to the Hungarian changes in citizenship policy. As already stated above, the European Union was not consulted about the significant amendments of the Hungarian Citizenship Act prior to their introduction. Despite this lack of consultation, the EU did not address the issue in any kind of official communication. The reasons for this might be manifold. First of all, it can be argued that the EU does not really meddle in the citizenship issues of a Member State once it becomes an EU country. There were past examples of the EU notifying a country before its accession (so in the monitoring phase) that it should not carry out a certain law modification. For instance, this was the case with Romania in 2001, which tried to modify its citizenship law, but the European Commission intervened in the process. This suggests that the EU voices its concerns and gives guidelines even in a policy under Member State competence in the pre-accession phase, but its 'post-accession conditionality' does not extend that far.[956] Secondly, we can say that the EU is generally 'inactive' when it comes to the citizenship issues of its Member States. The Council of Europe (namely the Venice Commission) is the European institution that usually addresses relevant cases. The EU is happy not to intervene, especially if other bodies can be expected to do so. Moreover, it does not belong under its authority to meddle in policy issues if there is no clear breach of law.[957] However, we cannot say that the EU is fully inactive in this area, because in some straightforward unilateral Member State actions, such as the investor and citizenship schemes, EU institutions provide guidelines and refer to the observation of EU values.

In its 2011 Opinion on the new Constitution of Hungary, the Venice Commission highlighted that the Preamble of the Fundamental Law has a wide understanding of the 'Hungarian nation,' which includes Hungarians living in other states. Moreover, Article D refers to Hungary's "responsibility for the fate of Hungarians living beyond its borders." The Venice Commission

[955] Mária M. Kovács, Zsolt Körtvélyesi, and Szabolcs Pogonyi, "The Politics of External Kin-State Citizenship in East Central Europe," *[GLOBALCIT], EUDO Citizenship Observatory, 2010/06, Comparative Reports*, 2010, 1, http://hdl.handle.net/1814/19576.
[956] Interview with government official 1.
[957] Interview with researcher.

stated that these paragraphs imply such a nation-definition that "may hamper inter-State relations and create inter-ethnic tensions."[958] According to the Venice Commission, the term 'responsibility' "may be interpreted as authorizing the Hungarian authorities to adopt decisions and take action abroad in favor of persons of Hungarian origin being citizens of other states and therefore lead to conflict of competences between Hungarian authorities and authorities of the country concerned."[959] In an Opinion in 2012, the Venice Commission addressed the new Act on the Election of Members of Parliament, including the extension of the right to vote to Hungarian citizens living abroad (i.e. without a permanent residence in Hungary). The Commission, in principle, welcomed the possibility of citizens to vote from abroad. Nevertheless, it noticed the serious effects of this new method of voting. The new Elections Act would bring around 5 million potential new Hungarian citizens. Accordingly, the Venice Commission welcomed "the legislature to limit the right to vote for Hungarians living abroad to the proportional part of the election." However, it also suggested for Hungarian law-makers to consider "whether the right should be restricted to citizens having close ties with the country."[960] These observations touch upon some sensitive issues, but they are far from raising serious concerns about the Hungarian citizenship-regulations introduced between 2010 and 2012.

4.4 Hungarian investor-citizenship schemes

A practice quite similar to the IPP applied by Malta and other EU Member States was introduced by Hungary, which pertained to giving out Hungarian citizenship to people without a genuine link to Hungary or Europe. The system operating between 2013 and 2017 was based on selling special government residency bonds called Hungarian State Bonds for Settlement (*Letelepedési Magyar Államkötvény*). This method differed from the practices of Malta primarily because purchasing them granted rights of residence for the interested parties. Even though these government settlement bonds did not grant citizenship to their owners, they enabled non-EU citizens to obtain residence permits, allowing them and their family members to stay in the EU permanently and travel within the Schengen area.[961] Usually third country nationals used this opportunity to get Hungarian, and together with it, EU citizenship.

[958] "Opinion on the New Constitution of Hungary," 9.
[959] "Opinion on the New Constitution of Hungary," 10.
[960] "Joint Opinion on the Act on the Elections of Members of Parliament of Hungary" (European Commission for Democracy Through Law (Venice Commission), OSCE ODIHR, June 18, 2012), 12.
[961] "Black Book on Corruption in Hungary 2010-2018" (Civitas Institute 2018 and Transparency International, 2018), 16, https://transparency.hu/wp-content/uploads/2018/03/Black-Book_EN.pdf.

The initial price of the settlement bonds was 250.000 euros, which went up to 300.000 euros from 2015.[962] Until 30 June 2017, a total of 6.621 bond packages have been sold enabling their holders to be eligible for settlement. If one adds the number of family members to the bond holders, then almost twenty thousand non-EU citizens were granted the right of free movement in the Schengen zone.[963] The selling of the government bonds was coordinated by the Government Debt Management Agency (*ÁKK*) through enterprises authorized by the Parliament's Economic Committee. Interestingly, almost each of the intermediary enterprises were registered in a country famous for its off-shore activities (e.g. Cayman Islands, Liechtenstein), which makes the allegations of corruption quite believable.[964] Although the primary aim of the Hungarian settlement bond system was to increase the national revenue, this goal was jeopardized by the non-Hungarian residency of the intermediary enterprises. Regardless of the fact that the bonds might not achieve their goal, the data also show that only 0,3% of the 20,000 bond requesters were denied Hungarian papers and the right to settle down in Hungary after the security screening. About 80% of the settlement bond 'immigrants' were Chinese, followed by Russians, Iranians, Pakistani Iraqi, Vietnamese, Turkish and Syrian citizens.[965] Besides the settlement bond business, the illegal selling of Hungarian citizenship by mafia groups makes the whole Hungarian 'citizenship-market' even more complex and widespread. At the beginning, mainly non-EU (Serbian or Ukrainian) neighboring country citizens were the biggest 'beneficiaries' of these illegal purchases, through which they created false Hungarian family roots that served as a basis for getting the citizenship. Even Romania was interested in such businesses, given that Hungarian citizenship is deemed to be much more valuable than Romanian, and Hungarians have visa-free travel to more countries than Romanians.

Besides its dubious economic effects, the settlement bond system also reveals the paradoxical nature of the government's attitude towards foreigners. As presented by the previous chapter, Hungary does everything in its power to reduce the number of foreigners entering the country under the refugee crisis, and the government repeatedly expressed that refugees are not welcome in Hungary. The Prime Minister often referred to Hungary as the protector of the EU in this sense, arguing that Hungary as a border country of the EU defended the whole Union

[962] "Black Book on Corruption in Hungary 2010-2018," 44.
[963] "Black Book on Corruption in Hungary 2010-2018," 16.
[964] "Black Book on Corruption in Hungary 2010-2018," 16.
[965] Wiedemann, Tamás. "59 országból jött Magyarországra a húszezer letelepedési kötvényes," G7.hu , January 16, 2019, https://g7.hu/kozelet/20190116/59-orszagbol-jott-magyarorszagra-a-huszezer-letelepedesi-kotvenyes/.

from illegal immigrants. In a different interpretation, however, Hungary was selling access to the EU to thousands of non-EU citizens lacking a genuine link to Europe. This gives the impression that based on the security-oriented aspect of handling migration and out of the fear of terrorism, Hungary denies entry to the EU from refugees and displaced persons fleeing wars, while rich businessman and their relatives are welcome. The fact that criminal activities, such as tax fraud, occasionally go together with obtaining settlement bonds is disregarded by the Hungarian administration.[966]

The biggest setbacks of the Hungarian citizenship regulations are that they unilaterally modified the conditions of EU membership several years after the country's accession. Whether ten or fifteen or even more million Hungarians live in the EU makes a huge difference. Moreover, third country nationals acquiring EU citizenship through Hungarian citizenship (or any other Member State citizenship that has similarly reckless practices) can result in these people settling down in other EU Member States. This may pose problems regarding workers' rights and rights to establishment. Granting EU citizenship to 'third-country nationals' through giving out national citizenship is a question in which the EU could undoubtedly have a say in national citizenship-regulations, but it mainly does so through its CJEU jurisprudence. Academic circles usually criticize the practice of selling EU-citizenship, for the above-mentioned obvious reasons. Besides the fact that these practices may violate EU constitutional principles, they are also detrimental to the concept of European identity, the basic requirement of which is strengthening the bond between the EU and its citizens. Rainer Bauböck argues that the EU and its Member States "should protest that these policies undermine solidarity between Member States, but they should also protest against the internal hollowing out of democratic standards. As a union of democracies, the EU must be concerned when democracy is corrupted by the rule of money in any of its Member States."[967] Moreover, the practice of preferential naturalization in some countries is also condemned by some experts. Bauböck, for instance, argues that "Italy, Hungary and Romania, whose ethnic citizenship policies have created hundreds of thousands of new EU citizens abroad, are worse sinners than Malta."[968]

[966] Hungary suspended its investment citizenship scheme in March 2017 due to the country's improving economic situation.
[967] Rainer Bauböck, "What Is Wrong with Selling Citizenship? It Corrupts Democracy!," ed. Ayelet Shachar and Rainer Bauböck, *Should Citizenship Be for Sale?* EUI Working Papers RSCAS EUDO Citizenship Observatory (January 2014): 19.
[968] Bauböck, 37.

During the interviews conducted in the circle of government officials it became obvious that the constitutional principles of the EU were not even remotely considered before introducing the biggest changes to Hungary's citizenship regulations between 2010-2012. The "legal re-unification of the nation" (*a nemzet közjogi újraegyesítése*) overwrote all kinds of values or principles that would have been considered at that time by the policy-makers. "What should we be loyal to, when there are no relevant EU rules?" was a question raised by a government official in reaction to the mention of the principle of loyalty.[969] Frankly, this is a relevant question if we strictly consider that there is no primary EU law regulating EU and Member State citizenship practices. Even some scholars dealing with international law and citizenship regulations argue that in order for the constitutional principles to prevail there should be a sound legal regulation present in the Treaties as point of reference. They argue that lacking such a legal provision makes the application of the principle of loyalty or solidarity in relation to citizenship policy irrelevant.[970]

However, the previously mentioned arguments of Bauböck are more convincing. He claims that the unilateral modification of national citizenship regimes can bring such considerable changes to the whole EU citizenship policy that a certain kind of cooperation, in the form of observing the principles of solidarity and loyalty, can be expected from Member States when they act in this policy area. "National decisions must comply with general principles of EU law and take into consideration their impact on citizenship of the Union."[971] Research on the Involuntary Loss of European Citizenship (ILEC) has shown the relevance of the principle of loyal cooperation in the field of EU citizenship when Member State "decisions have repercussions for their obligations under the Treaties and towards the EU institutions, and to other Member States." This includes, for instance, domestic actions affecting the concept or the substance of EU citizenship, which clearly was the case in Hungary between 2010-2012. Informing and consulting each other and EU institutions prior to the adoption of measures on the loss or acquisition of nationality is an obligation of Member States directly stemming from Article 4(3) TEU.[972] Researchers working on ILEC have confirmed that the European Union institutional framework has an indispensable role in monitoring and ensuring Member State compliance with the principle of loyal cooperation, in addressing the consequence of different Member

[969] Interview with government official 2.
[970] Interview with researcher.
[971] Carrera and Groot, "European Citizenship at a Crossroads: Enhancing European Cooperation on Acquisition and Loss of Nationality," 1.
[972] Carrera and Groot, 3.

State regulations and administrative decisions on the loss and acquisition of EU citizenship and in ensuring the effective implementation of multilateral international treaties.[973] The EU's increased activity in the area of citizenship should include creating an expert committee responsible for coordinating this policy area, holding annual European platforms on EU citizenship and fundamental rights, and issuing recommendations by the European Commission to address Member States' laws on nationality and practices in contravention with EU law.[974]

Based on the observation of Hungarian citizenship policy in the EU framework, in the case of Hungary, citizenship policy is both interest-driven and symbolic at the same time. The political dynamics of this area is different from that of migration policy, but this might also be because the EU's normative leverage is much weaker here than in migration policy, as this is a policy of Member State competence. Therefore, symbolic, rogue elements are more common in this policy area than they were in migration policy. However, even though EU countries are autonomous and sovereign actors in the area of citizenship, the EU does not stay always silent if Member States issue unilateral actions that might endanger common EU values or might be detrimental to other Member States. It tries to rely on common principles and values, such as sincere cooperation and loyalty, and offer guidelines for Member States in order to prevent them from acting unanimously and against Community interests.

5. Findings of the chapter

This chapter revealed that the area of citizenship is an important national preference for Hungary as it is an inherent part of the country's national identity. Moreover, analyzing it from the perspective of the thesis' theoretical framework was especially interesting as the symbolic elements within are very strong, but the EU's normative leverage is weak. It is easier to analyze policy areas over which the EU has a much clearer competence, for instance migration policy, from the perspective of liberal intergovernmentalism or small state studies. However, this analysis revealed that in citizenship policy, as the EU does not have the power to enforce a certain type of Member State behavior, it can only try to push forward its arguments for the respect of values and norms through its institutions. This gives more freedom for Member States to act as they please. Nevertheless, the principle of loyalty and Article 4(3) was mentioned as a reference more by EU institutions in citizenship-related cases than in cases related to the refugee crisis.

[973] Carrera and Groot, 4.
[974] Carrera and Groot, 5.

After addressing the main characteristics of citizenship policy in the EU and Hungary, we can conclude that there is no loyalty requirement strictly attached to the concept of EU citizenship. Since there is no direct relationship between the citizen and the EU, some Member State practices invoke the application of constitutional principles in this policy area. The fact that EU Member States have to take into consideration their international and EU law obligations when coordinating their national citizenship policies implies that they also have to comply with the values and principles set out in the Treaty. Loyalty and solidarity are such principles, and they can also be considered to be norms to follow, even if they are imperfect and are not enforceable. These principles must oblige Member States not to endanger other Member States or not to discriminate against their people with their national citizenship strategies. The protection of the EU as a collective system entails that these principles should be taken into consideration even if citizenship policy belongs under the competence of the Member States.

However, notwithstanding the differences between the European and Hungarian perceptions of citizenship, certain Member State practices and the EU's reaction to them suggested that this policy area could be a source of conflicts between the EU and its Member States. In our case Hungary, the research conducted so far does not seem to justify this hypothesis. In practice, the European Union does not really meddle in the citizenship regulations of the Member State, it only provides guidelines. The reason for this might be that the Hungarian citizenship regulations are quite recent, rendering their effects on population and labor market hard to identify, especially when it comes to the EU-wide context.[975] However, it should be noted that Member States will not abide by the given principles and take the interests of EU citizenship as a whole into account unless they are bound by strict rules and mechanisms. Enforcing a rule-abiding behavior from the part of the Member States in this policy area is the task of the European Union. On the one hand, the protection of European citizenship and the rights connected to it will not come to reality based on the voluntary cooperation of countries, but a central coordination is needed from the part of the European Union and its institutions. On the other hand, the quest for intergovernmentalism coming from certain Member States will always prevent collective institutional solutions from happening unless they serve their interests.

When it comes to its citizenship/nationality policy, the main interest of Hungary lies in extending the border of the Hungarian nation in a way that should include Hungarians living across the geographical border. This practice is a national-political (*nemzetpolitikai*) priority

[975] Survey interview with researcher.

for the government. On the one hand, it makes the benefits of EU membership available to ethnic Hungarians, while, on the other, it also serves the political purpose of increasing the electoral base. The main problem with giving EU membership to ethnic Hungarians through the Hungarian citizenship system is that due to the phenomenon of intra-EU migration, it becomes a matter of common concern for all EU Member States. This effect explains the relevance of EU principles, mainly loyalty, in analyzing Hungarian citizenship/nationality policy. Even if in a narrow understanding the principle of loyalty cannot be applied in policy areas that belong to Member State competence, it remains relevant due to the inevitable cross-border effects of the Hungarian citizenship/nationality policy. As mentioned in an EP brief on the subject, "[t]he bundling of national and EU citizenship means that Member States have a certain responsibility towards each other when taking decisions over who to accept (or reject) as citizens."[976]

Moreover, this case study has showed that citizenship/nationality policy is an area in which a small state can pursue its own interests and turn the possibilities provided by EU membership and the weakness of EU normativity to its own benefit. Hungary can benefit from the such even if there are other aspects of EU law (e.g. case law) that suggest some Member State practices might violate certain EU values. This is important because once this violation occurs, it becomes a common concern for all affected EU countries. Therefore, it generates a certain kind of responsibility to other Member States. As the above analysis shows, the violation of values has never been a concern for Hungarian law- and policy-makers. This tendency proves, yet again, that Hungary is following an interest-maximizing 'small state' realism within the EU. This strategy is aimed at getting the most out of its EU membership while possibly respecting the legal boundaries but overlooking the 'softer' rules of EU law that would constrain Member State behavior.

[976] Mentzelopoulou and Dumbrava, "Acquisition and Loss of Citizenship in EU Member States - Key Trends and Issues," 1.

VIII. Conclusion

This dissertation analyzed Hungary's EU membership from a novel perspective. It tried to present the spectrum of Member State behavior within and towards the EU that stretches between interest-maximizing national preference formation, on the one hand, and observing the principle of loyalty as a guiding force of Member State cooperation, on the other. The analysis adopted a bottom-up approach focusing on Hungary's domestic policy-making. Not only was this policy-making an adequate proxy for assessing the country's EU strategy, but it also caught the attention of the international community and resulted in political criticism, not to mention the several legal procedures, against Hungary from EU institutions.

The most important aim of the research was to analyze Hungary's policy towards the EU from the perspective of liberal intergovernmentalism and national preference formation tactics. As liberal intergovernmentalism cannot be fully applied to the case of Hungary, not least because the current Hungarian government emphatically denies any association with liberalism, small state studies came to the rescue by highlighting many useful tactics applied by small EU Member States in pursuing their interests within the EU. One such strategy was norm entrepreneurship, which Hungary successfully resorted to during the refugee crisis. However, a detailed analysis of Hungary's relationship with the EU reveals that these theories cannot fully account for Member State policies. The Hungarian example showed that Member States may apply rogue, symbolic policy-making, especially in areas over which the EU has a normative deficit and hence its leverage is weak.

After the Introduction, Chapter II provided a theoretical background to the analysis by focusing on the academic literature on national preference formation (liberal intergovernmentalism) and on small state studies. Despite the sometimes *ad hoc* nature of preference formation within the EU, the Hungarian strategy-formation can best be explained by liberal intergovernmentalism. This theory argues that Member State behavior is rooted in the cost-benefit calculations of the governing elite, which is constrained at home by the societal actors. Liberal intergovernmentalism also highlights the importance of the domestic level of policy-making, arguing that the goals of a country are defined domestically and that what is ultimately taken as the national interest emerges through domestic political conflicts. Small state studies explained that Member States like Hungary face several disadvantages in the EU in achieving their goals, and they outlined certain types of strategic behaviors that they can adopt if they want to exert influence. To reiterate, becoming a norm entrepreneur was such a 'smart state' strategy for

Hungary. The chapter also revealed that Hungarian preference formation within the EU can be explained by, for instance, the economic and political vulnerability of the country, or the ideas of the leading politicians and governing elites about what the country's national identity is.

Chapter III introduced the normative dimensions in the analysis by examining constitutional principles, such as mutual trust, solidarity, and loyalty (as defined in Article 4(3) TEU), and how they influence Member State policy-making within the European Union. The main argument of this chapter was that operating only driven by raw interests is not desirable in the EU because it jeopardizes the functioning of the collective system. Moreover, Member State particularism should be avoided because it undermines the interests of the EU, and those of certain other Member States. Based on the CJEU jurisprudence, the chapter concluded that the principles of direct effect and supremacy support the argument that the principle of loyalty is legally binding.

Chapter IV examined Hungary's relationship with the EU from the beginning, focusing on the country's integration process and its priorities throughout the period. One of the aims of this chapter was to discover whether the conflict-seeking, particularist attitude of the post-2010 government was something completely new from 2010. The analysis found that traces of a realist, interest-maximizing behavior were already detectable in the 1990s. Those times were different nonetheless, because the focus on economic gains was coupled with a certain enthusiasm towards EU membership. After the disintegration of the Soviet Union, many in the Hungarian political elite assumed there was no viable alternative to the European Union. In fact, the pre-accession period can be divided into 2 phases, the 1990s and the few years preceding accession. The 1990s was characterized by an all-in strategy from the Hungarian political elite, when Hungary was willing to sacrifice everything for the sake of EU accession. A few years prior to accession, Hungary became more and more confident regarding its membership prospects and started articulating its national interests more openly, sometimes even against EU interests. The post-accession period can be divided into the conformist years until 2010 and the conflict-seeking period starting in 2010.

Chapter V provided a general analysis of Hungary's EU membership since 2010, focusing on the most important conflicts the country took up with Brussels. From political conflicts that did not escalate to higher levels, through infringement procedures and to the initiation of the Article 7 procedure by the European Parliament, the chapter presented a wide array of dialogues taking place between Hungary and the EU. During these dialogues, Hungary insisted on protecting its

sovereignty, while Brussels emphasized the importance of protecting European democracy and the rule of law. The post-2010 era was characterized by particularism and Hungary's relationship with the EU has become erratic. An openly hostile and EU-critical rhetoric was paired with general legal compliance. Certain domestic acts, however, were seen to pose a threat to the rule of law. This chapter also gave an introduction to the tools the EU has to stop rogue Member State behavior, finding that loyalty was not mentioned by any EU institution in their action against Hungary (Parliament resolutions, Sargentini Report etc.), even if the violation of Article 4(3) TEU could have been a valid argument in many cases. This chapter also revealed that while some government actions can be understood within the liberal intergovernmentalist framework of preference formation and small state studies, other cases fall outside the scope of this framework and can be considered as manifestations of rogue Member State behavior. Accordingly, they have symbolic importance that cannot be effectively controlled by the EU's current normative leverage.

Chapter VI analyzed the refugee crisis and demonstrated that the period after 2010 is not homogeneous either. Until, 2015, the Hungarian strategic climate was characterized by the discrepancy between an openly hostile rhetoric against Brussels applied by the political elite, and a general legal compliance that nevertheless remained. It was the refugee crisis in 2015 that brought a change in Hungary's strategy. Rather than being critical towards the EU in front of the Hungarian audience but complying in the background, Hungary became the biggest critique of Brussels in the policy of migration, which at the same time weakened Hungary's legal compliance as well. In fact, Hungary entertained leading ambitions as the protector of Christian Europe from refugees, an objective that makes sense as the strategy of norm entrepreneurship stipulated by small state theories. Accordingly, most actions of the Hungarian government in this policy area fell within the analytical framework of liberal intergovernmentalism and small state studies. However, the chapter also revealed that these theories were not always enough to provide an adequate explanation. In cases in which the EU's normative leverage was weak, rogue, symbolic Member State conduct became possible and Hungary took advantage of this.

The Hungarian EU strategy applied during the refugee crisis might create a dangerous precedent. It violated not only asylum law, but the Single European Market as well. The decision-making of EU Member States about how to reform the Dublin-system and the failure of the quota plan are perfect examples of how countries focus on their domestic interests and disregard the collective goals as suggested by liberal intergovernmentalism. Hungary was not

alone in following a particularist policy during the refugee crisis, but it was the most vocal Member State and thus became a norm advocate. The chapter showed that Hungary did not act in the spirit of loyalty or solidarity as understood by the Treaties, but it created its own interpretation of solidarity and the Hungarian governing elite referred to it several times (e.g. in erecting a border wall, thus protecting the borders of the EU, or closing transit zones immediately after the CJEU judgement). During the refugee crisis, Hungary did not only change its own asylum system in a way that is less favorable for asylum seekers, but it also blocked measures of solidarity from the EU's side. The chapter also highlighted that the principle of loyalty (Article 4(3) TEU) did not really appear in EU institutional guidelines or case-law as a guiding principle of Member State conduct.

Chapter VII examined the EU's citizenship regulations and Hungary's citizenship policy in an area that belongs to national competence. This means that as EU normativity is quite weak in this area, and citizenship policy is a major preference for Hungary (and presumably other Member States as well), symbolic elements and rogue Member State action are quite common in this policy area. A lot of Member States, including Hungary, follow questionable practices (e.g. the investor citizenship schemes) because the EU cannot prevent them from doing so. The EU does not like to interfere with the citizenship regulations of Member States, providing only guidelines to consider. This is an unfortunate practice from the EU's side, because the effects Member States' citizenship regulations might have on the EU as a whole (for instance labor market) are immense. It is interesting to see that Article 4(3) TEU came up more frequently in this policy area than in the case of the refugee crisis despite the fact that the latter is a shared competence between the EU and its Member States. Some institutions refer to the principle of loyalty in relation to Member State practices in citizenship policy, such as the CJEU in its decisions, or certain EP resolutions and briefings. Nevertheless, the chapter concluded that the EU should be more involved in the citizenship regulations of Member States because even though there is no loyalty requirement strictly attached to the concept of EU citizenship, some Member State practices would require the application of constitutional principles even in this policy area. This chapter also revealed that small states can turn possibilities provided by EU membership to their own benefits in certain policy areas.

The two cases studies of the thesis illustrated that even though the elected theoretical framework provided interesting insights of Hungary's policy towards the EU, some elements of the Member State's strategy (rogue behavior) could not be explained as they are driven not by

interests but by symbolic policy-making. This is an area in which Member States take advantage of the EU's normative deficit. The existence of the normative deficit of the EU is proven by the fact that some Member State actions cannot be treated as regular Member State conduct and the aspect of loyalty is completely missing from them.

This thesis examined the relationship between particularist Member State behavior and the constitutional principle of loyalty, through the example of Hungary's policy-making in the EU. It argued that this relationship is mostly determined by the coexistence (or overlap) of different national and EU commitments. The analysis tried to evaluate the Hungarian promotion of national interests manifesting in a particularist, autonomous behavior from the perspective of the constitutional principle of loyalty in the EU and found that it is liberal intergovernmentalism that provides the best explanation for Hungary's strategy, even if the theory is ill-equipped to account for certain symbolic Member State actions. The Hungarian strategy can be characterized as conflict-seeking, sovereignty-oriented, focusing on domestic political concerns. However, such a particularist behavior cannot always be justified if there is a normative frame forcing countries to act in a coordinated way. The thesis argued that the principle of loyalty suggests avoiding particularism because it undermines EU interests, including the interests of its Member States and even the rogue Member State.

The thesis can make general conclusions about small states within the EU. It argues that although small states have several different tactics within the EU to exert influence, they should choose their methods wisely. The thesis makes no claim to the effect that there is a new or distinct type of small state behavior. It did find nonetheless that norm advocacy is a useful tool in the policy-making arsenal of small countries in an international political setting. However, it should also be noted that legal compliance and observing constitutional principles remain imperative for small states, as *ad hoc*, erratic policy-making undermines trust, a factor of utmost importance in Member State cooperation within the EU. The case studies focusing on Hungary's strategy towards 'foreigners' in two different policy areas showed that Hungary violated the principle of loyalty in the EU, both in its refugee policy and citizenship policy regulations. However, the Hungarian strategy during the refugee crisis shows a more severe case of disrespecting the principle of sincere cooperation, with humanitarian aspects and potential violations of international law. Moreover, Hungary applied symbolic, rogue Member State tactics in both examined policy areas, acting as it did under the radar of a normatively weak and inefficient EU.

The thesis also tried to find out if disregarding the principle of loyalty, outside the area of foreign policy, has legal consequences and how it could be sanctioned. The case studies showed that the EU would have a wide array of possibilities to use the principle of loyalty as reference, but it does not always take advantage of its available tools to do so. Although the principle of loyalty was referred to a few times in the case of citizenship, it was not used as a strict, binding principle. In the case of migration, the situation is even more worrying, as EU institutions never used loyalty, mentioning solidarity only a number of times. This should definitely be changed, and the EU should be proactive and creative in the interpretation of the treaties. The CJEU cannot be the only institution that sometimes calls Member States to observe the principle of loyalty. Article 4(3) should be seen as a guiding principle defining Member State behavior and disregarding it in certain policy areas should be sanctioned by the EU. Moreover, Member States themselves should be more attentive of this principle, as well as to the purpose it serves within the EU. In case a Member State violates the principle, the EU should monitor it strictly.

There is potential in continuing this research in other policy areas, as it would provide more insight about the Member States' observation of the constitutional principle of loyalty. Testing the theories that the thesis used in other policy areas might also reveal the ways the EU could enforce loyalty more effectively.

Annex

Table 1

Pre-accession period		*1990s*	ALL-IN: Accession is a primary aim and Hungary does whatever it takes to facilitate EU accession.
		The last years before accession	GAINING CONFIDENCE: After accession becomes certain, maximizing national interests becomes priority, even if it goes against EU interests.
After Accession	Pre-2010 governments	*2004-2010*	CAUTIOUS FIRST STEPS: Membership is achieved, but the administration and politicians are still getting used to membership. Hungary acts as a small, insignificant Member State; compliance is characteristic in most areas, there are no serious conflicts. The Hungarian population is disenchanted in EU membership.
	Orbán-government	*2010-2015*	SHOWING THE TRUE COLORS: Government change. Defending national interest at all costs - 'the EU cannot dictate to us'. Difference between hostile domestic rhetoric and general legal compliance. Depicting Hungary as a competent Member State. Rogue, symbolic political behavior.
		2015-now	NORM ENTREPRENEUR: Refugee crisis as a game-changer. Hungary (and Orbán) as protector of a Europe from terrorists (the wall), Orbán as a promoter of a Europe of nations, national sovereignty, fighting for an intergovernmental Europe instead of a federal one. Taking up more and more legal conflicts with the EU.

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