CHAPTER 10

Does It Help to Call a Spade a Spade? Examining the Legal Bases and Effects of Rule of Law-Related Infringement Procedures Against Hungary

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1 Introduction

In view of the "rule of law crisis" (Reding 2013), politicians and scholars started discussing the EU's tools to defend the rule of law and democracy in its member states. This chapter focuses on one of these tools, the infringement procedure.

Scholars agree that infringement procedures are generally an effective instrument to induce compliance with EU Treaty obligations and secondary law (Börzel 2003). Whether they are also a suitable means to

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enforce the EU's foundational values and to combat rule of law backsliding in EU member states is, however, still contested. Some regard the instrument as "too narrow to address the structural problems" of backsliding (Scheppele 2016, p. 109), fearing that it forces the Commission to misconstrue rule of law problems as instances of non-compliance with EU secondary law (Pech and Kochenov 2019, p. 5). This would allow the targeted governments to downplay the severity of the problems at hand, react with minimal legal changes to satisfy the Commission's requirements and then proceed with their illiberal agenda. Some suggest that rule of law-related infringement procedures induce symbolic compliance at best (Batory 2016) and might even be counterproductive if the targeted governments succeed in framing the Commission's criticism as an illegitimate interference into domestic politics (Schlipphak and Treib 2016). Others, in contrast, are more sanguine, deeming infringement procedures a "powerful alternative" to the procedure under Article 7 of the Treaty on European Union (TEU) and expecting them to contribute to depoliticising conflicts concerning the rule of law (Schmidt and Bogdanowicz 2018, p. 1062). The Commission has also recently shown a renewed interest in the instrument, announcing that it would continue to use it in rule of law related cases (European Commission 2019b).

Our empirical knowledge about the deployment and actual effects of infringement proceedings in rule of law related cases is, however, still limited. So far, scholars have focused predominantly on the most prominent cases, while systematic studies are lacking. Thus, we do not know on what legal basis the Commission introduces these proceedings, whether it always refers to concrete breaches of EU secondary law as assumed in literature or whether it also cites more fundamental values. Furthermore, we lack knowledge about the targeted government's legal and public reactions. To contribute to closing this gap, we empirically examine all infringement procedures with rule of law significance launched against Hungary since 2010. Hungary is an ideal case to study since it has already faced seven rule of law-related infringement procedures. This relatively high number of cases enables us to examine the legal bases and effects of these proceedings and explore patterns over time.

The chapter is structured as follows. The next section briefly takes stock of research on infringement procedures and discusses the arguments for and against the deployment of this tool in rule of law related

cases. Section 3 examines the legal bases of the infringement procedures with rule of law relevance launched against Hungary since 2010, while Section 4 briefly sketches the Hungarian government's reactions. Section 5 is devoted to exploring the interplay between Brussels and Budapest over time. The concluding section summarises and discusses the main findings.

2 Infringement Procedures as an Instrument Against Rule of Law Backsliding in EU Member States?

The meaning of the rule of law is notoriously contested (see Chapter 9). A thin concept simply equates the rule *of* law with the rule *by* law. More common are thicker concepts relating the rule of law to checks and balances, the independence of the judiciary as well as the guarantee of basic human rights (Merkel 2012). It is exactly these principles that are being systematically attacked in Hungary. Since Fidesz and its coalition partner KDNP won a two-thirds majority in parliament in 2010, the country's constitutional order has been changed dramatically. The government has centralised power within the executive, turned the National Assembly into a rubber-stamp parliament and considerably weakened the Constitutional Court. Besides, it adopted an electoral law designed to favour Fidesz and passed several laws to strengthen the government's influence over the media and to curb the activities of civil society organisations (Ágh 2018; Priebus 2016). As a result, the former democratisation frontrunner is considered a prime example of rule of law backsliding[1] or even autocratisation (see Chapter 12). Against this backdrop, and in view of similar developments in other member states, a growing body of research discusses the EU's political and legal tools to tackle backsliding in its member states.

Compared to other tools, such as the "nuclear option" of Article 7 TEU, the infringement procedure has several advantages. Most notably, its decisional thresholds are much lower and the defiant member states

[1] Rule of law backsliding is defined as the process "through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party" (Pech and Scheppele 2017, p. 10).

enjoy "a full set of procedural guarantees and rights" (Schmidt and Bogdanowicz 2018, p. 1065). The procedure starts with informal consultations between the Commission and the state suspected of violating EU rules. Then, the Commission can send a "letter of formal notice" to the member state concerned. If dissatisfied with the reaction to the letter, it can give a "reasoned opinion", and, if non-compliance prevails, bring the case before the Court of Justice of the European Union (CJEU). Relying on informal consultations and persuasion, the Commission usually tries to tackle non-compliance in the early stages of the procedure and avoids open conflicts with non-complying member states (Closa 2019). In fact, the vast amount of cases are settled in the early stages of the procedure (Börzel 2003, p. 207), showing that the Commission's enforcement actions are generally quite effective in inducing compliance with EU law (Panke 2010).

Infringement procedures can be initiated by the Commission if it "considers that a member state has failed to fulfil an obligation under the Treaties" (Article 258 TFEU). The Commission must base its proceeding on clear legal EU norms. The EU's foundational values of democracy and the rule of law, however, are legally undetermined as Article 2 TEU mentions but does not further specify these terms (Magen 2016, p. 1051; Müller 2015, p. 147). This does not mean that the EU's foundational values are explicitly excluded from the supervisory remit of the Commission (Hillion 2016). Yet, as these values do not provide a clear legal basis for their enforcement, the Commission has to look for a "more technical but more clearly established legal basis to prosecute the action" (Blauberger and Kelemen 2016, p. 325).

Whether the resulting indirect and piecemeal approach can restrain backsliding is questionable. As also stressed by the Commission, it is only a viable route when the concerns of the rule of law at hand "constitute, at the same time, a breach of a specific provision of EU law" (European Commission 2014, p. 5). Besides, critics underline that it misconstrues or miscategorises the problems at hand. Broader backsliding tendencies are not named as such but are reframed by the Commission as concrete breaches of EU law in individual proceedings (Scheppele 2016). This enables backsliding governments to respond "satisfactorily to the outstanding complaints without having to change anything essential about its illiberal reforms" (Jenne and Mudde 2012, p. 150). Others even posit that the targeted governments merely engage in symbolic

compliance and simply create the appearance of norm-conform behaviour (Batory 2016).

Besides, scholars debate how rule of law-related infringement procedures can be rhetorically exploited. Some contend that if the Commission sues backsliding states on more technical grounds and reframes rule of law problems as breaches of secondary law, it allows backsliding governments to downplay the actual conflicts by publicly presenting rule of law related problems as ordinary compliance difficulties (Jenne and Mudde 2012). Some scholars, therefore, suggest that the Commission should engage in systemic infringement actions and bundle "a group of specific violations together" (Scheppele 2016, p. 107) to highlight the systemic and persistent character of rule of law backsliding. Then, cases would not be miscategorised, providing the Commission with "greater options and a clearer message of response to rule of law backsliding" (Pech and Kochenov 2019, p. 5). Others, moreover, warn that rule of law-related infringement procedures might invite the errant governments to play a "blame game" (Schlipphak and Treib 2016). Governments could frame any EU intervention as a politically motivated, illegitimate interference "in policies beyond the remit established by the EU Treaties" (Dawson and Muir 2012, p. 473) and themselves as defenders of their nation, which, as a consequence, could alienate citizens from the EU. Whether governments really succeed with these strategies is doubted by others. Highlighting the high levels of public trust in the Commission and the CJEU, they suggest that infringement procedures might be welcomed by citizens and help to depoliticise current conflicts over the rule of law (Blauberger and Kelemen 2016; Schmidt and Bogdanowicz 2018).

In short, the concrete effects of infringement procedures as instruments against democratic backsliding remain unclear. Up until now, scholars have mainly focused on the most prominent infringement procedure (which addressed the lowering of the retirement age of judges) and generally concluded that infringement procedures are ineffective in remedying rule of law problems (Müller 2015; Scheppele 2016). Systematic empirical studies on the deployment and the legal effects of infringement procedures in all cases with rule of law relevance as well as on the government's communication in these cases are still lacking (see Szente 2017 for an exception). This chapter contributes to fill this gap by analysing all rule of law-related infringement procedures launched against Hungary since 2010 (see Table 1). So far, studies on Hungary have identified six

Table 1 Rule of law-related infringement procedures against Hungary. *Source* authors' compilation

No.	*Beginning IP*[a]	*Subject triggering IP*
1	12/2010[b]	Title: Media legislation Trigger: Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content + Act CLXXXV of 2010 on Media Services and Mass Media
2	01/2012	Title: Independence of Central Bank Trigger: Fundamental Law of Hungary + Act CCVIII of 2011 on the Hungarian National Bank
3	01/2012	Title: Independence of Judiciary: Retirement age of judges, prosecutors and public notaries Trigger: Fundamental Law of Hungary
4	01/2012	Title: Violation of Independence of Data Protection Supervisory Authority Trigger: Fundamental Law of Hungary
5	04/2017	Title: Violation of EU law by amendments to the Hungarian Higher Education Law Trigger: Act XXV of 2017 ("Lex CEU")
6	07/2017	Title: Violation of EU law by the Act on the Transparency of Organisations Supported from Abroad Trigger: Act LXXVI of 2017 ("NGO-law")
7	07/2018	Title: Violation of EU law by means of the Act VI of 2018 amending certain acts with respect to measures against illegal immigration and the 7th amendment to the Fundamental Law of Hungary Trigger: 7th Amendment to Fundamental Law of Hungary ("Stop-Soros") Act No VI of 2018

[a]Date of letter of formal notice

[b]This case was closed before a letter of formal notice was issued. We take the letter written by then-commissioner Neelie Kroes to the Hungarian government as the starting date

such cases; we additionally consider another recent case, the infringement procedure launched against the so-called "Stop Soros" legislation.

Drawing on Commission press releases and public statements of Commissioners, we first examine the legal basis referred to by the Commission when starting infringement action in rule of law related cases. In particular, we analyse whether the Commission bases its infringement actions solely on "technical" Treaty obligations and secondary law or if it also refers to the rule of law or other fundamental values connected to it. Besides, using a database of Hungarian legislation (https://net.jogtar.hu) as well as the Official Gazette of Hungary (*Magyar Közlöny*),

we analyse Hungary's legal reactions to these infringement procedures. Furthermore, we take a closer look at the government's public reactions, relying on official press releases, summaries of government members' public appearances and full transcripts or summaries of interviews with government members issued within two weeks after each Commission's announcement of action against Hungary and published on the government's official website.

3 Miscategorising the Problems? The Legal Bases of Rule of Law-Related Infringement Action

In all cases under examination, the Commission did not refer directly to Article 2 TEU, the EU's foundational values of democracy or the rule of law, but based its infringement actions on other EU law violations (see Table 2 in the Appendix for an overview). In most cases, however, it complemented technical references to breaches of Treaty provisions and secondary law with references to the Charter of Fundamental Rights of the European Union (CFR).

In this vein, the Commission framed the media legislation package of 2010 (case 1) primarily as an incorrect transposition of the EU's Audiovisual Media Services directive, but also stressed that "fundamental media freedoms such as freedom of expression and media pluralism" as enshrined in Article 11 of the CFR were endangered (European Commission 2011; Kroes 2011). This was in line with general criticism voiced by observers that the media legislation threatened the freedom of the press by establishing a politically biased Media Council, altering appointment procedures to ensure political influence on the public broadcasting service and demanding "balanced coverage" (Polyák 2015; Várnagy 2011).

Similarly, in the infringement procedure triggered by the restructuring of the Hungarian ombudsmen system (case 4), the Commission referred to both violations of secondary law and CFR provisions. Noting that the former data protection ombudsman's functions had been transferred to a new agency without the former guarantees of independence (Bánkuti et al. 2012, p. 266) and that the incumbent ombudsman for data protection had been prematurely removed from its office, the Commission argued that these provisions violated Article 16 of TFEU as well as Directive 95/46/EC codifying the EU rules on data protection. Additionally, it referred to Article 8 of the CFR guaranteeing the independence of data protection supervisors (European Commission 2012a).

In the case of the Lex CEU (case 5), which changed the rules for non-Hungarian universities and obviously targeted the private Central European University (CEU) founded by George Soros, the Commission primarily referred to violations of internal market principles. It argued that the law was incompatible with the freedom to provide services and the freedom of establishment as enshrined in Articles 56 and 49 TFEU, respectively, as well as in Directive 2006/123/EC on services in the internal market. At the same time, it also stressed violations of Articles 13, 14 and 16 of the CFR, namely academic freedom, the right to education and the freedom to conduct a business (European Commission 2017b).

Also in case 6, the infringement procedure launched in reaction to the "NGO law" (Act LXXVI of 2017 on the Transparency of the Organisations Supported from Abroad), the Commission communicated that it saw several fundamental principles of the CFR violated. The new legislation obliges NGOs receiving over 7.2 million HUF (about 24,000 Euros) per year from abroad to be registered by a court and to be officially labelled as "organisations supported from abroad" in any publications and on their websites. As for the Commission, this does not only constitute a violation of the free movement of capital, but also of the freedom of association as well as the rights to protection of private life and personal data (European Commission 2017c).

Reacting to the "Stop Soros" legislation (case 7), which further intensified pressure on civil society organisations by specifying that organisations or people who "support or promote illegal immigration" (Act VI of 2018, § 11) can be sanctioned with up to one year of imprisonment or even expulsion from the country, the Commission identified a violation of the Asylum Procedure Directive and the Reception Conditions Directive, a breach of Articles 20 and 21 (1) TFEU as well as the Free Movement Directive and the Asylum Qualifications Directive. Yet, just as in the aforementioned infringement procedures, it also saw a violation of the CFR, as the "Stop Soros" legislation introduced new non-admissibility grounds for asylum applications not regulated by EU law, thus restricting the right to asylum guaranteed in Article 18 (European Commission 2018).

In only two cases did the Commission frame rule of law related concerns solely as breaches of concrete Treaty obligations and secondary law. In the case of the Hungarian National Bank (case 2), an infringement procedure was launched because the new Hungarian Constitution in connection with Act CCVIII of 2011 on the Hungarian National Bank had introduced several provisions threatening its independence.

The Commission justified the infringement action by referring to Article 130 TFEU on the full independence of the national central banks and to Article 127(4) requiring consultation with the ECB "on any draft legislative provision in its field of competence" (European Commission 2012a). In the case of the lowering of the judges', prosecutors' and public notaries' retirement age (case 3), which caused the premature retirement of several hundred judges, enabling the government to fill vacant positions with new and loyal candidates (Scheppele 2016, p. 109), the Commission framed the obviously politically motivated replacement of judges exclusively as a breach of Directive 2000/78/EC on equal treatment in employment, which prohibits age discrimination in the workplace (European Commission 2012a). In this case, rule of law related concerns were treated as a matter of age discrimination.

Overall, this demonstrates that even though the Commission did not justify the rule of law-related infringement procedures with violations of the rule of law or democracy as such, and even though it never directly mentioned Article 2 TEU, it also did not simply miscategorise the underlying problems by presenting them as being only breaches of technical legislation. Instead, in most of the cases, it stressed various rights and freedoms constitutive of a democracy, such as the freedom of expression and information (case 1), the freedom of assembly and association (case 6), the right to protection of personal data (cases 4 and 6) and academic freedom as well as the right to education (case 5). Obviously, the Commission made a clear effort to link its rule of law concerns to fundamental democratic prerequisites.

4 From Limited Cooperation to Resistance: The Hungarian Government's Reactions to Rule of Law-Related Infringement Procedures

The Hungarian government's reactions to rule of law-related infringement procedures underwent a fundamental change, both in substance and rhetoric. In the beginning, the government presented the infringement procedures as regular, policy-related procedures addressing ordinary transposition problems. It stressed that the Commission never directly referred to fundamental values or rule of law problems (Hungarian Government 2011) and reasoned that there was no conflict concerning

fundamental values such as the freedom of the press or the independence of the judiciary (Hungarian Government 2012a, b). Disagreements between Brussels and Budapest were explained in terms of differing perspectives on compliance problems, e.g. that the former saw the retirement age of judges as a judicial matter while the latter viewed it as a matter of pensions policy (Hungarian Government 2012d; Orbán 2012). The government underlined that apart from these slightly differing interpretations and smaller technical problems, the Hungarian legislation was overall compatible with EU law and that it just had to be properly explained to the Commission. In this vein, it framed the infringement procedures as a chance for dialogue and an opportunity to resolve conflicts (Hungarian Government 2012a, b). It also displayed its optimism regarding the Commission's "objective, impartial evaluation, which excludes double standards and is founded on a judicial and professional basis"[2] (Hungarian Government 2012c). Last but not least, it stressed Hungary's willingness to comply with the Commission's requirements and CJEU rulings (Hungarian Government 2012a, c).

In accordance with these conciliatory public statements, the Hungarian government changed some parts of the new media legislation package after bilateral talks and enacted these changes through Act XIX of 2011. It also complied with the Commission requirements in case 3, but only after a ruling by the CJEU had confirmed the Commission's position (EU:C:2012:687). In reaction to the Commission's criticism, Act XX of 2013 re-increased the judges', notaries' and public prosecutors' retirement age gradually to 65 within ten years and also made provisions for reinstating unlawfully dismissed judges unless the position had not been filled yet. In these cases, the former judges should be entitled to financial compensation. Measured solely against the Commission's concrete requirements, these two infringement procedures induced complete compliance.

In contrast, the government's reaction in the cases of the National Bank and of the independence of the data protection authority were mixed, yielding only partial compliance with the Commission's requirements. The Hungarian government deleted some provisions that would have curtailed the National Bank's independence but did not withdraw the criticised changes in the governor's remuneration scheme. Despite

[2] All quotes are own translations.

this obvious partial compliance, the infringement procedure was closed in April 2012 even before the legislative changes were enacted (European Commission 2012b). The government's legal reaction to the infringement procedure on the independence of the data protection authority provides another example of partial compliance. The government changed the dismissal rules, but left the issue of the data protection ombudsman unresolved. Even though the Commission's position had been confirmed by the CJEU in April 2014 (EU:C:2014:237), the former ombudsman András Jóri was not reinstated, but only given financial compensation. Nevertheless, the Commission silently closed the case in October 2014.

In all four cases mentioned above, however, the underlying rule of law problems have not been resolved. Despite the changes to the media legislation, the government's direct influence on the public broadcasting service has been maintained, as the Media Council's composition remained unchanged. As a result of this direct political influence, independent or left-leaning media were put under severe financial pressure, while a new government-friendly media staffed with public money was established (Várnagy 2017, p. 127). The National Bank's independence has also been severely jeopardised. By appointing the minister of economics György Matolcsy as new governor in 2013, the government managed to install a Fidesz-loyalist as head of the bank (Buckley and Kester 2013), thus ensuring government control despite the legislative changes made in response to the infringement procedure. The same year, the fifth amendment to the constitution merged the Central Bank with the Financial Supervisory Authority, increasing the government's influence on financial and monetary matters. Concerning the independence of the judiciary, the altered legislation remained rather ineffective in practice as the majority of positions had already been filled by then. Many judges, especially in high-ranking positions, therefore, could not return to their former positions. While formally complying with the Commission's requirements, the Hungarian government could still at least partly realise its objective of filling positions with new judges (Scheppele 2016, p. 109f.).

The communication on cases 5, 6 and 7, in contrast, was highly confrontational, with the government showing hardly any inclination of cooperation or willingness to comply with the Commission's demands. Increasingly, it presented the rule of law-related infringement procedures as political attacks on Hungary due to its resistance against migrants and the EU's migration policy (Orbán 2017a, b). Especially in cases 5 and 6, the government linked the two rule of law-related infringement

procedures with two asylum related infringement procedures launched in parallel (see the contribution of Beger in this volume). Reacting to the infringement procedure on the "Stop Soros" package, the government's spokesman put forth that "those who protect Europe are punished while those who send for migrants are praised" (Hungarian Government 2018). Besides, from case 5 onwards, the alleged prominent role of Soros in orchestrating migration across Europe, the "Soros plan", became the government's dominant narrative. As the Prime Minister explained in summer 2017, "bureaucrats of Brussels want to take revenge on Hungary" as the country "is doing its job, is protecting its borders, is defending its citizens" (Orbán 2017a). He added that the bureaucrats "play by Soros's music. There is a Soros plan" (Orbán 2017b). Now, Soros's name figured in almost all public statements on the rule of law-related infringement procedures. EU institutions were repeatedly depicted as being infiltrated by "Soros's people" and, therefore, as acting according to his plan. As the Secretary of State for Justice argued, "according to leaked data, George Soros has more than 200 reliable people in the European Parliament alone" (Völner 2017a; also Völner 2017b). Orbán argued similarly that "Brussels is under his influence" and that the "Brussels machinery is executing his plan" (Orbán 2017c). In short, all rule of law-related infringement procedures after 2015 were officially depicted as Soros's "revenge" executed by EU institutions: "We see that the issue of the university, the issue of the 'fake civil society organisations' […] as well as the issue of quotas lead us to one person called George Soros" (Orbán 2017d). The government has not changed this line of reasoning since; rule of law related criticism by EU actors is regularly depicted as an act to punish Hungary for its migration policy (Hungarian Government 2019; Varga 2019).

In line with its public rhetoric, the Hungarian government refused to change the objectionable legislation even slightly and let the Commission refer them to the CJEU. Regarding the Lex CEU, it insisted that there was no necessity to change the law (Hungarian Government 2017). The complaint against the "Lex CEU" was therefore lodged before the CJEU in December 2017. Similarly, in the case of the NGO law, the Hungarian government did not implement any changes after the Commission's letter of formal notice and its reasoned opinion. Orbán called the Commission's criticism "ridiculous" and far-fetched, saying that an "intelligent lawyer" would not even touch the Commission's document (Orbán 2017c). Therefore, this case was also referred to the CJEU in December 2017

(European Commission 2017d), being without a ruling thus far. In the so-called Stop Soros case, the Hungarian government not only insisted on its position, rejecting legislative changes even if the case was referred to the CJEU (Hungarian Government 2017; Völner 2017b), the Prime Minister also proclaimed that the Hungarian government was not paying much attention to the matter, as due to the upcoming EP elections, the Commission's days were numbered (Orbán 2018). As a consequence, the Commission referred the case to the Court in July 2019, where it awaits its ruling.

5 Escalation and Learning Effects: The Interplay Between Brussels and Budapest Since 2010

As demonstrated above, the limited cooperative stance of the Hungarian government between 2010 and 2013 has turned into grim resistance. While the first four rule of law-related infringement procedures were at least partly successful in legal terms, the last three procedures met fierce opposition. Starting with case 5 in 2017, the Hungarian government has decidedly refused to even slightly change the provisions violating EU law, causing the referral of all cases to the CJEU.[3]

It seems that during this ongoing escalation of conflicts, the Hungarian government's increasingly confrontational stance in the rule of law related cases led the Commission to reconsider its conventional approach of conflict avoidance. In line with previous studies, cases 2 and 4 demonstrate that the Commission first avoided going through all the stages of the infringement procedure. Despite the obvious partial compliance, it closed both cases and did not bring them before the court. However, this hesitant position yielded adverse effects. First, it gave the Hungarian government the chance to downplay the rule of law problems. As the cases were officially closed, it could argue that it had "a confirmation of our freedom of the press being okay, our media regulations being

[3] Hungary's overall compliance record has not deteriorated and referrals to the court remain an exception as a closer look at all infringement procedures launched against Hungary since 2010 reveals European Commission (2020). This corroborates earlier findings. Scholars have repeatedly pointed out that the new member states comply even better with EU law than the older member states (Börzel and Sedelmeier 2017). While the EU's influence on "hot topics" decreases, the member states' compliance performance in less controversial areas remains strong (Grabbe 2014, p. 42; see also Schimmelfennig and Sedelmeier 2019).

okay, our electoral law being okay, our constitution being okay" (Orbán 2017d). Similarly, and despite the ongoing deterioration of the media situation which resulted in the "effective take-over of once-independent media" (Joint International Press Freedom Mission 2019), the Secretary of State for International Communication and Relations Zoltán Kovács recently claimed, "if there's a country that holds a certificate showing that its media regulatory system conforms to EU law, it's Hungary" (Kovács 2019).

Secondly, it became obvious that governments can use the long time span between the lodging of a complaint and the court ruling to buy time and meanwhile continue to dismantle democracy and the rule of law. The Lex CEU is just one case in point. When the Hungarian Parliament adopted the law, the Commission acted swiftly and more decisively than before, sending a letter of formal notice to Budapest in April, just a few days after the adoption, followed by a reasoned opinion in July and a referral to the Court in December that year (European Commission 2017a, b, d). Since then, the court ruling is pending, while the government has achieved its goal of driving the university out of the country. Although the CEU fulfilled the new requirements for foreign universities, the government did not sign the document that would have allowed the university to run a campus in Budapest. In response, the university partly moved to Vienna (Bárd 2018).

Obviously responding to these adverse effects of recent rule of law-related infringement procedures (and without doubt also inspired by the Polish experience), the Commission has announced its intention to deploy the instrument in a more decisive manner and to pursue a "strategic approach". According to the Commission, this strategic approach includes the request for expedited proceedings and interim measures "whenever necessary" (European Commission 2019a). This resonates with scholarly opinions according to which the Commission should "explore the untapped potential of increasing and interconnected infringement actions" (see also Bárd and Śledzińska-Simon 2019; Pech and Kochenov 2019, p. 5).

In addition, the Commission declared that it will "further build on the recent case law of the Court" (European Commission 2019b). In fact, case law is an important source to further determine the meaning of the EU's foundational values and thus to make it a legal basis for rule of law-related infringement procedures. For example, with Case C-64/16, the CJEU developed clear yardsticks to assess the independence of the

judiciary in EU member states. This might further reduce the risk of miscategorising rule of law problems.

6 Conclusion

To contribute to the burgeoning body of research on the EU's tools against rule of law backsliding, this chapter has set out to systematically analyse all rule of law-related infringement procedures launched against Hungary since 2010. Our analysis reveals that even though the Commission did not once directly refer to democracy and the rule of law as enshrined in Article 2 TEU, it did not simply miscategorise the rule of law problems as ordinary instances of non-compliance either. In most of the cases, it referred to fundamental democratic prerequisites, namely rights and freedoms incorporated in the Charter of Fundamental Rights of the European Union.

Secondly, in all cases under investigation, the Hungarian government downplayed the Commission's rule of law concerns. In early cases, it repeatedly talked down the severity of the Commission's complaints by presenting conflicts with Brussels as differences of opinion on technical problems. In later cases, it did so by playing a blame game and adopting a victim narrative, according to which the EU was infiltrated by "Soros people" and going against Hungary because it wanted to punish the country for its restrictive asylum policy. This demonstrates that despite their legal character and formalised procedures, infringement procedures could not contribute to depoliticising the conflicts and thereby ease the strained relations between Budapest and Brussels. On the contrary, as things currently stand, the rule of law-related infringement procedures obviously bear the risk of politicising the judiciary by bringing highly controversial conflicts before the CJEU. It remains to be seen how Hungary will react to the CJEU judgements on the Lex CEU, the NGO law and the "Stop Soros" package.

Thirdly, especially the Hungarian government's open resistance in the last three cases casts doubt on the premise that the correct identification of rule of law and democracy problems could induce compliance with the Commission's requirements. These cases clearly demonstrate that the most important prerequisite for the procedures' effectiveness is the targeted government's willingness to comply. If this is lacking, the categorisation of cases—references to fundamental rights such as freedom of association, academic freedom and the right to asylum—cannot make a

difference. Nevertheless, the Commission seems determined to draw on recent case law and to establish a clearer link to the rule of law in future cases.[4]

Last but not least, our findings cast doubt on the suitability of another prominent suggestion, namely the creation of a new neutral institution or a "committee of independent experts" (Weber and Di Fabio 2019) as a "democracy watchdog" (Müller 2015, p. 143). If the Commission, the guardian of the treaties, is systematically presented as an agent of Soros, and if its infringement procedures are systematically framed by the Hungarian government as political attacks, there is no reason to expect that the same fate would not befall a new institution of neutral experts.[5] The same seems true for systemic infringement procedures. While they enable the Commission to approach rule of law problems more systematically, they seem to be even more prone to politicisation and blame games by governments. By starting systemic infringement procedures, the Commission would focus exclusively on the rule of law as well as democracy issues, and the targeted government could easily present these as systematically orchestrated political attacks.

Overall, our analysis shows that the infringement procedures as a legal instrument against rule of law backsliding are not only futile but even counterproductive. It furthermore casts doubt on the premise that a proper application of the instrument will make a difference and yield the desired effects.

Appendix

[4] For a critical discussion of this, see Chapter 14.

[5] For the potential of supporting NGOs as watchdogs of democracy and EU membership, see Chapter 11.

Table 2 Rule of law-related infringement procedures launched against Hungary since 2010—trigger, the Commission's critique and Hungary's legal reactions. *Source* authors' compilation

	Content of legislation triggering infringement procedure	*Legal grounds of infringement procedures and Commission's critique*	*Hungary's legal reactions*
Case 1	Merger of National Telecommunications Authority with National Radio and Television Commission into National Media and Infocommunications Authority (NMHH), whose president is appointed by the President of the State for 9 years. Establishment of Media Council (MT), responsible for media content regulation. MT-Members elected with 2/3-majority in parliament; NMHH president can also be MT president Regulation of media content and broadcasting services obliges media services to be registered by the NMHH, contains a vague obligation to balanced coverage, eases the rules concerning the protection of information sources and establishes penalties for offenders of the regulations. Institution in control of the application of the regulations is the MT	Incorrect transposition of the EU's Audiovisual Media Services Directive; violation of Article 11 of the Charter of Fundamental Rights of the EU (CFR) Commissioner Kroes (2011) criticised that the requirement of balanced coverage also applied to on-demand services; that the country of origin principle was violated as new provisions applied to media firms established in other member states; that compulsory registration of all media services (including on-demand services) before starting to broadcast violated the freedom of establishment; that the provision according to which media content may not "cause offence" was too vague. She also stressed that the legislation threatened the "freedom of expression and media pluralism" (European Commission 2011)	After bilateral talks in February 2011, both sides agreed that on-demand services would be explicitly excluded from the balanced coverage provision; that media providers established in other member states could not be fined for violating Hungarian media provisions; that instead of a prior registration, a registration within 60 days after the beginning of operation would be mandatory; and that the scope of the provision on "causing offence" would be clarified, limiting it to situations of incitement to hatred or discrimination (European Commission 2011). Act XIX of 2011 adopted in March 2011 enacted these changes

(continued)

Table 2 (continued)

	Content of legislation triggering infringement procedure	*Legal grounds of infringement procedures and Commission's critique*	*Hungary's legal reactions*
Case 2	Introduction of a clause to merge the National Bank (NB) with the Financial Supervisory Authority. Furthermore, new regulations strengthening the executive's influence on the NB's decision-making: responsible ministers can participate in Monetary Council (MC) meetings; the NB is obliged to send meeting agendas to the government in advance. Rule changes for the dismissal of the governor and MC members: the Prime Minister can ask the President of the State to dismiss them on vague grounds. Immediate reduction of the governor's remuneration According to observers, changes were introduced because the NB had not supported the government's economic and financial policy (Szente 2017, 466)	Violation of Article 130 TFEU and Article 127(4) Commission criticised that the possible merger of the NB with the Financial Supervisory Authority would degrade the NB governor to a mere deputy chairman; that the participation of ministers in MC meetings and the government's prior notification of the agenda would enable the government to influence the NB from within; that the changes in the remuneration scheme for the Governor were immediately applicable to the incumbent; that the rules of dismissal for the Governor and MC members were prone to political interference. In effect, all measures were deemed to strengthen the executive's influence on the NB (European Commission 2012a)	The first amendment to the new Fundamental Law deleted the provision on the merger of the NB with the Financial Supervisory Authority. Furthermore, an amendment to the Act on the National Bank (Act XCIX of 2012) abandoned the minister's right to participate in meetings as well as the obligation to send meeting agendas to the government in advance. The amendment also redesigned the rules for the dismissal of MC members, so as to limit the parliament's basically unrestricted discretion to dismiss members for vague reasons. Changes in the governor's remuneration scheme were not withdrawn

	Content of legislation triggering infringement procedure	*Legal grounds of infringement procedures and Commission's critique*	*Hungary's legal reactions*
Case 3	Lowering of the judges', prosecutors' and public notaries' retirement age from 70 to 62. Establishment of a new National Judicial Council (NJC), whose president is elected by a 2/3-majority in parliament and has far reaching competences, i.e. transfer of cases to any court, selection of new judges and of court presidents (Sonnevend et al. 2015, pp. 99–102). Renaming of the Supreme Court (SC) to Kúria Reforms enabled the government to fill hundreds of positions with new judges (Szente 2017, p. 466). The concentration of powers in the NJC president's hand was seen as a threat to the independence of the judiciary (Venice Commission 2012). The renaming of the SC entailed premature termination of the SC president's mandate	Breach of Directive 2000/78/EC on equal treatment in employment, prohibiting age discrimination at the workplace The Commission additionally criticised the premature termination of the former SC president's mandate and demanded further information on the new NJC president's strong powers (European Commission 2012a)	The Hungarian parliament enacted Act XX of 2013, which re-increased the judges', notaries' and public prosecutors' retirement age to 65 within ten years. It also provided for reinstating unlawfully dismissed judges unless the position had not yet been filled

(continued)

Table 2 (continued)

	Content of legislation triggering infringement procedure	*Legal grounds of infringement procedures and Commission's critique*	*Hungary's legal reactions*
Case 4	Replacement of the existing ombudsman system (four specialised ombudsmen for civil rights, data protection, national and ethnic minorities and future generations) with one general ombudsman and mere deputies. Restructuring put the incumbent data protection ombudsman's six-year term prematurely to an end. Delegation of data protection to the National Agency for Data Protection, controlled by the government	Violation of Article 16 TFEU and Directive 95/46/EC on data protection and of Article 8 CFR on the right to the protection of personal data. The Commission was specifically concerned about the new agency's independence as the agency's head could be dismissed by the Prime Minister and the President of the State on arbitrary grounds. It also criticised that the incumbent data protection ombudsman's six-year term was prematurely put to an end (European Commission 2012a)	The Hungarian government changed the dismissal rules through Act XXV of 2012, but left the issue of the data protection ombudsman unresolved. The Commission referred the matter to the CJEU (European Commission 2012b). Although the court confirmed the Commission's position (EU:C:2014:237), the former ombudsman András Jóri was not reinstated, but only given financial compensation
Case 5	Reform of rules for Non-Hungarian universities. Study programmes may be offered in Hungary with certified degrees only if (1) the operation is based on an international agreement between Hungary and the country of origin, (2) the university is accredited and running a campus in its home country, and (3) the university's terms of operation are stipulated in a treaty between the Hungarian government and the (federal) government of the university's home country. Additional modifications of name requirements and work permits The amendment was clearly targeted at the Central European University (Bárd 2018)	Violation of the freedom to provide services as enshrined in Article 56 TFEU and Article 16 of Directive 2006/123/EC on services in the internal market, of the freedom of establishment laid down in Article 49 TFEU and Articles 9, 10, 13, 14 of Directive 2006/123/EC. Breach of Articles 13, 14, 16 of the CFR (right of academic freedom, right to education and freedom to conduct a business)	The Hungarian government insisted that there was no necessity to change the legislation (Hungarian Government 2017)

	Content of legislation triggering infringement procedure	*Legal grounds of infringement procedures and Commission's critique*	*Hungary's legal reactions*
Case 6	Reform of rules on NGOs. NGOs receiving over 7.2 million HUF (about 24,000 Euros) per year from abroad have to be registered by a court and be officially labelled as "organisations supported from abroad" in any publications and on their websites. Non-compliance leads to financial penalties or dissolution of respective NGOs	Violations of several fundamental CFR principles, especially the right to freedom of association. Breach or disproportional restriction of the right of free movement of capital as enshrined in the TFEU. The Commission also saw the right to protection of private life and of personal data endangered, as Hungarian authorities would receive and spread detailed information about the donors (European Commission 2017c)	The Hungarian government did not implement any changes
Case 7	New constitutional amendment restricts right to asylum. Asylum seekers coming to Hungary via a country where they are not exposed to persecution or the direct threat of persecution are no longer entitled to asylum in Hungary Organisations or people who "support or promote illegal immigration" (§ 11) can be sanctioned with up to one year of imprisonment or expulsion from the country (Act VI of 2018) The act was clearly targeted at organisations supported by George Soros	Violation of Asylum Procedure Directive and the Reception Conditions Directive. Breach of Articles 20 and 21 (1) TFEU as the package "unduly restricts the exercise of free movement rights of EU citizens without due regard for procedural guarantees or for the rights of the people affected" as well as the Free Movement Directive and the CFR. It also was a violation of the Asylum Qualifications Directive and the CFR (European Commission 2018)	The Hungarian government did not implement any changes

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