

## Article

# Protecting Asylum Seekers and Migrants in the Context of the Rule of Law Crisis in EU Member States: The Recent Approach of the Court of Justice of the EU through the Lens of the Global Compacts on Refugees and Migration

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**Abstract:** In recent times, the CJEU has started to develop its judicial response to the “rule of law crisis” in some Member States. On the one hand, this new trend has emerged also as a reaction to some national reforms concerning asylum and migration law. On the other hand, the CJEU in protecting the EU founding values has deployed its “traditional” competences attributed to it by the EU Treaties, namely the mechanisms of the preliminary ruling procedure and the infringement procedure. Against this background, this contribution aims at investigating this new CJEU’s jurisprudence through the lens of the Global Compacts on Refugees and Migration. This will lead us to reflect on how the CJEU’s caselaw could be seen as an effective tool to enhance the rule of law and protect third-country nationals, at least within the EU, and indirectly contributes to increasing compliance with some of the commitments laid down in the Global Compacts, regardless of the position taken by some recalcitrant EU Member States with respect to these documents.



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## 1. Introduction

The adoption of the Global Compact for Safe, Orderly and Regular Migration (GCM) and of the Global Compact on Refugees (GCR) in December 2018 within the framework laid down by the United Nations (UN) General Assembly in the New York Declaration for Refugees and Migrants of 19 September 2016 (New York Declaration), has been considered as the first attempt of the world’s governments to give a comprehensive response to the question of large movements of refugees and migrants, “who move for different reasons but who may use similar routes” ([New York Declaration 2016](#), para. 6).

The two Global Compacts (GCs or Compacts) set forth a series of political commitments, which touch upon different aspects of this growing global phenomenon of international migration. In particular, while the GCR focuses on providing “a basis for predictable and equitable burden and responsibility-sharing among the UN Member States” ([GCR 2018](#), para. 3) together with other relevant stakeholders, the GCM “offers a 360-degree vision of international migration”, fostering international cooperation among all relevant actors on migration, “acknowledging that no State can address migration alone” ([GCM 2018](#), para. 11). The general purposes foreseen in the Compacts are then detailed in more specific objectives and actions. Against this background, the protection of the crosscutting and guiding principle of the rule of law by the parties should be considered as an objective but also as a *pre-condition* to the achievement of the goals laid down in the Compacts. Only a State with strong checks and balances, which ensures the separation of powers and the protection of civil liberties and rights, is able to respond to the commitments laid down in the Compacts ([GCM 2018](#), para. 14; [Carrera et al. 2018](#)).

However, both the GCM and the GCR do not provide anything different from what has already emerged at the international level regarding the protection of the rule of law. In fact,

the GCR expressly refers to upholding of the rule of law “at the national and international levels” as part of the commitment of States to “tackle the root causes of large refugees situations” (GCR 2018, para. 9) and the GCM recognises in a general manner that the respect of the rule of law, “due process and access to justice are fundamental to all aspects of migration governance” (GCM 2018, para. 15). In the 2012 UN High-level Meeting on the Rule of Law at the National and International Levels, which culminated in the adoption of the Declaration on the Rule of Law at the National and International Levels (Declaration on the Rule of Law), heads of state and government had already recognized “that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions” (Declaration on the Rule of Law 2012, para. 2). They also recognized that “all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law” (Declaration on the Rule of Law 2012, para 2.) and reaffirmed “that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations” (Declaration on the Rule of Law 2012, para. 5).

While the two Compacts do not seem to add anything new under the sun, in recent times the European Union (EU or Union) has paid special attention to the protection and enforcement of the rule of law, as a value enshrined in Article 2 of the Treaty on European Union (TEU), *within* the territory of EU Member States. The innovative aspect of this new course concerns not only the role played by the Court of Justice of the EU (CJEU) in the context of the so-called “rule of law backsliding” in some EU Member States (Pech and Sheppele 2017), but also the progressive shaping of the notion of the rule of law under EU law.

These two aspects are closely linked. In fact, while the CJEU initially developed its judicial response to the “rule of law crisis” assessing the compatibility with EU law of Member States’ legislation that undermined the independence of the judiciary, it then extended its action with respect to national reforms concerning other aspects of EU law, including that of migration and asylum law (Tsourdi 2021). The most recent CJEU’s jurisprudence shows in particular how the need to uphold the rule of law value coexists with the exigence of protecting migrants’ and asylum seekers’ rights.

These new developments could thus be considered as particularly relevant as they can indirectly contribute to increasing compliance with some of the commitments laid down in the GCs, in particular in the GCM, regardless of the position taken by EU Member States in respect to these documents.

For that purpose, this contribution will first briefly describe the GCs, paying special attention to some of the objectives foreseen in the GCM (Section 2). Second, the focus will be on the pioneering role of the CJEU in protecting the EU founding values through the “traditional” competences attributed to it by the EU Treaties, namely the mechanisms of the preliminary ruling procedure and the infringement procedure (Section 3). Third, the recent developments of this line of jurisprudence will be dealt with, where the CJEU has acted in defence of the rule of law value, also protecting migrants’ and asylum seekers’ rights (Sections 4 and 5). Some conclusions can then be drawn, stressing how these recent developments could be seen as a tool to enhance the protection of migrants and asylum seekers in context of “rule of law crisis”, regardless of the position taken by some recalcitrant EU Member States with respect to the Compacts (Section 6).

## 2. Ambitious Objectives and Uncertain Nature of the Global Compacts

As already mentioned, the GCM and GCR represent the political will and ambitions of the parties in addressing the question of large movements of refugees and migrants (Micinski 2021; Guild and Grant 2017). Both Compacts introduced some broad commitments

regarding the treatment of migrants and refugees with the general purpose of the global governance of people on the move.

The GCR aims in particular to facilitate the application of a comprehensive response in support of refugees and countries particularly affected by a large refugee movement, through more equitable and predictable burden and responsibility-sharing with host countries. It further promotes the support of States, the international community and of other relevant stakeholders to host country or country of origin, in sectors identified as in need of support, such as reception and readmission.

By contrast, the GCM represents a “milestone in the history of the global dialogue and international cooperation on migration” (GCM 2018, para. 6), as it is the first ever UN comprehensive agreement on migration in all its dimensions. In particular, the GCM comprises 23 objectives, which are intended to achieve safe, orderly and regular migration along the entire migration cycle. Among these objectives is the commitment of the parties to develop and strengthen effective mechanisms for an adequate screening and individual assessment of all migrants “for the purpose of identifying and facilitating access to the appropriate referral procedures” (GCM 2018, para. 18). In particular, the actions envisaged in this regard include, *inter alia*, to ensure that, in the context of mixed flows of refugees or migrants “relevant information on rights and obligations under national laws and procedures, including on entry and stay requirements, available forms of protection, as well as options for return and reintegration, is appropriately, timely and effectively communicated, and accessible” (GCM 2018, para. 28, lett. e). Furthermore, in order to address and reduce vulnerabilities in migration, the GCM provides that parties should ensure that migrants “have access to public or affordable independent legal assistance and representation in legal proceedings that affect them [ . . . ] in order to safeguard that all migrants, everywhere, are recognized as persons before the law and that the delivery of justice is impartial and non-discriminatory” (GCM 2018, para. 23, lett. g). The GCM also affirms the commitment of parties to ensure that any detention, irrespective of the moment it occurs, “follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments” (GCM 2018, para. 29). This means providing access to justice for all migrants that are or may be subject of detention, including by facilitating access to free or affordable legal advice and assistance and ensuring the exercise of rights of all migrants in detention, including to have access to legal orientation and assistance (GCM 2018, lett. d). Parties should also ensure that all migrants, regardless of their migration status, can have access to basic services without discriminations (GCM 2018, para. 31). Finally, parties have also undertaken the commitment to ensure that the return of migrants “who do not have the legal right to stay on another State’s territory is safe and dignified, follows an individual assessment [ . . . ] and allows all applicable legal remedies to be exhausted, in compliance with due process guarantees” (GCM 2018, para. 37, lett. e).

States parties are therefore called to enact measures intended to fulfil the objectives expressed in the GCs. In this respect, difficulties may thus arise with regard to two linked aspects.

In the first place, these instruments expressly specify that they are non-legally binding instruments (McAdam 2019). Non-binding status does not mean that the Compacts are legally irrelevant (Hilpold 2021; Ferris and Donato 2019; Gammeltoft-Hansen et al. 2017; Panizzon and Vitiello 2019; Peters 2018). However, while the Compacts appears to acknowledge the need for an international coordination to address the question of large movements of refugees and migrants, these documents do not create any new legal obligations for States, nor rights for individuals (Höflinger 2020).

In the second place, some States have decided to quit the adoption process of the Global Compacts. In this regard, the GCR was adopted by a vote of 181 in favour to 2 against (Hungary and United States of America) and 3 abstentions (Eritrea, Liberia, Libya), while the GCM was adopted with 152 votes in favour, 12 abstentions, and 5 votes against (namely by the Czech Republic, Hungary, Israel, Poland and the United States of America). An additional 24 UN Member States were not present to take part in the vote. It

is relevant to note that both Hungary and Poland decided to disengage from the GCM's adoption process, respectively in July 2018 and November 2018, affirming in essence that the objectives laid down in these documents were in contrast with their national interests (Molnár 2020; Gatti 2018; Meline 2018). In particular, the Polish Government found that the GCM failed to meet its demands regarding strong guarantees for Countries to have the right to independently decide who they choose to accept (Reuters 2018). The Hungarian Foreign Minister as well affirmed that the GCM expanded the opportunities to "lodge complaints with relation to procedures conducted by national authorities" and it "calls for countries to afford every single migrant all of the services that they otherwise afford their own citizens during the whole period of the migrating process, and at an equal level of quality" (Website of the Hungarian Government 2018a). Moreover, the Hungarian Government voted against the GCR since, as stated by its Foreign Minister, such a document "opens the back door to those that cannot come in through the main entrance" (Website of the Hungarian Government 2018b).

These two Member States are indeed the same ones having introduced laws and policies that the EU has deemed to have serious, negative implications for human rights and the rule of law as protected by EU law, in particular, in respect of the independence of the judiciary and the protection of migrants and asylum seekers' rights (Bánkuti et al. 2012; Kovács and Tóth 2011; Wiącek 2021). In fact, despite the decision to leave the Global Compact's adoption process, these Member States are already under an obligation deriving from EU law to safeguard the rule of law as a founding value of the Union.

In this regard, the mechanisms provided for by Article 7 TEU are specifically meant to address the violation by the Member States of the EU values enshrined in Article 2 TEU. However, the political difficulties surrounding the activation of such mechanisms, led the CJEU to develop further "tools" in order to protect the common values of the Union (Editorial Comments 2015). The recent developments of this jurisprudence, where the "new" tools are deployed to cope with EU Member States' reforms concerning migration and asylum law, could thus indirectly contribute to ensuring compliance with the commitments laid down in the Compacts, regardless of the position taken by the two Member States in question on these documents.

### 3. The Protection of the EU Founding Values within the Member States and the "New" Role of the CJEU

Article 7 TEU is the provision meant to ensure, through mechanisms of political nature, the protection and enforcement of the EU founding values as enshrined in Article 2 TEU in the event of their (potential or actual) violation by a EU Member State (Sadurski 2010). The scope of application of Article 2 TEU covers all areas of action of EU Member States, as the procedures laid down in Article 7 TEU, which are horizontal and general in scope (Kochenov 2021). However, the wide scope of application of this latter provision corresponds to a limited competence of the CJEU. According to Article 269 of the Treaty on the Functioning of the European Union (TFEU), the CJEU shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TEU "in respect solely of the procedural stipulations contained in that Article".

However, since the very beginning such mechanisms have not proved effective in addressing "crises" of the EU founding values in Member States (Besselik 2017). Indeed, the reasoned proposals adopted by the Commission in 2017 and the European Parliament in 2018, respectively against Poland and Hungary calling the Council to determine "a clear risk of a serious breach" of the rule of law value by the two EU Member States, did not lead to any outcome so far. The political nature of the choices underlying the activation of the procedures laid down in Article 7 TEU, as well as the high voting thresholds, have made these mechanisms hardly practicable. This situation has been labelled as the "rule of law crisis" by several authors in EU studies (Müller 2015; Von Bogdandy and Ioannidis 2014).

Against this background, the CJEU has then been progressively involved in the protection of the EU values, through the "traditional" competences attributed to it by the EU



Treaties, namely the preliminary ruling procedure and the infringement procedure (Scheppele 2016; Blokker 2013). In this sense, the *Associação Sindical dos Juizes Portugueses* (ASJP) judgment of 27 February 2018 represents a turning point, thanks to the link established by the CJEU between the right to an effective judicial protection and the rule of law value, to which Article 19 TEU gives concrete expression. Indeed, the ASJP judgment represents the starting point of a line of cases through which the CJEU has progressively shaped its role as regards the violation by EU Member States of the founding values enshrined in Article 2 TEU (Bonelli and Claes 2018; Pech and Platon 2018). In this judgment, the CJEU held for the very first time that Article 19 TEU, which entrusts the responsibility for ensuring judicial review in the EU legal order not only to the CJEU but also to national courts, should be considered as giving “concrete expression to the value of the rule of law stated in Article 2 TEU” (ASJP 2018, para. 32). In this regard, the CJEU held that “[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law” (ASJP 2018, para. 36). Therefore, EU Member State must ensure that their national courts or tribunals, within the meaning of EU law, meet the requirements of effective judicial protection, in particular the requirement of independence, in accordance with Article 19 TEU.

Such an interpretation paved the way for several questions for preliminary ruling raised in particular by Polish courts, leading the CJEU to assess the compatibility with EU law of national judicial reforms undertaken by the Polish legislator. At the same time, the Commission, taking into account this new legal framework, started several infringement procedures leading the CJEU to rule on the violation of the obligations stemming from Article 19 TEU by Poland on account of its national reforms concerning both its Supreme Court and ordinary courts.

These developments in the CJEU’s role have then interested other areas of EU law, notably migration and asylum law. In particular, the reforms undertaken by Hungary in these fields had already been the subject, amongst others, of the reasoned proposal (European Parliament 2018) pursuant to Article 7(1) TEU, in which concerns were raised by the European Parliament with respect to the treatment of migrants and asylum seekers in Hungary and to the protection of their fundamental rights. In this regard, since 2015, the Hungarian Government has narrowed asylum seekers’ procedural rights in “ordinary” procedures, notably eliminating the possibility of presenting new facts in certain circumstances during the judicial phase and taking away the power of the courts to change the decision of administrative authorities. At the same time, the Hungarian Government strengthened the use of accelerated and border procedures, which entailed detention of asylum seekers and third-country nationals in “transit zones” where access to advice and representation was not always guaranteed. A fully informal removal mechanism was introduced, depriving asylum seekers crossing the Hungarian borders of the possibility to claim for asylum. Furthermore, all integration measures for persons recognised as in need of international protection were abolished (Nagy 2018).

Due to the difficulties surrounding the application of the procedures laid down in Article 7 TEU, both mechanisms of the preliminary ruling procedure and the infringement procedure have then been deployed by the CJEU to respond to the progressive deterioration of the rule of law in this respect, determining different effects as regard the protection of migrants and asylum seekers in such a context.

As the next section will show, the ASJP judgment laid the basis for subsequent developments, where the role of the CJEU as the “guardian” of the rule of law within the EU was strengthened, while at the same time ensuring an effective protection of migrants’ and asylum seekers’ rights in such contexts.

#### 4. Strengthening Migrants’ and Asylum Seekers’ Rights through the Preliminary Ruling Procedure

As recently recalled by the CJEU in its *Łowicz* judgment of 26 March 2020 (Platon 2020), the procedure provided for in Article 267 TFEU is an instrument of cooperation between

the CJEU and national courts, by means of which the CJEU provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. Therefore, the CJEU's function in proceedings for a preliminary ruling is to help the referring courts to resolve the specific dispute pending before them.

In recent times, references for preliminary rulings have been submitted by Hungarian courts concerning, in essence, the compatibility with EU law of the reforms undertaken by the Hungarian Government, which touched many aspects of national asylum and migration law. Particularly relevant in this regard are the *FMS* and *Torubarov* judgments issued by the CJEU following several preliminary references initiated by Hungarian courts, called upon to rule on appeals brought by third-country nationals claiming before them the protection of their rights deriving from EU law.

The *FMS* judgment of 10 May 2020 ([Dumas 2020](#)) allowed the CJEU to scrutinise various aspects of the Hungarian legislation relating, *inter alia*, to conditions of third-country nationals placed by national authorities in transit zones. In fact, the questions referred to the CJEU concerned, firstly, the absence in national law of any effective remedy to challenge a return decision issued by national administrative authorities against third-country nationals placed in a transit zone between Hungary and Serbia. Indeed, the Hungarian authority designated as having jurisdiction to rule on such appeals under national law, did not meet the requirements of independence stemming from EU law, namely from Article 47 which enshrines the right to an effective remedy and to a fair trial. The CJEU not only held that the Hungarian legislation was incompatible with Article 13 of Directive 2008/115 (the Return Directive) providing the right to an effective remedy against return decisions, but it also linked this situation to the broader context of the rule of law. Indeed, the CJEU expressly reminded that “in accordance with the principle of the separation of powers which characterizes the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive” ([FMS 2020](#), para. 136). Therefore, the national legislation at issue also failed “to comply with the essential content of the right provided for in Article 47 of the Charter” ([FMS 2020](#), para. 137). Moreover, the Hungarian legislation did not guarantee any judicial review of national decisions ordering the placement of asylum seekers and other third-country nationals in a transit zone, which according to the CJEU in the case at stake amounted to illegal detention. Nor did the national legislation provide for a remedy to ensure the protection of the right to material reception conditions of asylum seekers, after being unlawfully detained. The CJEU observed that Article 15 of Return Directive and Article 9 Directive 2013/33 (the Reception Directive) have direct effects and give concrete form to the right to an effective remedy enshrined in Article 47 of the Charter, both in the context of return procedures and against decisions concerning accommodation. Therefore, national legislation, which does not guarantee any judicial review of an administrative decision ordering the detention of an asylum seeker or an “illegally staying third-country national”, not only constitutes an infringement of Articles 15 of the Return Directive and Article 9 of the Reception Directive, “but also undermines the essential content of the right to effective judicial protection, guaranteed in Article 47 of the Charter” ([FMS 2020](#), para. 255).

Against this background, the principle of primacy of EU law and the right to an effective judicial protection, guaranteed by Article 47 of the Charter, require the referring court to disapply any national provision in contrast with EU law and to substitute its own decision for that of the national administrative authority.

In the specific context of the rule of law crisis concerning migration and asylum law, the CJEU, through the preliminary reference procedure, has thus paid special attention to strengthening the protection of the rights conferred by EU secondary legislation to migrants and asylum seekers, in particular the right to an effective remedy against return decisions and decisions ordering detention and the right to material accommodation. For this purpose, the CJEU has recognised to national courts broad powers and competences, which they directly derive from EU law.

The same approach had already been applied by the CJEU in the *Torubarov* judgment of 20 July 2019, concerning Hungarian legislation not providing national courts of any means to enforce their decisions relating to the recognition of a form of international protection against reluctant national administrative authorities (Caiola 2019). A national case could then be repeatedly shuttled back and forth between courts and administrative authorities. As already mentioned above, in 2015, the Hungarian legislator had changed the competence that courts had when reviewing administrative asylum decisions from having the possibility to directly alter a decision, to the power to merely annul and remit (Hungarian Law on Asylum 2007). As a result, national courts could not replace such decisions when they found them to be unlawful. They could merely annul them and refer the case back to the administrative authority for a new decision. The referring court then decided to stay the proceedings and refer a question for preliminary ruling to the CJEU, doubting the compatibility of such national legislation with Article 46 of Directive 2013/32 (the Procedures Directive), providing the right to an effective remedy in the context of asylum procedures, read in the light of Article 47 of the Charter.

The CJEU found in particular that “the right to an effective remedy would be illusory if a Member State’s legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party” (*Torubarov* 2019, para. 57). Therefore, a national legislation that results in such a situation deprives in practice the applicant for international protection of an effective remedy, within the meaning of Article 46 of Directive 2013/32, and “fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter” (*Torubarov* 2019, para. 72). Both provisions having direct effect, a national court seized of an appeal in such a context is required to set aside a decision of the administrative body that does not comply with its previous judgment and to substitute its own decision on the asylum seeker’s application by disapplying the national law that prohibits it from proceeding in that way.

In both judgments, national courts hold competences and powers directly deriving from EU law, namely from the right to an effective judicial protection and from the principle of primacy of EU law. In particular, such powers lead national courts to disapply the political choices made by the national legislator not complying with EU law, ensuring in this way the effectiveness of migrants and asylum seekers’ rights, which they derive from EU secondary legislation also in contexts where the national legislative will is to dismantle the procedural and substantial guarantees recognized to third-country nationals by EU law.

## 5. Addressing Multiple Violation of EU Migration and Asylum Law through the Infringement Procedure Mechanism

As previously mentioned, the CJEU has deployed another instrument to face rule of law crisis in Member States, namely its judgments issued following an infringement procedure under Article 258 TFEU. Indeed, where a situation of deterioration of the rule of law also implies a violation of EU law obligations by the Member States, the CJEU has considered the infringement procedure as an effective instrument to address such a situation (Bård and Śledzińska-Simon 2019; Kochenov 2015). In the area of migration and asylum law, this is evident in two recent EU rulings where the CJEU found that Hungary failed to comply with its obligations under EU law.

Firstly, in the *Commission v. Hungary* judgment of 17 December 2020 (*Commission v. Hungary* 2020), the CJEU found that, as a consequence of recent national reforms concerning asylum and migration law, Hungary failed to ensure effective access to the procedure for granting international protection under the Procedures Directive, as far as third-country nationals wishing to gain access to the EU from the Serbian-Hungarian border, were de facto barred from accessing asylum procedure. Moreover, the CJEU confirmed, as already held in the *FMS* judgment, that the obligation on applicants for international protection to remain in one of the transit zones for the duration of the procedure for examination of their application constitutes detention, within the meaning of the Reception Directive. The CJEU also held that Hungary failed to fulfil its obligations under the Return

Directive, as far as the Hungarian legislation allowed for the removal of third-country nationals who are staying illegally in the territory without prior compliance with the procedures and safeguards provided for in that directive, inter alia, to have their personal situation examined before their removal. Finally, the CJEU considered that Hungary did not respect the right, conferred by the Procedures Directive on any applicant for international protection, to remain in the territory of the EU Member States after the rejection of his application, until the time limit within which to bring an appeal against that rejection or, if an appeal has been brought, until a decision has been taken on it.

Secondly, in the *Commission v. Hungary* judgment of 16 November 2021 ([Commission v. Hungary 2021](#)), the CJEU similarly found that Hungary was in breach of its obligations under the Procedures and Reception Directives. In particular, the CJEU held that the legislative reforms undertaken by Hungary in 2018 had not only added a further ground of inadmissibility of an application for international protection but also criminalised organising activities facilitating the lodging of asylum applications by persons who were not entitled to refugee status under Hungarian law. In particular, the CJEU held that the national provisions criminalising persons who, in connection with an organising activity, provide assistance in order to make or lodge an application for asylum when it can be proved that that person was aware that that application could not succeed under Hungarian law, amounts to a restriction on the rights enshrined in the above-mentioned Directives. More specifically, the additions made to the Hungarian legislation restricted the right of access to applicants for international protection and the right to communicate with those persons, and the effectiveness of the right afforded to asylum seekers to be able to consult, at their own expense, a legal adviser or other counsellor.

It is apparent from these two judgments that the infringement procedure has been used by the CJEU to address multiple violations of EU obligations, which taken as a whole constitute a manifestation of the CJEU attempting to resolve a “rule of law crisis” in a EU Member State ([Bogdanowicz and Schmidt 2018](#)). In fact, the caselaw analysed shows how the infringement procedure can address violations of EU obligations, which derive from the political choices made at the national level aimed at depriving in a general and systemic manner third-country nationals of the procedural and substantial guarantees recognized to them by EU law.

The two mechanisms of the preliminary ruling procedure and the infringement procedure have thus proven to be effective instruments to address rule of law violations in EU Member States, which can also affect migration and asylum legislation.

However, the different nature of such mechanisms entails different effects as regards the protection of migrant and asylum seekers. While the mechanism of the preliminary ruling procedure can result in strengthening the protection of individuals’ rights also in context of deterioration of EU common values, the infringement procedure addresses such crisis in a more general and comprehensive manner. In fact, whereas in a preliminary ruling procedure the function of the CJEU is to help the referring courts to resolve the specific dispute pending before them, in an action for failure to fulfil obligations, the Court is called to ascertain whether the national measures challenged by the Commission or another EU Member State, contravenes EU law in general. Moreover, under Article 279 TFEU the CJEU has the power to prescribe an interim measure, which it considers necessary in a case brought before it. While this provision does not provide any limitation concerning the nature and type of case where interim measure could be prescribed by the CJEU, it appears to be particularly useful when it comes with an infringement action under Article 258 TFEU ([Prete 2021](#)). This is evident in the recent order of 27 October 2021, issued by the Vice-President of the CJEU ([Order of the Vice-President of the CJEU 2021](#)) in the context of an infringement action brought by the Commission against Poland and which ordered to the Member State in question to pay to the Commission a periodic penalty payment of 1,000,000 euros per day.

Against this background, the infringement procedure seems to be a more effective tool to address not only specific, but also multiple violations of EU law obligations as a



manifestation of the rule of law crisis in a Member State, which can also affect the area of migration and asylum law.

## 6. Conclusions

As emerged from the previous Sections, the recent developments in caselaw show the increasingly essential function of the CJEU in protecting the rule of law within the Union, which now also extends to national migration and asylum law. In particular, through the two mechanisms of the preliminary ruling procedure and of the infringement procedure, the CJEU assessed the compatibility of the Hungarian legislative reforms with EU law, notably with the procedural and substantial guarantees which Member States are called to provide to third-country nationals in case of detention in transit zones and in case of return decisions.

In respect to these obligations, it is possible to find a convergence with the commitments expressed, in a broader manner, in the GCs, in particular in the GCM. In fact, the GCM requires States parties to ensure that any detention, irrespective of the moment it occurs, follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments. This includes notably having access to basic rights, such as access to food, basic healthcare, legal orientation and assistance, information and communication, as well as adequate accommodation. Moreover, States parties are committed to enact measures aimed at ensuring that the return of migrants who do not have the legal right to stay on another State's territory is safe and dignified, follows an individual assessment, is carried out by competent authorities and allows all applicable legal remedies to be exhausted.

Taking into account the existent link between these different sources of protection, if one looks at the two mechanisms employed by the CJEU in its caselaw through the lens of the GCs, the infringement procedure appears to be the most appropriate to indirectly contribute to increasing compliance with the commitments provided for by the GCM. In fact, the infringement procedure allows the CJEU to scrutinize in a more comprehensive manner national measures violating EU asylum and migration legislation, notably thanks to the Commission's monitoring role as "guardian of the Treaties".

In this way, the CJEU has thus required the fulfilment of the obligations, which are also reflected in a broader manner in the GCM, by EU Member States regardless of the existence of a specific dispute pending before a national court. This also appears to be in line with the general purpose of the GCs, which are not intended to ensure the protection of migrants and refugees, in their "individual" dimension, but rather to provide a "global" protection of people on the move. Furthermore, in these cases, the infringement procedure seems to be used as an instrument of political pressure on EU Member States to fulfil their obligations under EU law, as the Commission "may" bring the matter before the CJEU and therefore exercise its discretion in this respect where, as the cases analysed show, the political institutions fail to initiate the procedures under Article 7 TEU.

The risk of jeopardizing the principle of institutional balance provided for by the EU Treaties does not seem to affect the need for protecting the rule of law value and migrants' rights which are inseparably combined, allowing (and requiring) that all the available legal and judicial tools and procedures are deployed.

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