DOI:10.1017/ilm.2024.37

INTRODUCTORY NOTE TO CASE C-123/22, COMM'N V. HUNG. (C.J.E.U.)

BY GAVIN BARRETT*

[June 13, 2024]

Introduction

On June 13, 2024, the European Court of Justice (ECJ) delivered its judgment in Case C-123/22 *European Commission v. Hungary,*[1] a follow-up action to Case C-808/18 *European Commission v Hungary*[2] condemning Hungary's non-compliance with EU legislation on common standards and procedures for returning illegally staying third-country nationals and on common procedures regarding international protection.[3] Hungary had responded to the earlier judgment in what the Commission deemed a wholly inadequate manner. The Commission requested that a lump sum and penalty payment be imposed on Hungary by the ECJ.[4] The Court now responded by ordering a record lump sum payment and record-equalling penalty payment,[5] forcefully underlining judicial power in policing rule of law compliance.

Background

Ongoing rule of law breaches by the Fidesz administration in Hungary have triggered numerous EU responses, generally of limited effectiveness.

Commission infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union (TFEU) constitute one such response. Finding EU rules on which to base such prosecutions has, however, proved challenging.[6] In practice, proceedings have focused on EU secondary legislation provisions rather than broader underlying principles or values—for example, age discrimination rules (when Hungary lowered the retirement ages for judges)[7] or violations of various directives (where Hungary defied the EU's common asylum and international protection policy).[8]

The December 2020 ECJ ruling in Case C-808/18 *Commission v. Hungary,*[9] involved a narrow-focus Commission prosecution. Yet Case C-123/22 would turn out to be anything but narrow in its focus.

Hungary had required, in defiance of Directive 2013/33, that international protection applications be lodged in person in "transit zones" bordering Serbia, which few persons were allowed to enter, resulting in months-long delays in making applications. Hungary then required detention of nearly all asylum seekers throughout the application process in facilities in "transit zones," without Directive 2013/33-mandated safeguards. Appeals had no suspensory effect, again violating the Directive. Third-country nationals illegally present in Hungary were removed to a narrow strip of land without infrastructure on the other side of a border fence without Directive 2008/115-mandated safeguards, effectively forcing them back into Serbia. In a fifteen-judge 2020 Grand Chamber ruling, Hungary was held to have infringed multiple provisions of both Directives.[10]

Hungary responded by merely closing the two transit zones.[11] A dissatisfied Commission then launched Article 260 TFEU proceedings seeking Hungary's penalization with lump-sum and penalty payments. Delivered by a five-member Chamber, the resulting Case C-123/22 ruling [12] was more significant than the earlier Article 258 ruling, first because of judicial willingness to take Hungary's violations seriously, and second because of the scale of the consequences visited on Hungary for failing to comply with the 2020 ruling.

The ECJ Decision

Hungary was now held to have failed to ensure effective, easy and rapid access to international protection procedures[13] and to have wrongfully maintained rules permitting removal of illegally staying third-country nationals. Hungary's post-2020 policy of not expelling anyone before decisions became final failed to impress; by their nature, mere administrative practices—alterable at will and lacking appropriate publicity—did not constitute proper fulfilment of EU law obligations.[14]

The lump sum and penalty the Court fixed were based on the seriousness and duration of the infringements and Hungary's ability to pay.[15] The Court identified twelve reasons why the misbehavior was serious. First, Hungary's three-

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year failure to implement a ruling seriously undermined the legality and *res judicata* principles.[16] Second, the provisions infringed were important: Article 6 of Directive 2013/32's procedural requirements ensured the Directive's operation. Third, compliance with Article 6 also underpins the whole common policy on asylum, subsidiary protection, and temporary protection. Fourth, Hungary's deliberate evasion of a common policy constituted an unprecedented and exceptionally serious infringement. Fifth, this represented a significant threat to EU law unity and member state equality.[17] Sixth, systematic avoidance of international protection applications undermined the international refugee protection regime and deprived those seeking protection of their rights.[18] Seventh, non-compliance with the Directive 2013/32 right to remain violated the principle of effective judicial protection.[19] Eighth, Hungary's removal of most third-country nationals violated a vital component of the common immigration policy: its forming part of a general and persistent practice made it more serious.[20] Ninth, Hungary's conduct undermined the principle of solidarity,[21] "one of the fundamental principles of EU law and . . . one of the values . . . on which the European Union is founded, pursuant to Article 2 TEU," thereby striking at the very root of the EU legal order.[22] Tenth, the impact on public and private interests was "extraordinarily serious."[23] Eleventh, an aggravating factor was Hungary's repeated unlawful conduct.[24] Twelfth, Hungary had subsequently violated the principle of sincere cooperation and undermined respect for member state equality in seeking to rely on national law in violation of the duty of primacy while failing to put an end to the misconduct established in 2020, an additional aggravating circumstance.[25]

The Court was conscious of the broader ramifications of Hungary's misbehavior: one infringement was seen as containing, matrushka-like, another, more serious one within it: failure to comply with the 2013 Directive blocked the operation of the common policy on international protection, which in turn constituted a significant threat to EU law unity, seriously undermining the principle of solidarity.

The consequences were reflected in the scale of lump sum and penalty payment imposed, with the ECJ reaffirming its long-held right to impose them cumulatively[26] and stressing that "the Commission's proposals regarding the amount of penalty payment cannot bind the Court and are merely a useful point of reference."[27]

The need for a lump sum depended on an infringement's characteristics and member state conduct.[28] Here, in the light of "in particular the exceptional seriousness of the infringements . . . and Hungary's failure to cooperate in good faith in order to bring them to an end," the ECJ ordered a record lump sum payment of €200 million,[29] over 191 times what the Commission had sought,[30] and a record-equalling penalty payment of €1 million per day of delay in complying with the 2020 ruling,[31] over 61 times what the Commission had sought.[32]

Conclusion

Hungary subsequently failed to commence paying the sums required under Case C-123/22. The Commission has now begun the process of recovering these amounts by offsetting EU payments that would otherwise be made to Hungary.[33] This may not be straightforward. Hungary has previously weaponized the veto it enjoys in the foreign and security policy field to counter measures not to its liking—for example, effectively extorting €10 billion in EU funding in exchange for not blocking EU policy on Ukraine.[34] Such sums dwarf the amount involved in Case C-123/22. *Commission v. Hungary* is nonetheless significant in demonstrating ECJ willingness to deem repeated EU directive violations to have breached more fundamental EU norms, and its determination to impose significant penalties for rule of law violations.

ENDNOTES

1 ECLI:EU:C:2024:49 (June 13, 2024) [hereinafter Judgment].

2 ECLI:EU:C:2020:1029 (Dec. 17, 2020). This prosecution was brought under Article 258 of the Treaty on the Functioning of the European Union (TFEU).

3 The relevant EU standards are found in 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 (2008 O.J. (L 348) 98); and 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 (2013 O.J. (L 180) 60).

4 Such proceedings are brought under Article 260 TFEU.

5 In Case C-204/21 R EU:C:2021:878, which concerned Poland's failure to comply with interim measures which the Court of Justice had ordered in the same case concerning the Polish

disciplinary regime for judges (as to which, see EU:C:2021:593), Poland was similarly ordered to pay the European Commission a periodic penalty payment of €1 000 000 per day. This was, however, a case involving interim measures under Article 279 TFEU, rather than proceedings under Article 260 TFEU, as in the present case.

6 Zoltán Szente, *Challenging the Basic Values-Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them, in* THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE (András Jakab and Dimitry Kochenov eds.). Other hurdles have included political considerations, and Commission unwillingness to go beyond its neutral Article17 of the Treaty on European Union role of overseeing the application of EU law under the control of the CJEU.

7 Case C-286/12, Comm'n v. Hung., EU:C:2012:687 (Nov. 6, 2012).

8 Since 2015, the Commission has initiated seven infringement procedures against Hungary in the asylum field. Four have come before the Court.

9 European Comm'n v. Hung, *supra* note 2.

10 *Id.*

11 Judgment, Para. 16 *et seq*.

12 Judgment, *supra* note 1.

13 *Id.* ¶¶ 64–65.

14 *Id.* ¶¶ 78–83.

15 *Id.* ¶¶ 101,141.

16 *Id.* ¶ 102.

17 *Id.* ¶ 107. *See* art. 4(2) TEU.

18 *Id.* ¶ 107.

19 *Id.* ¶¶ 108–110, referring to Article 19 of the EU Charter of Fundamental Rights.

20 *Id.* ¶ 112.

21 *Id.* ¶ 115 (and the fair sharing of responsibility)

22 *Id.* ¶¶ 116–17.

23 *Id.* ¶ 118.

24 *Id.* ¶ 120.

25 *Id.* ¶¶ 121–24.

26 *Id.* ¶ 134, relying on Case C-109/22, Comm'n v. Rom. and the case-law cited therein.

27 *Id.* ¶ 140. For the Commission proposals, *see* ¶¶ 84–95.

28 *Id.* ¶ 98, relying on Case C-109/22, Comm'n v. Rom., ¶ 78 and the case-law cited therein.

29 *Id.* ¶ 132.

30 The Commission had sought a lump sum payment of €1,044,000 (*Id.* ¶ 1)

31 €900,000 of this related to Directive 2013/32. €100,000 related to Directive 2008/115.

32 The Commission had sought a daily penalty payment of €16,393.16 (Judgment, supra note 1, ¶ 1)

33 Jorge Liboreiro, *Brussels movers to deduct €200 million fine from Hungary's EU funds, as country refuses to pay*, EURONEWS (Sept. 18, 2024); Cases T-200/22 and T-314/22, Pol. v. European Comm'n, EU:T:2024:329 (May 29, 2024); Pekka Pohjankoski, *Safeguarding EU Law's Authority: the General Court Affirms the Commission's Decisions to Recover Penalty Payments from Member States by Offsetting*, EU LAW LIVE (June 11, 2024); *Contesting the Ultimate Leverage to Enforce EU Law*, VERFASSUNGSBLOG (July 12, 2023).

34 Jorge Liboreiro, *Brussels releases €10 billion in frozen EU funds for Hungary amid Orbán's threats*, EURONEWS (Dec. 13, 2023).

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CASE C-123/22, COMM'N V. HUNG. (C.J.E.U.)*
[June 13, 2024]

JUDGMENT OF THE COURT (Fourth Chamber)
13 June 2024 (**)

(Failure of a Member State to fulfil obligations – Area of freedom, security and justice – Directives 2008/115/EC, 2013/32/EU and 2013/33/EU – Procedure for granting international protection – Effective access – Border procedure – Procedural safeguards – Return of illegally staying third-country nationals – Appeals brought against administrative decisions rejecting an application for international protection – Right to remain in the territory – Judgment of the Court establishing a failure to fulfil obligations – Non- compliance – Article 260(2) TFEU – Financial penalties – Proportionality and dissuasiveness – Lump sum – Periodic penalty payment)

In Case C-123/22,

ACTION for failure to fulfil obligations under Article 260(2) TFEU, brought on 21 February 2022,

European Commission, represented initially by A. Azéma, L. Grønfeldt, A. Tokár and J. Tomkin, and subsequently by A. Azéma, A. Tokár and J. Tomkin, acting as Agents,

applicant,

v

Hungary, represented by M.Z. Fehér, acting as Agent,

defendant,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot, S. Rodin and L.S. Rossi, Judges,

Advocate General: P. Pikamäe,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2023,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

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**Language of the case: Hungarian.

Judgment

1 By its action, the European Commission claims that the Court should:

- declare that, by failing to adopt all the measures necessary to comply with the judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, 'the 2020 *Commission* v *Hungary* judgment', EU:C:2020:1029), Hungary has failed to fulfil its obligations in accordance with that judgment and Article 260(1) TFEU;
- order Hungary to pay the Commission a daily lump sum of EUR 5 468.45, amounting in total to at least EUR 1 044 000, for the period from the date on which the judgment in the 2020 *Commission* v *Hungary* judgment was delivered until the date on which the defendant complies with that judgment or the date of delivery of the present judgment, whichever is the earlier;
- order Hungary to pay the Commission a daily penalty payment of EUR 16 393.16 for the period from the date of delivery of the present judgment until the date of compliance with the 2020 *Commission* v *Hungary* judgment; and
- order Hungary to pay the costs.

Legal context

European Union law

Directive 2008/115/EC

2 Article 5 of 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 (OJ 2008 L 348, p. 98) provides:

> 'When implementing this Directive, Member States shall take due account of:
>
> (a) the best interests of the child;
>
> (b) family life;
>
> (c) the state of health of the third-country national concerned, and respect the principle of non-refoulement.'

3 Article 6(1) of that directive provides:

> 'Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.'

4 Pursuant to Article 12(1) of that directive:

> 'Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.
>
> The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.'

5 Under Article 13(1) of the same directive:

> 'The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.'

Directive 2013/32/EU

6 Article 6 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60), provides:

> 1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.
>
> If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.
>
> Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.
>
> 2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. Where the applicant does not lodge his or her application, Member States may apply Article 28 accordingly.
>
> 3. Without prejudice to paragraph 2, Member States may require that applications for international protection be lodged in person and/or at a designated place.
>
> 4. Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.
>
> 5. Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it very difficult in practice to respect the time limit laid down in paragraph 1, Member States may provide for that time limit to be extended to 10 working days.'

7 Under Article 24(3) of that directive:

> 'Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.
>
> Where such adequate support cannot be provided within the framework of the procedures referred to in Article 31(8) and Article 43, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply, Article 31(8) and Article 43. Where Member States apply Article 46(6) to applicants to whom Article 31(8) and Article 43 cannot be applied pursuant to this subparagraph, Member States shall provide at least the guarantees provided for in Article 46(7).'

8 Article 43 of that directive, entitled 'Border procedures', is worded as follows:

> 1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on:
>
> (a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or
>
> (b) the substance of an application in a procedure pursuant to Article 31(8).

2. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive.

3. In the event of arrivals involving a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply there the provisions of paragraph 1, those procedures may also be applied where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.'

9 Article 46(5) and (6) of the same directive provides:

5. Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

6. In the case of a decision:

(a) considering an application to be manifestly unfounded in accordance with Article 32(2) or unfounded after examination in accordance with Article 31(8), except for cases where these decisions are based on the circumstances referred to in Article 31(8)(h);

(b) considering an application to be inadmissible pursuant to Article 33(2)(a), (b) or (d);

(c) rejecting the reopening of the applicant's case after it has been discontinued according to Article 28; or

(d) not to examine or not to examine fully the application pursuant to Article 39,

a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting *ex officio*, if such a decision results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.'

Hungarian law

The Law on the right to asylum

10 Paragraph 5(1) of the menedékjogról szóló 2007. évi LXXX. törvény (Law No LXXX of 2007 on the right to asylum) of 29 June 2007 (*Magyar Közlöny* 2007/83.; 'the Law on the right to asylum') provides:

'An applicant for asylum shall be entitled:

(a) to reside, in accordance with the conditions laid down in this law, in Hungarian territory and, in accordance with the specific regulations, to receive an authorisation to reside in Hungarian territory;

. . .'

11 Paragraph 80/H of the Law on the right to asylum is worded as follows:

'In the event of a crisis situation caused by mass immigration, the provisions of Chapters I to IV and V/A to VIII are to be applied with the derogations provided for in Articles 80/I to 80/K.'

12 Subparagraph 1 of Paragraph 80/J of the Law on the right to asylum provides:

'The asylum application must be lodged in person with the competent authority, and exclusively in the transit zone, unless the asylum applicant:

(a) is the subject of a coercive measure, a measure or a penalty restricting his or her personal liberty;

(b) is the subject of a detention measure ordered by the competent asylum authority;

(c) is staying legally in Hungary and does not seek accommodation in a reception centre.'

The Law on State borders

13 Paragraph 5 of the az államhatárról szóló 2007. évi LXXXIX. törvény (Law No LXXXIX of 2007 on State borders), of 4 July 2007 (*Magyar Közlöny* 2007/88.; 'the Law on State borders'), provides:

'(1) In accordance with the present law, it is possible to use, in Hungarian territory, a strip of 60 metres from the delineation of the external border as defined in Article 2(2) of [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) (OJ 2006 L 105, p. 1)], or from the signs indicating the border, in order to build, establish or operate facilities for maintaining order at the border . . . and to carry out tasks relating to defence and national security, disaster management, border surveillance, asylum and migration control.

. . .

(1b) In a crisis situation caused by mass immigration, the police may, in Hungarian territory, apprehend foreign nationals staying illegally in Hungarian territory and escort them beyond the gate of the nearest facility referred to in paragraph 1, except where they are suspected of having committed an offence.

. . .'

The 2020 *Commission* v *Hungary* judgment

14 In the 2020 *Commission* v *Hungary* judgment the Court ruled that Hungary had failed to fulfil its obligations under Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115, Article 6, Article 24(3), Article 43 and Article 46(5) of Directive 2013/32 and Articles 8, 9 and 11 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96):

– by providing that applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access, in its territory, the international protection procedure, may be made only in the transit zones of Röszke (Hungary) and Tompa (Hungary), while adopting a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily;

– by establishing a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa, without observing the guarantees provided for in Article 24(3) and Article 43 of Directive 2013/32 and Articles 8, 9 and 11 of Directive 2013/33;

– by allowing the removal of all third-country nationals staying illegally in its territory, with the exception of those of them who are suspected of having committed a criminal offence, without observing the procedures and safeguards laid down in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115; and

– by making the exercise by applicants for international protection who fall within the scope of Article 46(5) of Directive 2013/32 of their right to remain in its territory subject to conditions contrary to EU law.

Pre-litigation procedure and procedure before the Court

15 By letter of 26 January 2021, the Director-General of the Commission's Directorate-General for Migration and Home Affairs asked the Hungarian Government to inform it of the measures taken to comply fully with the 2020 *Commission* v *Hungary* judgment.

16 On 26 February 2021, the Hungarian Government replied to that letter, stating that the transit zones of Röszke and Tompa had been closed following the delivery of the judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367). In its view, Hungary had therefore complied with the 2020 *Commission* v *Hungary* judgment as regards the detention of asylum seekers.

17 As regards access to the international protection procedure and the removal of illegally staying third- country nationals, the Hungarian Government considered that, in complying with the 2020 *Commission* v *Hungary* judgment, it was faced with a 'constitutional dilemma' concerning the implementation of Hungary's obligations under EU law. As a result, on 25 February 2021, that government brought an action before the Alkotmánybíróság (Constitutional Court, Hungary) seeking to determine whether the Magyarország Alaptörvénye (Hungarian Basic Law) could be interpreted as meaning that Hungary may implement an obligation under EU law which, in the absence of effectiveness of EU legislation, may lead a third-country national staying illegally in Hungary to reside there for an indefinite period and, therefore, to be a de facto member of its population.

18 On 9 June 2021, the Commission sent Hungary a letter of formal notice ('the letter of formal notice') in which it took the view that that Member State had not taken the measures necessary to comply with the 2020 *Commission* v *Hungary* judgment and called on that State to submit its observations pursuant to Article 260(2) TFEU within two months. The letter of formal notice referred to the four infringements identified in that judgment.

19 On 9 August 2021, the Hungarian Government replied to the letter of formal notice, stating that it was unable to take a position on the enforceability of the 2020 *Commission* v *Hungary* judgment until the proceedings before the Alkotmánybíróság (Constitutional Court), referred to in paragraph 17 above, had ended. That government asked the Commission to make the continuation of enforcement proceedings in respect of the 2020 *Commission* v *Hungary* judgment subject to the conclusion of the abovementioned proceedings before the Alkotmánybíróság (Constitutional Court), in order to 'ensure compliance with the constitutional dialogue'. The Hungarian Government also stated that, contrary to what the Commission claims, emphasising the 'unlimited primacy' of EU law, the constitutional rules prevailed over that law.

20 On 7 December 2021, the Alkotmánybíróság (Constitutional Court) issued Decision No 32/2021 (XII.20) in which it held, first, that as long as the European Union did not exercise a shared competence effectively, Hungary could exercise that competence, second, that if the inadequacy of the exercise by the European Union of a shared competence was such as to result in an infringement of the right to identity of persons residing in Hungary, the Hungarian State was required to ensure the protection of that right and, third, that the protection of Hungary's inalienable right to determine its territorial integrity, its population, its form of government and its State structure formed part of its constitutional identity.

21 Taking the view that there was still no compliance with the 2020 *Commission* v *Hungary* judgment, the Commission brought the present action on 21 February 2022.

22 By decision of the President of the Court of 1 April 2022, the proceedings were stayed, at the request of the Commission, under Article 55(1)(b) of the Rules of Procedure of the Court of Justice. By decision of 21 September 2022, the President of the Court decided to resume the proceedings, under Article 55(2) of the Rules of Procedure, also at the request of the Commission.

The action

The failure to fulfil obligations

Arguments of the parties

23 The Commission acknowledges, as a preliminary point, that the transit zones of Röszke and Tompa have been closed. Accordingly, the application does not contain any arguments relating to the second infringement established

in the 2020 *Commission* v *Hungary* judgment, concerning the generalised detention of applicants for international protection in those transit zones.

24 Similarly, as regards the fourth infringement established in that judgment, namely the failure to observe the right of applicants for international protection to remain in Hungarian territory until the time limit for exercising their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy, the application relates only to a situation other than a crisis situation caused by mass immigration. Indeed, in paragraphs 290 and 291 of the 2020 *Commission* v *Hungary* judgment, the Court established an infringement in relation to a crisis situation caused by mass immigration only on account of the system of systematic detention in the transit zones of Röszke and Tompa, a system which ceased to exist with the closure of those zones.

25 However, the Commission considers that the closure of the transit zones of Röszke and Tompa is insufficient to ensure compliance with the 2020 *Commission* v *Hungary* judgment. The same is true of the amendments made to the Law on the right to asylum in June 2020, in the context of the COVID-19 pandemic, by the a veszélyhelyzet megszstahlneturel összefüggő átmeneti szabályokról és a járványügyi készültségről szóló 2020. évi LVIII. törvény (Law No LVIII of 2020 on transitional rules relating to the end of the state of emergency and on the pandemic crisis), of 17 June 2020 (*Magyar Közlöny* 2020/144.; 'the 2020 Law'). According to the Commission those amendments are contrary to EU law, as it claimed in the case that gave rise to the judgment of 22 June 2023, *Commission* v *Hungary (Declaration of intent prior to an asylum application)* (C-823/21, 'the 2023 *Commission* v *Hungary* judgment', EU:C:2023:504).

26 Moreover, the Commission is of the view that the Hungarian Government implicitly acknowledged the continued commission of the infringements established in the 2020 *Commission* v *Hungary* judgment, since it stated that it was unable to take a position on the enforceability of that judgment until the decision of the Alkotmánybíróság (Constitutional Court) referred to in paragraph 20 of the present judgment had been delivered.

27 According to the Commission, in the first place, as regards effective access to the procedure for international protection, it follows from paragraphs 104 and 106 of the 2020 *Commission* v *Hungary* judgment, and from the first indent of point 1 of the operative part thereof, that, in order to comply with that judgment, Hungary must take the measures necessary to ensure that third-country nationals and stateless persons can effectively exercise their right to make an application for international protection in its territory, including at its borders.

28 In particular, compliance with the 2020 *Commission* v *Hungary* judgment requires the amendment of Article 80/J(1) of the Law on the right to asylum, under which, in a crisis situation caused by mass immigration, applications for international protection may be lodged, with limited exceptions, only in the transit zones concerned. Yet, Hungary has neither repealed nor amended that provision. Since the transit zones of Röszke and Tompa have been closed, it is impossible to make such applications in the territory of Hungary.

29 Furthermore, on the date of expiry of the period prescribed in the letter of formal notice, a crisis situation caused by mass immigration continued to exist throughout Hungarian territory. Indeed, the period of applicability of the a tömeges bevándorlás okozta válsághelyzet Magyarország egész területére történő elrendeléséről, valamint a válsághelyzet elrendelésével, fennállásával és megszüntetésével összefüggő szabályokról szóló 41/2016. (III. 9.) Korm. rendelet (Government Decree No 41/2016 on the declaration of a crisis situation caused by mass immigration throughout Hungary and on the rules relating to the declaration, existence and termination of the crisis situation) of 9 March 2016 (*Magyar Közlöny* 2016/33.), was extended by the Hungarian Government until 7 March 2022, pursuant to Article 1 of the a tömeges bevándorlás okozta válsághelyzet Magyarország egész területére történő elrendeléséről, valamint a válsághelyzet elrendelésével, fennállásával és megszüntetésével összefüggő szabályokról szóló 41/2016. (III. 9.) Korm. rendelet módosításáról szóló 509/2021. (IX. 3.) Korm. rendelet (Government Decree No 509/2021 amending Government Decree No 41/2016 (III. 9.) on the declaration of a crisis situation caused by mass immigration in Hungary and on the rules relating to the declaration, existence and end of the crisis situation) of 3 September 2021 (*Magyar Közlöny* 2021/162.). Subsequently, the period of applicability of the legal regime governing the crisis situation caused by mass immigration was extended until at least 7 March 2024.

30 As regards the 2020 Law, in the Commission's view it merely introduces a separate transitional regime on account of the COVID-19 pandemic. In any event, that law cannot be considered to be a measure of compliance with the 2020 *Commission* v *Hungary* judgment, since it had been adopted before that judgment was delivered,

in the specific context of that pandemic, and was intended to apply, initially, only until 31 December 2020, before that applicability was extended until 31 December 2023.

31 Furthermore, according to the Commission, Hungary does not claim that the 2020 Law is intended to comply with the 2020 *Commission* v *Hungary* judgment. Therefore, the fact that that law was the subject, by reason of the complexity of the Hungarian asylum system, of a procedure under Article 258 TFEU in the case that gave rise to the 2023 *Commission* v *Hungary* judgment does not infringe Hungary's rights of defence in the present case.

32 In the second place, as regards the removal of third-country nationals staying illegally in Hungary, the Commission submits that Article 5(1ter) of the Law on State borders was neither repealed nor amended. Accordingly, the Hungarian legislation continues to allow the removal of third-country nationals staying illegally in its territory, with the exception of those who are suspected of having committed a criminal offence, which is incompatible with paragraphs 253 and 254 of the 2020 *Commission* v *Hungary* judgment and with the third indent of point 1 of the operative part of that judgment. In that regard it is apparent from the Hungarian police's website that Hungary has not put an end to the unlawful removal of third country nationals staying illegally in its territory, a matter which that Member State does not contest.

33 In the third place, as regards the right of applicants for international protection to remain in Hungarian territory in a situation other than a crisis situation caused by mass immigration, the Commission submits that Hungary has not amended Article 5(1)(a) of the Law on the right to asylum, which is applicable in a situation other than a crisis situation caused by mass immigration.

34 Therefore, the conditions set out in Hungarian law for the exercise of the right to remain in the territory, provided for in Article 46(5) of Directive 2013/32, remain 'unclear', contrary to what is required by paragraphs 288 and 289 of the 2020 *Commission* v *Hungary* judgment and the fourth indent of point 1 of the operative part of that judgment. According to the Commission, in the light of paragraphs 297 to 301 of that judgment, the national legislation must be amended, since the infringement found by the Court concerns not a practice that is contrary to EU law, but inadequate transposition of EU law into Hungarian law.

35 Hungary contends that the Court should dismiss the action by declaring it inadmissible in so far as it concerns access to the international protection procedure, and unfounded as to the remainder.

36 As a preliminary point, that Member State considers that the 'central elements' of the 2020 *Commission* v *Hungary* judgment are no longer relevant, since the transit zones of Röszke and Tompa have not been used since 20 May 2020. Furthermore, the evolution of the migration situation on the 'Western Balkan route' and the large number of displaced persons from Ukraine render the Commission's arguments inappropriate and unfounded.

37 According to Hungary, in the first place, as regards access to the international protection procedure, the action is inadmissible.

38 In its view, all the findings made in the 2020 *Commission* v *Hungary* judgment relating to the transit zones of Röszke and Tompa have become devoid of purpose as a result of the closure of those transit zones. It does not make sense to speak of 'limitations' on access to the international protection procedure in those transit zones, since it is no longer possible to make a 'limited number' of applications there.

39 It is true that Hungarian legislation continues to contain provisions relating to transit zones, but those provisions have not been applicable since 26 May 2020 on account of the entry into force of the 2020 Law. That law introduces a transitional regime derogating from the Law on the right to asylum, under which access to an international protection procedure in the territory of Hungary is subject to the initiation of a preliminary procedure before a diplomatic representation of Hungary in a third country.

40 According to Hungary, since the compatibility of the 2020 Law with Article 6 of Directive 2013/32 was the subject of the case that gave rise to the 2023 *Commission* v *Hungary* judgment, the Commission could not initiate a parallel procedure, under Article 260(2) TFEU, concerning the same alleged infringement without disregarding Hungary's rights of defence and the principle of legal certainty.

41 In that regard, Hungary submits that it is justified for the Court to examine that law in the procedural context of Article 258 TFEU, since it forms part of a new context which was not examined in the 2020 *Commission* v *Hungary* judgment. However, the proceedings that gave rise to the 2023 *Commission* v *Hungary* judgment also concerned whether the infringement of Article 6 of Directive 2013/32 that had been found to exist in the 2020 *Commission* v *Hungary* judgment continued to exist. As a result, if the Court were to find a failure to fulfil obligations in the present case, the arguments put forward by Hungary in the proceedings under Article 258 TFEU with regard to the infringement of Article 6 of Directive 2013/32 could not have any effect, which would undermine Hungary's rights of defence in that case.

42 Furthermore, according to Hungary, the application does not set out the content of the provisions adopted following the delivery of the 2020 *Commission* v *Hungary* judgment, which prevents the Court from ruling on the substance.

43 In the alternative, Hungary submits that that part of the action is unfounded. First, the Hungarian legislature has adopted legislation which departs from Article 80/J of the Law on the right to asylum. Second, the 2020 *Commission* v *Hungary* judgment expressly refers to the legislation and practice relating to the transit zones of Röszke and Tompa. Yet the situation analysed in that part of the 2020 *Commission* v *Hungary* judgment no longer exists.

44 In the second place, as regards the removal of illegally staying third-country nationals to beyond the border fence, the maintenance in force of Article 5(1ter) of the Law on State borders is, according to Hungary, justified by the increasing migratory pressure on the 'Western Balkans migration route' and the large number of refugees from Ukraine since February 2022. In addition, before amending that provision, it is necessary to wait for the decision of the Alkotmánybíróság (Constitutional Court) to be issued in a case, ongoing at the date of the closure of the written part of the procedure, concerning, at the initiative of the Fővárosi Törvényszék (Budapest High Court, Hungary), the constitutionality of that provision.

45 Hungary submits, in the third place, as regards the right of applicants for international protection, in a situation other than a crisis situation caused by mass immigration, to remain in Hungarian territory, the Court held, in the 2020 *Commission* v *Hungary* judgment, that, in the context of Article 5(1)(a) of the Law on the right to asylum, the right to remain in Hungarian territory may be subject to conditions.

46 However, the legislation concerned did not make use of the optional possibility of making the right to remain in that territory subject to conditions. Therefore, there is no need to amend that legislation. In practice, the Hungarian authorities do not proceed with an expulsion until the decision of the authorities rejecting the asylum application has become final. In that regard, the Commission did not refer to any administrative or judicial decision that would call that observation into question.

Findings of the Court

– *Admissibility of the action*

47 Hungary considers that the action is inadmissible in so far as it concerns access to the international protection procedure.

48 In the first place, arguing that the closure of the transit zones of Röszke and Tompa rendered the findings made in the 2020 *Commission* v *Hungary* judgment relating to those transit zones devoid of purpose, and that the Law of 2020 introduced a transitional regime derogating from the Law on the right to asylum, Hungary claims, in essence, that it took the measures necessary to comply with that judgment as regards access to the international protection procedure, an argument which relates not to the examination of the admissibility of the action, but to the examination of the merits of the action.

49 In the second place, the argument that the principle of legal certainty and Hungary's rights of defence would be undermined on account of the matters raised in parallel in the case that gave rise to the 2023 *Commission* v *Hungary* judgment must be rejected, since that case gave rise to a judgment which has become final and thus has the force of *res judicata*.

50 In the third place, Hungary criticises the Commission for failing to set out, in its application, the content of the provisions of the 2020 Law.

51 In that regard, it is apparent from settled case-law in relation to Article 120(c) of the Rules of Procedure that an application initiating proceedings must state clearly and precisely the subject matter of the proceedings and set out a summary of the pleas in law relied on, so as to enable the defendant to prepare its defence and the Court to rule on the application. It follows in particular that the essential points of law and of fact on which such an action is based must be indicated coherently and intelligibly in the application itself (judgment of 21 December 2023, *Commission* v *Denmark (Maximum parking time)*, C-167/22, EU:C:2023:1020, paragraph 25 and the case-law cited).

52 In the present case, those requirements are met. The Commission set out coherently and precisely, in its application, the reasons which led it to consider that Hungary had not adopted the measures necessary to ensure compliance with the 2020 *Commission* v *Hungary* judgment. That institution referred, inter alia, to the amendments made to the Law on the right to asylum in June 2020 in the context of the COVID-19 pandemic, stating that, in its view, those provisions did not lead to compliance with the 2020 *Commission* v *Hungary* judgment and that, as it had argued in the case that gave rise to the 2023 *Commission* v *Hungary* judgment, they were contrary to EU law.

53 Therefore, the application enables Hungary and the Court to understand exactly the Commission's position, a condition which must be satisfied in order for that Member State to be able to present an effective defence and in order to enable the Court to ascertain whether that Member State has taken the measures necessary to comply with the 2020 *Commission* v *Hungary* judgment.

54 In the light of the foregoing, it must be held that the action is admissible.

– *Substance*

55 Under Article 260(2) TFEU, if the Commission considers that the Member State concerned has not taken the necessary measures to comply with a judgment by which the Court has found that that Member State has failed to fulfil an obligation under the Treaties, it may bring the case before the Court after giving that Member State the opportunity to submit its observations, specifying the amount of the lump sum or penalty payment to be paid by that Member State which it considers appropriate in the circumstances.

56 The reference date for assessing whether there has been a failure to fulfil obligations under Article 260(2) TFEU is the date of expiry of the period prescribed in the letter of formal notice issued under that provision (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 37 and the case-law cited).

57 In that regard, it should be noted that the authorities of the Member State concerned participating in the exercise of legislative power are under a duty to amend national legislative provisions which have been the subject of a judgment establishing a failure to fulfil obligations so as to make them conform with the requirements of EU law (see, to that effect, judgment of 13 July 2023, *YP and Others (Lifting of a judge's immunity and his or her suspension from duties)*, C-615/20 and C-671/20, EU:C:2023:562, paragraph 57 and the case-law cited).

58 It must also be borne in mind that the operative part of a judgment establishing a failure to fulfil obligations, which describes the failure to fulfil obligations established by the Court, is of particular importance for the determination of the measures which that Member State is required to adopt in order to comply fully with that judgment. The operative part of that judgment is to be understood in the light of the grounds of that judgment (see, to that effect, judgment of 22 October 2013, *Commission* v *Germany*, C-95/12, EU:C:2013:676, paragraphs 37 and 40 and the case-law cited).

59 In the present case, in the 2020 *Commission* v *Hungary* judgment, the Court held that Hungary had failed to fulfil its obligations relating, first, to access to the international protection procedure, second, to the detention of applicants for international protection in the transit zones of Röszke and Tompa, third, to the removal of illegally staying third-country nationals, and, fourth, to the right of applicants for international protection to remain in Hungarian territory until the time limit for exercising their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

60 It should be noted, as a preliminary point, that the Commission's application does not concern the detention of applicants for international protection in the transit zones of Röszke and Tompa and that, as regards the right of applicants for international protection to remain in Hungarian territory, the application concerns only a situation other than a crisis situation caused by mass immigration.

61 In the first place, as regards access to the international protection procedure, the description of the infringement at issue follows from the introductory wording and the first indent of point 1 of the operative part of the 2020 *Commission* v *Hungary* judgment.

62 It follows from the introductory wording of point 1 of the operative part of that judgment that the infringement in question consists in having failed to fulfil Hungary's obligations under Article 6 of Directive 2013/32.

63 That infringement was established on account of the situation referred to in the first indent of point 1 of that operative part, namely the combination of the requirement that applications for international protection from third-country nationals or stateless persons arriving from Serbia be made in the transit zones of Röszke and Tompa, and the existence of a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily.

64 In that regard, the Court held, inter alia, in paragraph 106 of that judgment, that Article 6 of Directive 2013/32 requires Member States to ensure that the persons concerned are able to exercise in an effective manner the right to make an application for international protection, including at their borders, as soon as those persons declare their wish to do so, so that that application is registered and can be lodged and examined in effective observance of the time limits laid down by that directive. As stated in paragraph 104 of that judgment, the very objective of that directive, in particular the objective of Article 6(1) thereof, is to ensure effective, easy and rapid access to the international protection procedure.

65 Therefore, as regards access to the international protection procedure, compliance with that judgment requires Hungary to adopt all the measures necessary to ensure effective, easy and rapid access to the international protection procedure.

66 However, on the date of expiry of the period prescribed in the letter of formal notice, namely 9 August 2021, Hungary had not complied with that requirement.

67 In that regard, contrary to what Hungary submits, the closure of the transit zones of Röszke and Tompa is not sufficient to guarantee effective, easy and rapid access to the international protection procedure. Indeed, it is common ground between the parties that, on the date of expiry of the period prescribed in the letter of formal notice, the regime applicable to access to the international protection procedure was that resulting from the Law of 2020.

68 In that regard, in point 1 of the operative part of the 2023 *Commission* v *Hungary* judgment, the Court held that, by making the possibility, for certain third-country nationals or stateless persons present in the territory of Hungary or at the borders of that Member State, of making an application for international protection subject to the prior lodging of a declaration of intent at a Hungarian embassy located in a third country and to the granting of a travel document enabling them to enter Hungarian territory, Hungary had failed to fulfil its obligations under Article 6 of Directive 2013/32.

69 It is apparent from paragraphs 8 to 13 and 37 of that judgment that that finding concerns the provisions of the 2020 Law on access to the international protection procedure, the application of which cannot, therefore, be regarded as valid compliance with the 2020 *Commission* v *Hungary* judgment.

70 It is important to clarify that the measures that must be taken in order to comply with a judgment of the Court establishing a failure to fulfil obligations must necessarily be compatible with the provisions of EU law which were found to have been infringed in that judgment, namely, here, Article 6 of Directive 2013/32, and must facilitate the proper application of those provisions. However, as the Court ruled in the 2023 *Commission* v *Hungary* judgment, that is not the case, here, with respect to the provisions of the 2020 Law on access to the international protection procedure.

71 Accordingly, it must be held that Hungary has not taken the necessary measures to comply with the 2020 *Commission* v *Hungary* judgment as regards access to the international protection procedure.

72 In the second place, as regards the removal of third-country nationals staying illegally in Hungary, the Court held, in the third indent of point 1 of the operative part of the 2020 *Commission* v *Hungary* judgment that, in allowing the removal of all third-country nationals staying illegally in its national territory, with the exception of those of them who are suspected of having committed an offence, without observing the procedures and safeguards laid down in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115, Hungary had failed to fulfil its obligations under those provisions.

73 Hungary does not dispute the fact that Article 5(1ter) of the Law on State borders, identified in paragraph 254 of that judgment as the national provision justifying that finding, was still in force on the date of expiry of the period prescribed in the letter of formal notice, namely 9 August 2021. However, that Member State considers that situation to be justified on account of the migratory pressure on the 'Western Balkan migration route' and the number of displaced persons from Ukraine.

74 A Member State cannot plead practical, administrative or financial difficulties or difficulties of a domestic nature to justify failure to observe obligations arising under EU law (see, to that effect, judgment of 8 June 2023, *Commission* v *Slovakia (Right of termination without fees)*, C-540/21, EU:C:2023:450, paragraph 86 and the case-law cited).

75 In the third place, as regards the right of applicants for international protection, in a situation other than a crisis situation caused by mass immigration, to remain in Hungarian territory until the time limit for exercising their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy, in the 2020 *Commission* v *Hungary* judgment, the conclusion that Hungary has failed to fulfil its obligations under Article 46(5) of Directive 2013/32 is apparent from the fourth indent of point 1 of the operative part of that judgment.

76 That conclusion is based on the finding, made in paragraphs 289 and 301 of that judgment, that, where a Member State decides to lay down detailed rules governing the exercise of the right to remain in its territory, as established in Article 46(5) of Directive 2013/32, those rules must be defined in a sufficiently clear and precise manner so that the applicant for international protection may ascertain the exact extent of that right and it is possible to assess whether such rules are compatible, inter alia, with Directives 2013/32 and 2013/33.

77 It is apparent from paragraph 297 of that same judgment that, according to Hungary, the conditions to which Article 5(1) of the Law on the right to asylum refers consist in requiring that the person concerned conform to the status of applicant defined by law and, in addition, comply with his or her obligation, as the case may be, to reside in a particular place.

78 First, as stated in paragraph 298 of the 2020 *Commission* v *Hungary* judgment, Hungary identifies no provision of the Law on the right to asylum which precisely provides that the right to remain in the territory of a Member State is subject to compliance with a residence condition.

79 Second, as was observed in paragraph 300 of that judgment, the condition requiring compliance with the status of applicant for international protection defined by the law and to which, according to Hungary's own assertions, the right of residence under Article 5(1)(a) of the Law on the right to asylum is also subject is open to various interpretations and refers to other conditions which have not been identified by that Member State.

80 Thus, compliance with the 2020 *Commission* v *Hungary* judgment requires, as regards the infringement in question, amendments to the national legislation, irrespective of the fact relied on by Hungary that, in practice, the Hungarian authorities do not proceed with an expulsion until the decision of the authorities rejecting the asylum application has become final.

81 In that regard, it must be borne in mind that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under EU law (judgment of 24 October 2013, *Commission* v *Spain*, C-151/12, EU:C:2013:690, paragraph 36 and the case-law cited).

82 On the date of expiry of the period prescribed in the letter of formal notice, namely 9 August 2021, Article 5(1)(a) of the Law on the right to asylum was still in force without having been amended, a fact which Hungary does not dispute.

83 In the light of all of the foregoing, it must be found that, by failing to take the measures necessary to ensure compliance with the 2020 *Commission* v *Hungary* judgment, Hungary has failed to fulfil its obligations under Article 260(1) TFEU.

Financial penalties

Arguments of the parties

84 Being of the view that Hungary has still not complied with the 2020 *Commission* v *Hungary* judgment, the Commission claims that the Court should order that Member State to pay a lump sum in the amount of EUR 5 468.45 multiplied by the number of days between the date of delivery of that judgment and either the date of compliance by Hungary with that judgment or the date of delivery of the present judgment if the latter date is sooner than the date of compliance with the 2020 *Commission* v *Hungary* judgment, the minimum amount of that lump sum being EUR 1 044 000.

85 The Commission also claims that the Court should order Hungary to pay a penalty payment of EUR 16 393.16 per day from the date of delivery of the present judgment until the date Hungary complies with the 2020 *Commission* v *Hungary* judgment.

86 Referring to its Communication SEC(2005) 1658 of 12 December 2005, entitled 'Implementation of Article [260 TFEU]', as updated in particular by its Communication of 13 April 2021, entitled 'Adjustment of the calculation for lump sum and penalty payments proposed by the Commission in infringement proceedings before the Court of Justice of the European Union, following the withdrawal of the United Kingdom' (OJ 2021 C 129, p. 1), the Commission proposes that the amount of the lump sum referred to in paragraph 84 of the present judgment be determined by multiplying a standard flat-rate amount of EUR 895 by a coefficient for seriousness. The result obtained is multiplied by an 'n' factor that takes into account, inter alia, the ability to pay of the Member State concerned, and by the number of days the failure to fulfil obligations in question persists. As regards the calculation of the amount of the daily penalty payment referred to in paragraph 85 above, the flat-rate amount is set at EUR 2 683 per day and should be multiplied by that coefficient for seriousness, by a coefficient for duration and by that 'n' factor.

87 In the first place, as regards the seriousness of the infringement at issue, the Commission proposes applying a coefficient for seriousness of 13 on a scale of 1 to 20.

88 According to the Commission, the EU rules which were the subject of the infringements at issue are of particular importance. First, Articles 6 and 46 of Directive 2013/32 are essential to ensure the effectiveness of the rights guaranteed by the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations, *Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954, as supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967 and which entered into force on 4 October 1967, and by the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the right to asylum, respect for the principle of non-refoulement and the right to an effective remedy. Second, the infringement relating to unlawful removals affects several fundamental provisions of Directive 2008/115.

89 According to the Commission, failure to comply with the 2020 *Commission* v *Hungary* judgment has significant effects on the public interest and on individual interests. First, the Commission states that, since 2015, it has initiated seven infringement procedures against Hungary in the area of asylum, four of which have been referred to the Court. Persistent non-compliance with EU law risks creating a precedent for other Member States and undermining the Common European Asylum System by transferring responsibility for the reception of applicants for international protection to other Member States and by strengthening illegal trafficking in human beings. Second, the infringements at issue have a serious impact on third-country nationals.

90 Moreover, the Commission identifies aggravating circumstances. Hungary did not cooperate with the Commission during the pre-litigation procedure, as it did not indicate any amendment or repeal of the provisions held to be contrary to EU law. Furthermore, repeated infringements of EU migration and asylum law, manifest disregard of the principle of primacy of EU law and the explicit refusal to comply with a judgment of the Court are extremely serious aggravating factors.

91 In the second place, as regards the duration of the infringement, the Commission proposes applying a coefficient for duration of 1 on a scale of 1 to 3, taking into account the period of ten months which elapsed between the date of delivery of the 2020 *Commission* v *Hungary* judgment and the date on which the Commission decided to bring the matter before the Court, namely 12 November 2021.

92 In the third place, as regards the 'n' factor, while taking note of the guidance given in the judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)* (C-51/20, EU:C:2022:36) – from which it is apparent that the gross domestic product (GDP) of the Member State concerned is the predominant factor, whereas it is not essential to take account of the institutional weight of that Member State – the Commission nevertheless bases its request on the parameters set out in the communications referred to in paragraph 86 of the present judgment. Against that background, the Commission proposes setting the 'n' factor at 0.47 for Hungary.

93 Hungary considers that the Commission erred in its assessment of the gravity of the infringement at issue by failing to take account of the closure of the transit zones of Röszke and Tompa, of the new Hungarian legislation on asylum, of the increasing pressure of illegal migration and of the consequences of Russian aggression against Ukraine. In particular, in its view, on account of the closure of those transit zones, Hungary's alleged failure to fulfil obligations is much more limited than that at issue in the case that gave rise to the 2020 *Commission* v *Hungary* judgment, which should be a fundamental consideration in the assessment of the gravity of the infringement at issue. In addition, it is of the view that on account of the proceedings in the case that gave rise to the 2023 *Commission* v *Hungary* judgment, the question of the compatibility of the provisions of the 2020 Law with Article 6 of Directive 2013/32 cannot be taken into account in assessing the seriousness of that infringement.

94 Moreover, Hungary considers that it did not infringe the principle of the primacy of EU law. In that regard, the opening of the procedure before the Alkotmánybíróság (Constitutional Court) referred to in paragraph 17 above, in order to ensure compliance with the Hungarian Basic Law, cannot be regarded as an aggravating circumstance. The Hungarian Government did not make compliance with the 2020 *Commission* v *Hungary* judgment subject to the decision of the Alkotmánybíróság (Constitutional Court) referred to in paragraph 20 of the present judgment, but merely waited for that decision. Nor did that government expressly refuse to comply with the 2020 *Commission* v *Hungary* judgment; it merely took into account external circumstances, unlike the Commission.

95 Lastly, Hungary, referring to paragraph 55 of the judgment of 30 May 2013, *Commission* v *Sweden* (C-270/11, EU:C:2013:339), asks the Court to take into account, as a mitigating circumstance, the fact that it has never failed to comply with a judgment of the Court to date.

Findings of the Court

96 As a preliminary point, it must be recalled that the procedure laid down in Article 260(2) TFEU is aimed at inducing a defaulting Member State to comply with a judgment establishing a failure to fulfil obligations, thereby ensuring that EU law is in fact applied, and the measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve that objective (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 50 and the case-law cited).

97 It should also be recalled that, in each case, it is for the Court to determine, in the light of the circumstances of the case before it and according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties appropriate, in particular, for preventing the recurrence of similar infringements of EU law (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 51 and the case-law cited).

– *The lump sum payment*

98 In accordance with settled case-law, the imposition of a lump sum payment and the fixing of that sum must depend in each individual case on all the relevant factors relating both to the characteristics of the failure to fulfil obligations that was established and to the conduct of the Member State involved in the procedure initiated under Article 260 TFEU. That provision confers a wide discretion on the Court in deciding whether to impose such a

penalty and, if it decides to do so, in determining the amount (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 78 and the case-law cited).

99 In the present case, all the legal and factual circumstances that have led to the finding of a failure to fulfil obligations indicate that, if the future repetition of similar infringements of EU law is to be effectively prevented, a dissuasive measure must be adopted, such as the imposition of a lump sum payment.

100 In those circumstances, it is for the Court, in the exercise of its discretion, to fix the lump sum in an amount appropriate to the circumstances and proportionate to the infringements (see, to that effect, judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 80 and the case-law cited).

101 Relevant factors in that regard include the seriousness and duration of the infringements found and the ability of the Member State in question to pay (see, to that effect, judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 81 and the case- law cited).

102 In the first place, as regards the seriousness of the infringements at issue, a prolonged failure to comply with a ruling of the Court of Justice in itself seriously undermines the principle of legality and the principle of *res judicata* in a Union based on the rule of law.

103 In that regard, despite the closure of the transit zones of Röszke and Tompa, Hungary has not taken the measures necessary to comply with the 2020 *Commission* v *Hungary* judgment as regards several essential aspects of that judgment, namely access to the international protection procedure, the removal of illegally staying third-country nationals and the right of applicants for international protection to remain in Hungarian territory until the time limit for exercising their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

104 In that context, it is necessary to emphasise the importance of the provisions which are the subject of the failure to fulfil obligations established in paragraph 83 above.

105 First, compliance with Article 6 of Directive 2013/32 is necessary in order to ensure, in accordance with the right to asylum recognised in Article 18 of the Charter, the effectiveness of the other provisions of that directive and, as a result, of the common policy on asylum, subsidiary protection and temporary protection as a whole.

106 Infringement of that fundamental provision systematically prevents any access to the international protection procedure, making it impossible for the Member State concerned to apply that policy, as established in Article 78 TFEU, in its entirety.

107 It should be noted that the deliberate evasion by a Member State of the application of a common policy as a whole constitutes an unprecedented and exceptionally serious infringement of EU law, which represents a significant threat to the unity of EU law and to the principle of equality of the Member States, referred to in Article 4(2) TEU.

108 As regards the specific case of the common policy on asylum, subsidiary protection and temporary protection, such an infringement undermines in a particularly seriously manner both the public interest and the interests of third-country nationals and stateless persons wishing to apply for international protection. In particular, the systematic avoidance of applications for international protection deprives the Convention Relating to the Status of Refugees, as supplemented by the Protocol Relating to the Status of Refugees, to which all Member States are parties and which constitutes the cornerstone of the international legal regime for the protection of refugees, of its essential effects as regards the Member State concerned (see, to that effect, judgment of 16 January 2024, *Intervyuirasht organ na DAB pri MS (Women victims of domestic violence)*, C-621/21, EU:C:2024:47, paragraph 36 and the case-law cited). Furthermore, the fact that it is impossible for third-country nationals or stateless persons to make an application for international protection at the Hungarian border deprives those persons of the effective enjoyment of their right, as guaranteed by Article 18 of the Charter, to seek asylum in Hungary (see, to that effect, the 2023 *Commission* v *Hungary* judgment, paragraph 52).

109 Second, compliance with Article 46(5) of Directive 2013/32 is essential in order to ensure, as regards applicants for international protection, the effectiveness of the principle of effective judicial protection of an individual's rights under EU law, which is a general principle of EU law stemming from the constitutional traditions common to

the Member States, enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and now reaffirmed in Article 47 of the Charter (see, to that effect, judgment of 7 September 2023, *Asociaţia 'Forumul Judecătorilor din România'*, C-216/21, EU:C:2023:628, paragraph 59).

110 Third, Articles 5, 6, 12 and 13 of Directive 2008/115 establish fundamental guarantees, in particular with regard to the right to protection in the event of removal and expulsion, enshrined in Article 19 of the Charter, for the application of that directive.

111 By allowing, without complying with those guarantees, the removal of all third-country nationals staying illegally on its territory, with the exception of those of them who are suspected of having committed an offence, a Member State fails to have regard to much of the content of the requirements concerning the procedures applicable to the return of illegally staying third-country nationals, which, pursuant to Article 79(2)(c) TFEU, is a vital component of the common immigration policy.

112 Moreover, the fact that proceedings concern a failure to comply with a judgment relating to a general and persistent practice has the effect of rendering the failure to fulfil obligations in question more serious (judgment of 2 December 2014, *Commission* v *Italy*, C-196/13, EU:C:2014:2407, paragraph 100).

113 It should be noted that, by failing to take the measures necessary to comply with the 2020 *Commission* v *Hungary* judgment, Hungary is systematically and deliberately evading the application of the common policy on asylum, subsidiary protection and temporary protection, and the rules relating, in the context of a common immigration policy, to the return of persons residing without authorisation, which constitutes an exceptionally serious breach of EU law.

114 It should be added that Hungary's conduct has the effect, inter alia, of transferring to the other Member States its responsibility, including financial responsibility, for ensuring the reception of applicants for international protection in the European Union, for examining applications in accordance with the procedures for granting and withdrawing that protection, and for ensuring arrangements for the return of illegally staying third-country nationals that comply with EU law.

115 Such conduct seriously undermines the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which governs, in accordance with Article 80 TFEU, the common policy on asylum, subsidiary protection and temporary protection and the common immigration policy (see, to that effect, judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 80 and the case-law cited).

116 In that regard, it should be recalled that the principle of solidarity is one of the fundamental principles of EU law and is one of the values common to the Member States on which the European Union is founded, pursuant to Article 2 TEU (see, to that effect, judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 129 and the case-law cited).

117 By unilaterally upsetting the balance between the advantages and obligations arising from its membership of the European Union, a Member State calls into question observance of the principle of equality of the Member States before EU law. That failure in the duty of solidarity accepted by the Member States by the fact of their accession to the European Union strikes at the very root of the EU legal order (see, to that effect, judgment of 7 February 1979, *Commission* v *United Kingdom*, 128/78, EU:C:1979:32, paragraph 12).

118 It follows from all of the foregoing that the failure to comply with the 2020 *Commission* v *Hungary* judgment has an extraordinarily serious impact on both the public interest and private interests, in particular the interests of third-country nationals and stateless persons wishing to apply for international protection.

119 It is true that account must be taken of the fact that Hungary has not previously been the subject of any proceedings brought under Article 260 TFEU (see, by analogy, judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 63 and the case- law cited).

120 However, in addition to the exceptional seriousness of the infringement in question, it is necessary also to take into consideration, as an aggravating circumstance, the repetition of the unlawful conduct of that Member State (see, by analogy, judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)*, C-51/20, EU:C:2022:36, paragraph 103), which led to various other findings of infringements in the area of international protection (judgments of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257; of 16 November 2021, *Commission* v *Hungary (Criminalisation of assistance to asylum seekers)*, C-821/19, EU:C:2021:930; and the 2023 *Commission* v *Hungary* judgment).

121 Furthermore, account must be taken of the fact that the Hungarian Government stated that it was appropriate to wait, before complying with the 2020 *Commission* v *Hungary* judgment, for the completion of the proceedings, referred to in paragraph 17 of the present judgment, which it had initiated before the Alkotmánybíróság (Constitutional Court), and the decision of that court referred to in paragraph 44 of the present judgment.

122 In that regard, it should be recalled that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. Compliance with the obligations following from that principle is necessary in particular in order to ensure respect for the equality of Member States before the Treaties and constitutes an expression of the principle of sincere cooperation set out in Article 4(3) TEU (judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)*, C-204/21, EU:C:2023:442, paragraph 77 and the case-law cited).

123 In addition, following the 2020 *Commission* v *Hungary* judgment, Hungary, instead of ensuring full compliance with that judgment, extended the applicability *ratione temporis* of the provisions of the 2020 Law, which were also incompatible with Article 6 of Directive 2013/32, as was held in the 2023 *Commission* v *Hungary* judgment.

124 In those circumstances, Hungary's conduct shows that it has not acted in accordance with its duty of sincere cooperation to put an end to the failure to fulfil obligations established by the Court in the 2020 *Commission* v *Hungary* judgment, which constitutes an additional aggravating circumstance (see, by analogy, judgment of 12 November 2019, *Commission* v *Ireland (Derrybrien wind farm)*, C-261/18, EU:C:2019:955, paragraph 120).

125 Lastly, it must be stated that migratory movements over recent years, and in particular those following the Russian aggression against Ukraine, cannot be regarded, in the present case, as a mitigating circumstance since Hungary has not established, in its written observations or at the hearing, how it was prevented, as a result of those migratory movements, from adopting the measures necessary to comply with the 2020 *Commission* v *Hungary* judgment.

126 In the second place, as regards the duration of the infringements at issue, it should be borne in mind that that duration must be assessed by reference to the date on which the Court assesses the facts (judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)*, C-51/20, EU:C:2022:36, paragraph 105 and the case-law cited).

127 In order to determine whether the failure on the part of the defendant to fulfil obligations continued up until the Court's examination of the facts, it is necessary to consider the measures which were adopted, according to that party, after the period prescribed in the letter of formal notice (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 53 and the case-law cited).

128 Hungary has not mentioned any measure, adopted between the date of expiry of that time limit and the end of the written part of the procedure, that is capable of calling into question the finding made in paragraph 83 of the present judgment. It stated at the hearing that there had been no change in the relevant national legislation since the end of the written part of the procedure.

129 It is therefore established that the failure to fulfil obligations has continued for more than three years after the date of delivery of the 2020 *Commission* v *Hungary* judgment, which is a considerable period of time.

130 Although Article 260(1) TFEU does not specify the period within which a judgment must be complied with, it follows from settled case-law that the importance of the immediate and uniform application of EU law means that the process of compliance must be initiated at once and completed as soon as possible (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 67 and the case-law cited).

131 In the third place, as regards the ability of the Member State concerned to pay, its GDP should be taken as the predominant factor, without taking account of its institutional weight. In that regard, it is also necessary to take account of recent trends in that Member State's GDP at the time of the Court's examination of the facts (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 69 and the case-law cited).

132 In the light of the foregoing considerations, and in particular the exceptional seriousness of the infringements at issue and Hungary's failure to cooperate in good faith in order to bring them to an end, the Court considers it appropriate to impose a lump sum, the amount of which must be set at EUR 200 000 000.

133 Hungary must, therefore, be ordered to pay the Commission a lump sum of EUR 200 000 000.

– *The penalty payment*

134 According to settled case-law, in exercising the discretion conferred on it in such matters, the Court is empowered to impose a penalty payment and a lump sum payment cumulatively (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 77 and the case-law cited).

135 The imposition of a penalty payment is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 52 and the case-law cited).

136 In the present case, as established in paragraph 129 of the present judgment, Hungary's failure to fulfil obligations has continued up to the time of the Court's examination of the facts of the case.

137 In those circumstances, an order imposing a periodic penalty payment on Hungary is an appropriate financial means by which to encourage that Member State to take the measures necessary to put an end to the failure to fulfil obligations established and to ensure full compliance with the 2020 *Commission* v *Hungary* judgment (see, by analogy, judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 55 and the case-law cited).

138 In that regard, according to settled case-law, that penalty payment must be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct and bring to an end the impugned conduct (see, to that effect, judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 56 and the case-law cited).

139 In exercising its discretion in the matter, it is for the Court to set that penalty payment so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 57 and the case-law cited).

140 The Commission's proposals regarding the amount of that penalty payment cannot bind the Court and are merely a useful point of reference. The Court must remain free to set the penalty payment to be imposed in an amount and in a form that it considers appropriate for the purposes of inducing the Member State concerned to bring to an end its failure to comply with its obligations arising under EU law (judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 58 and the case-law cited).

141 For the purposes of determining the amount of a penalty payment, the basic criteria which must be taken into consideration in order to ensure that that payment has coercive effect and that EU law is applied uniformly and effectively are, in principle, the seriousness of the infringements, their duration and the capacity of the Member State in

question to pay. In applying those criteria, regard must be had in particular to the effects of failure to comply on private and public interests and to the urgency of inducing the Member State concerned to fulfil its obligations (see, to that effect, judgment of 14 December 2023, *Commission* v *Romania (Closure of landfill sites)*, C-109/22, EU:C:2023:991, paragraph 59 and the case- law cited).

142 In the present case, in the light of all the legal and factual circumstances which led to the finding of a failure to fulfil obligations as well as the considerations set out in paragraphs 102 to 131 of the present judgment, the Court considers it appropriate to impose a penalty payment of EUR 900 000 per day in respect of Article 6 and Article 46(5) of Directive 2013/32, and to impose a penalty payment of EUR 100 000 per day in respect of Articles 5, 6, 12 and 13 of Directive 2008/115.

143 Hungary must therefore be ordered to pay the Commission a penalty payment of EUR 900 000 per day of delay in implementing the measures necessary to comply with the 2020 *Commission* v *Hungary* judgment, from the date of delivery of the present judgment until the date of full compliance with that first judgement in so far as concerns Article 6 and Article 46(5) of Directive 2013/32. Hungary must also be ordered to pay the Commission a penalty payment of EUR 100 000 per day of delay in implementing the measures necessary to comply with the 2020 *Commission* v *Hungary* judgment, from the date of delivery of the present judgment until the date of full compliance with that first judgement in so far as concerns Articles 5, 6, 12 and 13 of Directive 2008/115.

Costs

144 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Hungary has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that, by failing to take all the measures necessary to comply with the judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029), Hungary has failed to fulfil its obligations under Article 260(1) TFEU;**

2. **Orders Hungary to pay the European Commission a lump sum in the amount of EUR 200 000 000;**

3. **Orders Hungary to pay the Commission a penalty payment of EUR 900 000 per day from the date of delivery of the present judgment until the date of compliance with the judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029), in so far as concerns Article 6 and Article 46(5) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection;**

4. **Orders Hungary to pay the Commission a penalty payment of EUR 100 000 per day from the date of delivery of the present judgment until the date of compliance with the judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029), in so far as concerns Articles 5, 6, 12 and 13 of 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;**

5. **Orders Hungary to pay the costs.**

[Signatures]