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Never Say Never:

Consequences of the CJEU Decision in Case C-66/18 *Commission v. Hungary****

ABSTRACT

The CJEU's judgment in case C-66/18 made a significant change to the jurisprudence concerning the status of WTO-law in the EU. While it stopped short of making WTO-law justiciable to individuals and companies, it established that WTO-law can be relied on against Member States in infringement cases. It is likely that if the Commission can rely on WTO-law in infringement cases against Member States based on the decision in case C-66/18, then member States will also have the right to start infringement procedures against each other. It is unclear whether the decision could be a basis for using WTO-obligations in other direct procedures, such as annulment.

The judgment significantly extended the scope of the application of the Charter. It was the first instance where a European court provided interpretation as to the scope of protection provided by Article 13 for educational institutions in light of a Member State's measure limiting institutional autonomy. Member States will have to pay more attention when they adopt measures that have the potential effect of limiting any foreign educational institutions' freedoms as established by the ECHR or the Charter.

KEYWORDS: applicability of WTO-law in EU law, applicability of the Charter, rule of law, academic freedom

I. INTRODUCTION

The Court of Justice of the European Union ('CJEU') delivered a judgment on October 6, 2020 in case C-66/18 after long deliberations. The case concerned an amendment to the Hungarian law on national higher education [act CCIV of 2011 ('HEA')] in

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2017 requiring both new and already established foreign universities in Hungary (host state) to prove that they have a physical campus in their home state and if their host and home states did not conclude an international treaty on the university's operation in Hungary within a period of six months they were forced to close and leave the Hungarian market ('HEA Amendment'). Of the 24 established foreign university programmes in Hungary in 2017, one was particularly affected by the new requirement, an American university operating in Hungary, the founder of which was in a political conflict with the Hungarian government – was forced to stop admitting students. The dispute, therefore, primarily concerned the rights of a US-based university teaching in Europe and the applicability of certain international agreements and EU law to higher education institutions established in Europe.

The HEA Amendment seemed to be in conflict with certain General Agreement on Trade in Services (hereinafter 'GATS') schedules and the Charter of Fundamental Rights of the EU. In the schedules, each country identifies the service sectors to which it will apply the market access and national treatment obligations of the GATS and any limitations it wishes to maintain. The GATS differentiates between market access rights (which enable newcomers to enter the market) and the standard of national treatment (that allows established service providers the same treatment as others). In 1997, when ratifying the Marrakesh Agreement, Hungary did not make any exceptions in its Schedule of Commitments annexed to the GATS on its national treatment commitment to established higher education service providers, although it did make an exception applicable to new market entrants.

In the case of both the GATS and the Charter, the question was not so much whether – as a matter of substantive law – the HEA Amendment was in line with Hungary's international and/or European legal obligations. Instead, the question was whether the European Commission was willing and entitled to raise the issue of non-compliance with the GATS and the Charter *vis-à-vis* a member state.

II. BACKGROUND

The Central European University – a New York State accredited university – has been present on the Hungarian higher education market since the early-1990s. Licensed by the US educational authorities, interestingly, it did not have a presence on the US educational markets, it did not initially have a campus in the state of New York, its formal home state: it was only present in Hungary. The Central European University ('CEU') is one of several dozen US licensed universities in the world that are active in foreign jurisdictions, selling US degrees based on US programmes. More than a dozen of these universities operate in EU countries such as Bulgaria, the Czech Republic, Croatia, France, Germany Ireland, Italy and Spain besides Hungary. Many of these

US universities do not have campuses or activities in the US; their entire operation is carried out in the host state.

Since 2004, CEU had a twin-institution, the Közép-Európai Egyetem ('KEE'), created by an Act of Parliament in Hungary. KEE became an accredited Hungarian university. CEU and KEE cooperated in a symbiosis, functioned within the same building and with the same faculty, and students could enrol in both establishments if they wished to receive both a US and a Hungarian degree. After KEE's creation, CEU did not have an independent campus from KEE.

The HEA dealt with foreign-based universities active in Hungary in its chapter XX and with private and church-based universities in chapter XXVI. Chapter XX concerned CEU and Chapter XXVI concerned KEE.

The Hungarian Government submitted a draft law to the Hungarian Parliament on March 28, 2017 to amend the HEA. This HEA Amendment has become Act 25 of 2017 amending chapter XX of the HEA on April 4, 2017. The HEA Amendment radically changed the conditions under which foreign universities could be established or operate in Hungary.

According to the official explanation, the HEA Amendment followed up on the findings of the Hungarian Education Authority, which examined foreign universities in the autumn of 2016 and discovered discrepancies and serious irregularities in their functioning. In addition, the new regulatory framework also aimed to respond to wider policy imperatives and national security concerns. Under the new Section 76(1) of the HEA, a foreign university could admit students and issue diplomas in Hungary only if four cumulative conditions were met. Out of these four conditions, two had existed since the inception of the HEA. The following two were new conditions: (1) an international treaty is concluded between Hungary and the home country government of the foreign university and (2) the foreign university genuinely offers higher education services in its home country and qualifies there as a recognised university. The law made an exception on the new international treaty requirement to universities with a seat in the European Economic Area. The law was applicable to incumbents with 6 months' lead time and to incoming universities. Later this lead time was prolonged.

The EU Commission sent a letter of formal notice to Hungary. The letter claimed that the law was not compatible with the freedom to provide services and the freedom of establishment¹ and also with the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the EU, the Union's legal obligations under international trade law. The Commission subsequently issued two reasoned opinions on the matter, in July and October 2017. After inconclusive discussions with Hungary, the EU Commission launched an infringement procedure at the CJEU on February 1, 2018 on legal grounds essentially identical to those listed in the formal notice.

¹ The letter was sent on April 27, 2017.

In addition, on April 27, 2017, the Parliamentary Assembly of the Council of Europe requested the opinion of the Venice Commission on the new law. It delivered its opinion on the matter in July 2017, and accepted that the new regulatory framework introduced by the Law might legitimately be applied to new market entrant foreign universities. It stated, however, that ‘introducing more stringent rules without very strong reasons, coupled with strict deadlines and severe legal consequences, to foreign universities which are already established in Hungary and have been lawfully operating there for many years, appears highly problematic from the standpoint of rule of law and fundamental rights principles and guarantees’.²

In the course of 2017 and 2018, Hungary has concluded international agreements with many home states of universities active in Hungary, such as from China and the state of Maryland, but it did not conclude an international agreement with the state of New York to enable CEU to continue operating. In 2017 CEU established a campus in order to fulfil the ‘genuine teaching activities in the State of origin’ requirement. New York State has accepted the campus for US teaching purposes; Hungary inspected the CEU campus in Annandale-on-Hudson but did not recognise that CEU has complied with the requirement. News organizations close to the government indicated that Hungary considered CEU’s new campus to be insufficient to fulfil the requirement.³

III. THE TIME FACTOR

As described above, the Commission and the Venice Commission both reacted exceptionally quickly to legislative events taking place in March–April 2017, and concluded their processes by July 2017. The Commission did not propose to the Court that it applied an expedited procedure and also did not apply for interim measures. The Court held an oral hearing in June 2019 and decided the case in the autumn of 2020. The most contested provisions of the HEA Amendment came into operation by the end of 2018 following a postponement.

² See Council of Europe, Hungary – Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education, endorsed by the Venice Commission at its 112th Plenary Session (Venice, 6–7 October 2017), CDL-AD(2017)022-e, 77.

³ It was called a „Potemkin campus” by the *About Hungary blog*. <https://abouthungary.hu/blog/consider-the-ceus-so-called-campus-in-new-york> (Last accessed: 31 December 2020). The campus was called insufficient by Magyar Idők: „Megdöböntő dolog derült ki a Soros-egyetemről”, <https://www.magyaridok.hu/kulfold/megdobbento-dolog-derult-ki-a-soros-egyetemrol-3624335/> (Last accessed: 31 December 2020) and Mandiner: „Magyar Idők: Itt működik az amerikai CEU”, https://mandiner.hu/cikk/20181030_magyar_idok_itt_mukodik_az_amerikai_ceu (Last accessed: 31 December 2020).

IV. THE PARTIES' ARGUMENTS

The parties' arguments have not been made public and can be understood only from references in the judgment, but the Commission's arguments must have essentially been the same as in its reasoned opinions.

1. Commission

a) International treaty requirement

The Commission argued that Hungary undertook a full commitment without any limitations in respect of the national treatment determined in GATS, as demonstrated by the 'none' word indicated in the column relating to 'limitations on national treatment' in the Schedule of Commitments. The Commission also argued that, although there is a limitation made by Hungary in the column relating to 'limitations on market access' referred to in Article XVI of the GATS, according to which the 'establishment of schools is subject to license from the central authorities', this is too vague and general and therefore it cannot be considered to relate to the national treatment obligation.

The Commission's conclusion was that Hungary has committed itself to applying, to service providers from third country members of the WTO, treatment no less favourable than that which Hungary accords to its domestic providers and that national treatment is infringed when Hungary requires an international treaty to be concluded between Hungary itself and the relevant institutions State of origin. The Commission saw this requirement as clearly arbitrary as Hungary, as a sovereign state, has the discretion to decide whether to enter into such a treaty and, if yes, with what content and even if the other State was ready to enter into a treaty then Hungary had the right to refuse to do so.

The Commission stressed that Hungary's discretion to enter into negotiations with the other State concerned demonstrates that the requirement does not meet the condition for exceptions laid down in Article XIV of the GATS, which Hungary referred to, because such exceptions cannot be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services'.

b) The 'genuine teaching activities in the State of origin' requirement

The Commission pointed out that this requirement modifies competition for the benefit of Hungarian service providers and may have the effect of preventing foreign providers to enter into the Hungarian market and it infringes the national treatment obligation, fully committed to by Hungary, and is also discriminatory.

As to the justifications argued by Hungary, the Commission was of the opinion that Hungary had failed to provide any substantive evidence as to why this requirement contributes to maintaining public order or what is the genuine and sufficiently serious threat posed to one of the fundamental interests of Hungarian society that justifies the modification of competition. The Commission noted that, even if there was a proper justification for the purpose of maintaining public order, Hungary would have had to demonstrate that there was no other, less restrictive alternative.

According to the Commission, private institutions, such as CEU, carrying out teaching and scientific research activities in Hungary, can indeed rely on their right to the freedom of establishment under Article 49 TFEU and the requirement constitutes a restriction on this freedom.

Finally, the Commission brought in the argument of this requirement breaching the freedom to provide services under Article 16 of the Services Directive and, alternatively, Article 56 TFEU on the same freedom.

2. Hungary

Hungary primarily contended – as it follows from an obiter dictum in the AG’s opinion and the judgment – that Hungary’s GATS obligations may not be brought up by the Commission in front of the CJEU and were obliged to have claimed that Arts 49 and 56 of the TFEU and the Services Directive⁴ were inapplicable in this case.

a) International treaty requirement

Hungary contended that the general license condition relating to ‘limitations on market access’ constitutes a limitation of the national treatment obligation, despite the fact that the limitation was not indicated in the other, relevant column relating to limitations on national treatment. According to Hungary’s interpretation, the limitation in the ‘wrong’ column was formulated in such a general way so that it enabled the wide discretion of the Member State in restricting the establishment of foreign higher education institutions and the possibility to adjust the relevant legal framework, e.g. by introducing a new requirement to conclude international treaties.

Hungary noted that the requirement’s objective was to intensify the diplomatic relations in the cultural and educational sector and the fact that two different treaties had indeed been concluded⁵ shows that the condition was not impossible to fulfil.

As to the justification of an exception under Article XIV of the GATS, Hungary argued that the international treaty requirement is necessary for the ‘purposes of

⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006, p. 36–68.

⁵ One by Maryland (USA) and the other with the Republic of China.

maintaining public order and preventing deceptive practices' and serves to ensure that the home State (in which the seat of the institution concerned is situated) considers that provider to be 'reliable', in compliance with that other State's laws and supports the institution's future activities in Hungary.

b) The 'genuine teaching activities in the State of origin' requirement

Hungary's argument in relation to this requirement was basically identical to its arguments relating to the international treaty requirement. The justification pleaded by Hungary for the modification of the competition rules was maintaining public order and preventing of deceptive practices.

As to the application of Article 49 TFEU (freedom of establishment), Hungary argued that this Article is not applicable to the CEU because it is a school financed mostly from private funds and the education it offers cannot be considered an 'economic activity'. Relating to the restriction element, Hungary contended that this requirement does not qualify as a restriction because it relates to the operation and not the form of establishment and it does not prevent a foreign entity from setting up a branch, for example, in Hungary.

c) Other arguments

Regarding the application of Article 49 TFEU (freedom of establishment), Hungary argued that education and training offered by educational institutions financed largely by private funds could not be characterized as 'economic activity' within the meaning of the TFEU if it is the service provider itself which finances the teaching activities and Article 49 TFEU was therefore not applicable.

V. THE ADVOCATE GENERAL'S OPINION

Advocate General Kokott's opinion was rendered on March 5, 2020 and raised important arguments in favour of the Commission, which CJEU agreed with and reflected in the judgment, relating to both the restriction of freedom to provide services under the GATS and the violation of the academic freedom principle and the freedom to establish educational establishments as part of the right to education incorporated into the Charter of Fundamental Rights of the European Union.

1. The applicability of the GATS

According to the AG, with reference to settled case-law, the CJEU has jurisdiction to hear claims related to a Member State's obligation to comply with WTO law and in this case specifically, the GATS, because international agreements concluded by the EU form

an integral part of EU's legal order and they are binding on EU institution and Member States alike under Article 216(2) TFEU.⁶ In addition, Article 207 TFEU provides that the external competence of the EU for trade in services, established previously under Article 133 of the Lisbon Treaty, is now exclusively within the framework of the CCP, i.e. the EU's Common Commercial Policy. The AG then went on to conclude that GATS obligations, as obligations stemming from an international agreement on trade in services, were transferred from the Member States to the EU so they also constitute an obligation under EU law and thus, can be subject to an infringement procedure.

The second part of the AG's arguments on the applicability of the GATS was related to the responsibility of the EU under international law for infringements of the GATS by Member States. As outlined above, it is fully binding on the EU. As the EU cannot influence the Member States as to how they implement the GATS within their own regulatory competence, Member States' actions within its scope can ultimately be attributed to the EU itself. According to the CJEU case-law, the Member States, when they implement on a national level their obligations under an international agreement, fulfil an obligation in relation to the EU and the EU has basically assumed responsibility, externally, for the due performance of the agreement.⁷

This is substantiated by the Member States' duty of sincere cooperation under Article 4(3) TFEU, which acts as a limit on the exercise of competence.⁸ It follows from this that Member States are free to exercise their internal competence to regulate higher education, but only to the extent that the relevant rules do not infringe their obligations under the GATS. This would not only render the European Union responsible in international law, but also expose the other Member States to the risk of countermeasures.

As it can be seen, the AG took the position that GATS obligations may be brought up in front of the CJEU in infringement proceedings but only in infringement procedures. *The AG did not go so far as to say that, for example, individuals or companies could sue for non-compliance with the GATS.*

2. International treaty requirement

On the substance, the AG's opinion first examined the requirement of the conclusion of an international treaty between Hungary and the State of origin (in the CEU's case, the United States) in order to be granted an operating licence in Hungary and

⁶ Article 216(2) TFEU: Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

⁷ Most recently see *Commission v France* (C-239/03, EU:C:2004:598, paragraph 26).

⁸ (3) Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

the collision of such requirement with Article XVII:1 of the GATS and Hungary's specific commitment for the higher education sector. According to AG Kokott, an infringement of a Member State's obligation under an international treaty such as the GATS also constitutes an infringement of that particular Member State's obligation under Article 216(2) TFEU, which provides that international treaties concluded by the EU are binding upon both the EU institutions and the Member States.

AG Kokott took the position that the international treaty requirement introduced by the disputed HEA Amendment constituted a manifest infringement of the GATS on multiple levels. First, it was in breach of the principle of the national treatment obligation required by the GATS, as it restricted foreign higher education institutions (that are considered 'service suppliers' under GATS) and distorted competition to the detriment of higher education institutions seated in non-EU countries. Second, the GATS opt-in system enabled sovereigns to include limitations on their national treatment commitments and Hungary could have included such specific limitations regarding the establishment or operation of schools in its Schedule of Commitments annexed to the GATS but, as a matter of fact, Hungary did not list any such limitations. Hungary was, therefore, according to AG Kokott, fully obliged to accord national treatment without any restrictions to US and other higher education service providers.

AG Kokott did not find Hungary's defence based on Article XIV of the GATS to be well-founded either. This Article provides for exceptions if the measure at issue is necessary to guarantee public policy and public security or to prevent deceptive and fraudulent practices. AG Kokott took the position that the international treaty requirement was not a permissible exception but rather a measure enabling the Hungarian authorities to exercise arbitrary discrimination, which is expressly prohibited by the very same Article XIV of GATS, which provides that such exceptions cannot be applied in a manner which constitutes an 'arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services'.

The AG's opinion pointed out that the international treaty requirement could not be regarded as an objective criterion combating fraud because it covered not just newly established institutions but established schools as well, and established schools were already operating under the control of the host state (Hungary) so an international treaty cannot be relevant. The AG was also of the opinion that an international treaty could not prevent any fraudulent activities of the higher education institutions concerned in the host state. AG Kokott also agreed with the Commission's argument that an international treaty necessarily involved the exercise of political discretion and it is not fully amenable to judicial review, which means that the condition requiring an international treaty between Hungary and the State of origin ultimately falls within the control of Hungary.

3. The ‘genuine teaching activities in the State of origin’ requirement

The second part of the restrictions provided by the disputed Hungarian laws was that every school was required to have genuine teaching activities in the State of origin if it wished to continue its operation in Hungary. Compared to the international treaty requirement, which affected non-EU and non-EEA third countries, this legal requirement concerned every non-Hungarian school originating in any country other than Hungary. This meant that the possible violation of the freedom of establishment principle incorporated in Article 49 and 54 of the TFEU had to be examined as well.

According to AG Kokott, the requirement of having an ‘establishment’ in a foreign country clearly impedes the ability of foreign institutions to commence (‘the right to take up and pursue activities’ under Article 49 TFEU) higher education activities in Hungary and it does not qualify as a special treatment of foreign nationals as allowed by Article 52(1) TFEU on grounds of public policy, public security or public health, as Hungary did not provide any reasonable grounds that the disputed law fulfils these criteria.

This requirement also raised the question of compatibility with Article 2(1) of Directive 2006/123/EC, aka the Services Directive, which provides in general that ‘Member States shall respect the right of providers to provide services in a Member State other than that in which they are established’ and also that the ‘Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory’. As already established by case-law,⁹ privately financed schools constitute services, since ‘the aim of such establishments is to offer a service for remuneration’.

As a possible limitation of Article 2(1), Article 16(1) and (3) of the Services Directive enables Member States to regulate access to or exercise of a service activity in their territory subject to compliance with requirements which are non-discriminatory, necessary and proportionate which must serve to maintain public policy, public security, public health or the protection of the environment. According to GA Kokott, however, the reviewed Hungarian law was clearly discriminatory, not justified on the grounds of protection of public policy and there was no overriding public interest behind it.

For reasons already presented above, the AG opinion found that this ‘genuine teaching activity in the State of origin’ requirement also breached Article 13 and 14(3) of the Charter and Article XVII of the GATS in conjunction with Article 216(2) TFEU in the same way as the international treaty requirement.

⁹ Most recently, see para 48 of the judgment dated 27 June 2017 in *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496.

4. Applicability of the Charter

As to the possible infringement of the right to education and academic freedom enshrined in the Charter, the Advocate General took the novel position that although the Charter is applicable first and foremost to EU institutions and only secondly to Member States 'when they are implementing EU law', the implementation criteria should be interpreted broadly.

According to AG Kokott, the individual commitments of Member States under the GATS constitute obligations on the EU under international law. In her view, Member States basically 'represent' the EU when they put into effect the EU's obligations by implementing measures in their own regulatory competence. In other words, the Member States fulfil an obligation in relation to the EU under international law for which the EU assumed responsibility. Hence, the AG argued, because Article XIV of the GATS imposes an obligation of national treatment on Hungary and the Hungarian legislation is not compatible with this obligation, this invokes the application of Article 14(3) of the Charter providing for the freedom to establish and operate educational institutions and which also protects the commercial side of higher educational institutions operating in the field of privately-financed education. In the view of AG Kokott, the purpose of Article 14(3) of the Charter is to guarantee the continuous existence of private educational establishments in parallel with State-financed colleges and universities and thus provide a diverse spectrum of education opportunities.

5. Right to education and academic freedom

On the substantive matter of the Charter, although the exercise of the freedom to establish and operate educational institutions must comply with the relevant national laws and this gives Member States the possibility to enact legal measures that regulate the conditions and operation of such institutions, such measures must be in line with the proportionality requirement under Article 52(1) of the Charter. Hungary cited various justifications for the disputed national law, including the protection of public policy, in particular against deceptive and fraudulent practices, and the assurance of the quality of teaching courses but, according to the AG, these arguments were not substantiated by Hungary and they do not underline Hungary's argument that the international treaty requirement is a lawful limitation of Article 14(3), i.e. the freedom to found educational establishments.

In addition, Article 13 of the Charter provides that 'academic freedom shall be respected,' which complements the protection provided for the organisational and institutional framework by Article 14. In settled case-law, academic freedom is understood as a broader freedom to hold opinion and as a fundamental right to

communication and a requirement prescribed by national law, which provides that no teaching and no research activity can be continued at an institution unless the condition is fulfilled is in clear breach of these freedoms and, similarly to the Article 14(3) argument, it does not fulfil the proportionality criteria set out in Article 52(1).

VI. THE COURT'S DECISION

In the oral hearing, the Court extensively questioned both the Commission and Hungary about the GATS arguments and granted until March 2020 to the AG to deliver her opinion. The Court then took six months to deliver its judgment following receipt of AG Kokott's opinion.

1. The applicability of the GATS and the applicability of the Charter

a) The GATS

Despite settled case law holding that WTO law lacked direct effect and therefore could not be relied on against member states,¹⁰ the Court (and the AG) relied on another precedent decision¹¹ to come up with a creative solution on the applicability of WTO norms: They maintained the non-justiciability of WTO norms for non-state actors, but opened the gates for infringement actions by the Commission when there is an alleged infringement of a WTO obligation by a member state and a related risk to the EU incurring liability under international law through WTO dispute settlement.¹²

The Court reiterated the arguments raised in AG Kokott's opinion that WTO law formed an integral part of EU law and the GATS falls within the Common Commercial Policy, where the EU has exclusive competence. Second, the CJEU also followed AG Kokott's lead by accepting that if legislative provisions adopted by Hungary were incompatible with the GATS and it is part of the EU's legal regime,

¹⁰ See originally in Joined Cases C-21–24/72, *International Fruit Company*, 1972 E.C.R. 1219, and later restated in Case C-149/96, *Portugal v. Council*, 1999 E.C.R. I-8395.

¹¹ The AG stated in her opinion in paragraph 63: 'The Court has already answered that question in the affirmative in *Commission v Germany*, where it reviewed a national measure in the light of an agreement concluded within the framework of the General Agreement on Tariffs and Trade (GATT).' [Citing Case C-61/94, *Comm'n v. Germany*, ECLI:EU:C:1996:313, 16 (Sept. 10, 1996).] In paragraph 64 she added: 'I consider that the Court was essentially correct in its view in that decision that the considerations on the basis of which a review of EU acts in the light of the WTO Agreement is precluded cannot be applied to infringements of WTO law by Member States. The possibility of bringing infringement proceedings against a Member State does not run counter to the aims and particular character of dispute settlement in the WTO.'

¹² Para. 39 of Judgment dated 13 November 2003 in *Neri*, C-153/02, EU:C:2003:614.

Hungary indirectly failed to comply with EU law. The CJEU drew the conclusion that the objective of the infringement proceedings was to ensure that the EU does not incur any international responsibility¹³ in a situation in which there is a risk of a dispute being brought before the WTO.

b) The Charter

The Charter's applicability raised interesting questions for the Court, because Article 51(1) on the scope of the Charter provides that the provisions of the Charter are addressed to the Member States only 'when they are implementing Union law', so the Court first had to establish whether Hungary implemented EU law. With reference to case-law, the Court established that because an international agreement entered into by the EU is, from its entry into force, an integral part of EU law,¹⁴ the GATS therefore also forms part of EU law. According to the Court, it follows from this that, when a Member State performs its obligations under the GATS; that is, Hungary accord the national treatment obligation under Article XVII(1) in this present case, it is actually implementing EU law within the meaning of Article 51(1) of the Charter.

Furthermore, the Court added when a Member State argues that a particular measure which actually restricts a fundamental freedom enshrined in the TFEU is justified by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter.¹⁵

2. International treaty requirement

The Court was of the view that the obligations and the limitations of commitments under the GATS were clear and simple. Each and every member had the possibility to make limitations to various undertakings relating to specific sectors and modes of supply. The terms, limitations and conditions relating to 'limitations on market access' and the conditions and qualifications relating to 'limitations on national treatment' are set out in two separate columns and Hungary made no limitation in

¹³ The CJEU uses the term liability but in correct international legal terminology, it should be talking about state responsibility.

¹⁴ See, in particular, judgments of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, paragraphs 5 and 6 of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 73; and Opinion 1/17 (EU-Canada CET Agreement) of 30 April 2019, EU:C:2019:341, paragraph 117.

¹⁵ See para. 101 of Judgment dated 18 June 2020, *Commission v Hungary* (Transparency of associations), C-78/18, EU:C:2020:476.

the national treatment section. Article XX(2) of the GATS provides for a rule that enables limitations in the market access column to be applicable to national treatment as well, but only if the particular limitation is discriminatory. The Court therefore examined whether these rules can be applied in the present case but the market access limitation made by Hungary was worded in a way that was applicable across all higher education institutions and it was not discriminatory, so the limitation in the market access column cannot be interpreted in any event as a limitation also affecting Hungary's national treatment obligation.

The Court went on to examine whether the requirement under Hungarian law actually modified the competition in favour of service suppliers seated in Hungary under Articles XVII(2) of the GATS and, by adapting AG Kokott's arguments, it was of the view that Hungary has discretion, both as to whether it is appropriate to conclude such a treaty and as regards its content, which means that third country operators are entirely dependent on Hungary to be able to comply with the international treaty requirement.

As to the justifications for the modification of competition prohibited by the GATS pleaded by Hungary, maintenance of public order and prevention of deceptive and fraudulent practices, the Court found that Hungary did not put forward substantive and detailed arguments on how the operation of a third country higher education supplier like CEU in Hungary would constitute, without the required international treaty, a genuine and sufficiently serious threat affecting a fundamental interest of Hungarian society or how the requirement would prevent such operators from engaging in deceptive and fraudulent activities.

The Court also referred back to AG Kokott's opinion that, in accordance with Article XIV of the GATS, the 'exceptions listed cannot be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services'.

3. The 'genuine teaching activities in the State of origin' requirement

The second disputed measure was approached by the Court from two different perspectives. First, in relation to third country operators, the measure was examined under Article XVII (national treatment) and XIV (justification of exception) of the GATS, identically to the review of the international treatment measure. Second, in relation to EU operators, it was examined whether it complies with Article 49 TFEU (freedom of establishment) and Article 16 of the Services Directive (freedom to provide services).

The Court's finding regarding the national treatment under the GATS of third country operators like CEU was very similar to the findings made in relation to the

international treaty requirement. As already established for the first measure, the Court took the same position as the Commission and AG Kokott and ruled that Hungary was fully committed to the national treatment obligation without any limitation. The Court also found that the requirement to pursue educational activities in the State of origin is a clear modification of competition and the justifications on which Hungary relied, maintaining the public order and the prevention of deceptive practices were not adequately substantiated by Hungary and, thus, are unfounded.

The more interesting part was the Court's arguments relating to the infringement of Hungary's obligation under the TFEU and the Services Directive in relation to schools having their seat in an EU Member State. Because Article 49 TFEU provides the freedom of establishment for economic activities, the Court had to examine whether a higher education institution can rely on this right or not. Already established by case-law, the Court noted that the provision of higher education courses for remuneration constitutes an economic activity for the purposes of Article 49 (and in a broader sense, Chapter 2 of the TFEU) when provided by a national of one Member State in another Member State.¹⁶

In another case, the Court has also ruled that the freedom of establishment extends to a higher education institution that has its seat in a Member State other than Hungary and offers education or training for remuneration in Hungary.¹⁷ And finally, the Court also held in another case¹⁸ that any measure 'which prohibits, impedes or renders less attractive the exercise of the freedom of establishment must be regarded as a restriction on that freedom' and, thus, the requirement of pursuing genuine teaching activities not just in Hungary but in the State of origin as well is not in compliance with Article 49 TFEU, unless it is justified by special circumstances.

As to the justification of the measure, Hungary first argued that this requirement serves the maintenance of the public order, second, it is of public interest relating to the prevention of deceptive practices and third, ensures the good quality of higher education but Hungary did not provide sufficient explanation as to why these justifications are applicable and why the measure addresses these concerns.

Following up on the Commission's arguments, the Court also examined whether the measure is in compliance with the Services Directive and Article 56, TFEU both of which provides for the freedom to provide services. Contrary to Hungary's allegation, the Court was of the view that higher education institutions providing courses for remuneration indeed fall into the category of economic activity for the purposes of the Services Directive. Also, the requirement of institutions to provide higher education services in the State of their seat imposes an additional condition on service providers and is capable of restricting the free exercise of the right to provide higher education services in Hungary.

¹⁶ Para 39 of Judgment dated 13 November 2003 in *Neri*, C-153/02, EU:C:2003:614.

¹⁷ Para 38 of Judgment dated 25 October 2017 in *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804.

¹⁸ Para 26 of Judgment dated 6 September 2012, *Commission v Portugal*, C-38/10, EU:C:2012:521.

The Court did not accept the justification offered by Hungary that the requirement was necessary for reasons of public policy and public security under Article 16(1) of the Services Directive, as these were not substantiated in detail.

4. Breach of Arts 49 and 56 TFEU and the Services Directive

As the CJEU established, Arts 49 and 56 of the TFEU and the Services Directive were applicable because Article 49(1) TFEU prohibits any restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State and, according to the Court, the genuine teaching requirement which means that a higher educational institution must provide services in its state of origin (a Member State of the EU) in order to provide higher education services in Hungary (another Member State of the EU) gives rise to the suspicion that the freedom of establishment is restricted.

The Services Directive applies to services supplied by providers established in a Member State and protects the freedom to provide services in any other Member State. The definition of 'service' covers any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU. Therefore, the Services Directive was applicable because the HEA concerned, in general terms, education services that may be provided by foreign higher education institutions in Hungary and, therefore, also the provision of education or training courses for remuneration.

Although the Commission suggested Hungary's possible infringement of the freedom to provide services enshrined in Article 56 TFEU as well, the Court did not investigate this allegation because it already established the infringement of Hungary's obligations under the Services Directive.

5. Examination of the measures based on the Charter

After establishing the applicability of the Charter, the Court went to examine whether the measures constituted a limitation of the fundamental rights and if yes, whether they were justified. The Court examined the HEA Amendment as to whether Hungary complied with its obligations under Article 13 (freedom of the arts and sciences), Article 14(3) (right to education) and Article 16 (freedom to conduct a business) of the Charter.

The Court accepted AG Kokott's argument that the concept of 'academic freedom' under Article 13 of the Charter must be understood in a broad way. The Court also referred to a recommendation of the Council of Europe from 2006,¹⁹ according

¹⁹ Recommendation 1762 (2006), adopted by the Parliamentary Assembly of the Council of Europe on 30 June 2006 and entitled 'Academic freedom and university autonomy'.

to which academic freedom ‘also incorporates an institutional and organisational dimension, a link to an organisational structure being an essential prerequisite for teaching and research activities’.

In addition, the freedom to found educational establishments and the freedom to conduct a business, as incorporated, respectively, in Article 14(3) and Article 16 of the Charter also need to be respected as the different freedom applicable to the same higher education institution affected by the measures.

The Court found that the Hungarian measures are capable of restricting these freedoms because they can ‘render uncertain or exclude the very possibility of founding a higher education institution, or of continuing to operate an existing higher education institution, in Hungary’.

According to Article 52(1) of the Charter, the rights and freedoms incorporated in the Charter can be limited only if such ‘limitations are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’ (principle of proportionality). Hungary relied on the same justifications as those mentioned above but the Court found that measures at issue were not justified by any of the objectives of general interest as recognised by the EU.

6. Summary of the Judgment

Accordingly, the Court held that, by introducing the ‘international treaty’ requirement, Hungary infringed its national treatment obligation under Article XVII of GATS, and by introducing the ‘genuine teaching activities in the State of origin’ requirement, Hungary (in relation of higher education institutions having their seat in third countries), infringed its national treatment obligation under Article XVII of the GATS and (in relation to higher education institutions having their seat in EU countries) infringed Article 49 TFEU and Article 16 of the Services Directive, both on the freedom to provide services. The Court also held that Hungary failed to fulfil its obligations under Article 13 (freedom of the arts and sciences), Article 14(3) (right to education) and Article 16 (freedom to conduct a business) of the Charter.

VII. ANALYSIS

Case C-66/18 constitutes interesting developments in the CJEU’s practice on the admissibility of WTO law-based claims in infringement procedures and also on the applicability of the Charter to actions by the Member States.

In case C-66/18, the Commission and the Court was confronted with a dilemma as so often in the preceding years. Facing apparent or alleged breaches of democratic

values of Art 2 of the TEU – so-called ‘democratic backsliding’ – the Commission had no legal tools to speak of. Instead, the Commission had to resort to the technical toolkit consisting essentially of the EU’s four freedoms, such as in the case of the compulsory retirement of judges.²⁰ While the case was about the independence of the judiciary, it was dealt with as a case of age discrimination. This is why the FBI’s nailing of Al Capone was a fitting parallel. He could not be arrested for his activities as a mobster but he was imprisoned for failing to pay his taxes.²¹

In case C-66/18, the Commission claimed Hungary acted in breach of the freedom to provide services and of the Services Directive, so its claim was similar to the recent NGO case, where Hungary was also found to have acted in breach of the freedom to provide services.²²

Additionally in case C-66/18, the Commission claimed that Hungary’s action (amendment of the HEA) constituted a breach of the EU’s international obligations (technically, it made the EU breach its obligations and allowed other WTO members to sue the EU). The Commission based its claim on highly technical documents: WTO Schedules from 1997 on exceptions to the freedom to provide certain services by established service providers.

The Commission also claimed that the Charter was applicable and academic freedom was breached.

Everything was disputed in this case, even whether Hungary ticked the rights box on those schedules and whether ticking the other box – the one for new market entrants – also meant an exception regarding established market players. Hungary has also disputed whether the Commission had the right to bring Hungary to court for violation of WTO norms, whether Charter based norms in this case were binding on Hungary and whether EU freedom to provide services and freedom of establishment norms applied to higher education at all, especially if it was fully funded (i.e. the students needed to pay for the services).

Some say that the judgment in C-66/18 is an improvement over previous case-law related to de facto rule of law cases and provides some ammunition for the EU to strengthen its power related to rule-of-law issues *vis-à-vis* Member States.²³ Others also highlight the importance the Court’s innovative approach to the old topic of applicability of WTO law in the EU, especially in procedures where the EU institutions and Member

²⁰ Case C-286/12, *Comm’n v. Hungary*, ECLI:EU:C:2012:687 (Nov. 6, 2012) on the compulsory retirement of judges, prosecutors and notaries.

²¹ See article I. Cs. Nagy, *The Commission’s Al Capone Tricks. Using GATS to protect academic freedom in the European Union*, (2020), <https://verfassungsblog.de/the-commissions-al-capone-tricks/> (Last accessed: 31 December 2020).

²² C-78/18, *Commission v Hungary* (Transparency of associations) ECLI:EU:C:2020:476.

²³ Case C-286/12, *Comm’n v. Hungary*, ECLI:EU:C:2012:687 (Nov. 6, 2012) on the compulsory retirement of judges, prosecutors and notaries.

States clash.²⁴ Many claim that case C-66/18 marks the first significant appearance of the protection by the Court of academic freedom as a fundamental human right.²⁵

In our view the AG and – following in her footsteps – the CJEU took at least three innovative steps in this case with interesting consequences:

1. Despite settled case law holding that WTO law lacked direct effect and therefore could not be relied on against member states,²⁶ the CJEU relied on another precedent²⁷ to come up with a creative solution on the applicability of WTO norms: the Court maintained the non-justiciability of WTO norms for non-state actors, but opened the gates for infringement actions by the Commission when there is an alleged infringement of a WTO obligation by a member state and a related risk to the EU of incurring liability under international law through WTO dispute settlement.

The CJEU accepted the Commission's argument that it had the right to sue a Member State for a breach by the MS of an international obligation of the EU including when no third party has raised the matter of a breach of international law and no international court established illegality. The CJEU accepted the argument that it (and not only the Disputes Settlement Body) had the competence to establish a breach of WTO obligations.

However, to arrive there, the Court first had to tackle why the GATS – a mixed trade agreement to be concluded jointly by the EU and its Member States – can be used as applicable legal grounds in an infringement procedure between the European Commission and a Member State. The CJEU had to come up with a new argument because, in previous cases, the direct application of WTO law was always denied, and it was received wisdom that neither individuals or companies, nor Member States can seek the annulment of EU measures contrary to WTO law. This showed in practice

²⁴ See article MTA–DE Public Service Research Group Kutatócsoport 5, *ECJ delivers ruling on the incompatibility with EU law of "lex CEU"*, <https://publicgoods.eu/ecj-delivers-ruling-incompatibility-eu-law-lex-ceu> (Last accessed: 31 December 2020).

²⁵ See articles R. Uitz, *Finally: The CJEU Defends Academic Freedom*, <https://verfassungsblog.de/finally-the-cjeu-defends-academic-freedom/> (Last accessed: 31 December 2020) and R. Uitz, *Academic Freedom in an Illiberal Democracy: From Rule of Law through Rule by Law to Rule by Men in Hungary*, <https://verfassungsblog.de/academic-freedom-in-an-illiberal-democracy-from-rule-of-law-through-rule-by-law-to-rule-by-men-in-hungary/> (Last accessed: 31 December 2020).

²⁶ See originally in Joined Cases C-21–24/72, *International Fruit Company*, 1972 E.C.R. 1219, and later restated in Case C-149/96, *Portugal v. Council*, 1999 E.C.R. I–8395.

²⁷ The AG stated in her opinion in paragraph 63: 'The Court has already answered that question in the affirmative in *Commission v Germany*, where it reviewed a national measure in the light of an agreement concluded within the framework of the General Agreement on Tariffs and Trade (GATT).' [citing Case C-61/94, *Comm'n v. Germany*, ECLI:EU:C:1996:313, 16 (Sept. 10, 1996)]. In paragraph 64 she added: 'I consider that the Court was essentially correct in its view in that decision that the considerations on the basis of which a review of EU acts in the light of the WTO Agreement is precluded cannot be applied to infringements of WTO law by Member States. The possibility of bringing infringement proceedings against a Member State does not run counter to the aims and particular character of dispute settlement in the WTO.'

in the WTO's Bananas decision²⁸ where the EU decided to ignore the ruling and, as a consequence, the US imposed regulatory tariffs on goods exported from the EU that were not even related to the decision. Nevertheless, the manufacturers, who suffered the consequences of the imposed tariffs, turned to the CJEU but their claims for damages against the Commission were denied. The CJEU was of the opinion that it could not assess the legality of EU measures based on WTO law.²⁹ So, basically, the Court said that a breach of an international law obligation by the EU does not automatically mean an infringement under EU law, of which that particular international law provision is part. There was a time when an Advocate General argued that both Member State and EU measures should be reviewable for their compliance with WTO law but the Court finally took the opposite position.³⁰

And then, in the CEU case, the CJEU held that (1) a domestic measure implemented by Hungary was in violation of WTO law constituting a part of EU law and, therefore, (2) Hungary's infringement can be established.

This could indeed be reminiscent of *Animal farm*³¹ where 'some are more equal than others': Member States and individuals cannot enforce their rights arising from the EU's WTO obligations. but the EU can enforce the Member States' breaches of their WTO obligations whether or not third parties are already making claims as a consequence of that breach or the DSB has taken a decision. This also means that the WTO's DSB remains the sole body to assess the compliance of an EU measure with WTO law, while the Member States' responsibility for non-compliance with WTO law can be determined by the CJEU and the DSB.

By examining the relationship between the existence of the WTO's Dispute Settlement Board (DSB) as an international law dispute settlement mechanism and jurisdiction of the CJEU in the CEU case, which was strongly debated by Hungary for various political and legal reasons,³² the CJEU's judgment established for the first time that the parallel existence of these two legal venues does not prevent the CJEU to establish in an infringement procedure that a Member State has failed to comply with its international law obligations under GATS when the possible liability of the EU under international law arises. The CJEU complemented this finding by clearly making the distinction that the WTO bodies are not bound by the CJEU's decision which

²⁸ WTO, *European Communities – Regime for the importation, sale and distribution of bananas*, Appellate Body Report, WT/DS27/AB/R, 9 September 1997.

²⁹ Joined cases C-120/06 P and C-121/06 P, *FLAMM and Fedon v. Council and Commission*, Judgment of 9 September 2008, ECLI:EU:C:2008:476, para. 111.

³⁰ Case C-61/94, *AG Opinion*, paras 23–24.

³¹ G. Orwell, *Animal Farm: A Fairy Story*, (Secker and Warburg, London, 1945).

³² See article at P. Bárd, *A Strong Judgment in a Moot Case: Lex CEU before the CJEU*, <https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/> (Last accessed: 31 December 2020).

means the Member States, or the EU, cannot escape their international law obligations by referring to a court judgment.

In C-66/18 judicial policy appeared in the making: the CJEU does not have a problem with the operation of parallel venues regarding WTO law breaches of Member States but it does have a problem when its monopoly on the interpretation of EU law is threatened by the likes of ICSID.³³

2. The Court accepted or rather, made it its own,³⁴ AG Kokott's broad interpretation of the concept of 'academic freedom' under Article 13 of the Charter and found that the HEA – by giving the state the right to block or to stop university programs with absolute discretion – is capable of restricting this freedom. The Court found, therefore, that matters relating to the organization of universities, such as their right of establishment and operation are covered by the principle of academic freedom incorporated in the Charter.

3. It was never disputed that the Charter's applicability to EU Member States is secondary and limited. This results from the plain language of Article 51(1) of the Charter. Even so, the Court has extended the Charter's applicability in several decisions over the past decade.³⁵

In case C-66/18 it, held that the Charter was applicable because, (1) The GATS is a part of EU law and (2) in performing their obligations under it, Member States were in fact implementing EU law.

However, there was a small logical problem because the CJEU – in the first part of the judgment – established that Hungary acted in breach of Article XVII of the GATS. Acting in breach of an international obligation normally means failing to implement it.

The CJEU then went to logical step further when it established that the mere fact that a Member State uses a GATS exception or an exception to the freedom to provide services or the Services Directive to justify a national measure triggers the application of the Charter.

The Court established that a measure contrary to EU law 'must be regarded as implementing EU law'.³⁶ Therefore, such a measure must comply with the fundamental

³³ *Slovak Republic v. Achmea*, (C-284/16) ECLI:EU:C:2018:158.

³⁴ J. Bornemann, *Academic freedom in illiberal times – A bittersweet victory for the Central European University*, <https://europeanlawblog.eu/2020/10/21/academic-freedom-in-illiberal-times-a-bittersweet-victory-for-the-central-european-university/> (Last accessed: 31 December 2020).

³⁵ C-617/10, *Åklagaren és Hans Åkerberg Fransson*, ECLI:EU:C:2013:105; C-06/13, *Cruciano Siragusa kontra Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, ECLI:EU:C:2014:126.

³⁶ Para 214 of the CJEU judgment provides: 'Second, where a Member State argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the FEU Treaty is justified by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter (judgment of 18 June 2020, *Commission*

rights enshrined in the Charter and the Charter's application depends on the assumption that the GATS is EU law and that the CEU act implements EU law under Article 51(1) of the Charter.

The fact that the CJEU has established in C-66/18 that a state measure can be both a violation of WTO/EU law and the Charter may have interesting and potentially unintended consequences. If a directly applicable/effective (mostly but not exclusively economic) right protected by the Charter is also a right protected by the directly inapplicable WTO legal provisions then individuals or companies could try to make claims for EU measures for breaches of the Charter, in EU courts or in domestic proceedings.

So, through the back door of human rights, the economic rights of individuals and companies directly or indirectly originating from the WTO documents could be directly enforced.

However, the same is probably not true for Members States based on C-66/18. It would be hard to imagine a situation where a MS would sue the Commission for breach of a WTO obligation based on the Charter.

But the old saying will be especially true here: 'never say never...!'

v Hungary (Transparency of associations), C-78/18, EU:C:2020:476, para. 101 and the case-law cited). The same applies with respect to Article 16 of Directive 2006/123.'