Where trade and academic freedom meet: Commission v. Hungary (LEX CEU)

Kosta, V.; Piqani, D.

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Managing Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax: + 31 71 5277600

Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Where trade and academic freedom meet: *Commission* v. *Hungary (LEX CEU)*

Case C-66/18, *European Commission* v. *Hungary*, judgment of the Court (Grand Chamber) of 6 October 2020, EU:C:2020:792

1. Introduction

This is a high-profile case concerning the forced move of the Central European University (CEU) from Budapest to Vienna. At least since the hashtag #IstandwithCEU started circulating on social media and protests unfolded in the streets of Budapest,[1] the circumstances leading up to the judgment and its pronouncement received a great deal of attention in the academic blogosphere and the wider press.[2] At first sight, the judgment seems mainly to be about trade – only 35 out of 244 paragraphs are devoted to the fundamental rights dimension. However, there is no doubt that the question of academic freedom and the wider issue of democratic backsliding in Hungary are at the heart of this case.

From a legal doctrinal perspective, the ruling has a series of interesting and novel aspects which will be discussed in turn: the jurisdiction of the Court in infringement proceedings for breaches of the General Agreement on Trade in Services (GATS) by Member States; the relationship between EU fundamental freedoms and the Services Directive;[3] the scope of application of the EU Charter of Fundamental Rights; the interpretation of Article 13 CFR and Article 14(3) CFR – it should be noted that this is the first ECJ ruling on these articles; and the question whether expedited or interim measures should have been granted and could have made a difference.

1. See <www.reuters.com/article/us-hungary-soros-ceu-protests-idUSKCN1N02O8> (all websites last visited 29 March 2022).

2. E.g. <www.bbc.com/news/world-europe-54433398>; <www.tagesschau.de/ausland/budapest-ceu-101.html>.

3. Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, O.J. 2006, L 376/36 (Services Directive).

2. Factual and legal background

2.1. *The origin of the dispute: Amendments of the Hungarian law on higher education*

Before the 2017 amendments, the operation of foreign higher education institutions in Hungary was regulated by Act CCIV of 2011 on national higher education (the 2011 Act). According to Article 76(1) of the 2011 Act, a foreign higher education institution could operate in Hungary if it was recognized by its home State as a higher education institution, if the programme delivered in Hungary was equivalent to a programme leading to a tertiary degree recognized there, and if the operation of the foreign higher education institution was authorized by the Hungarian educational authority.[4]

On 4 April 2017, the Hungarian Parliament, through an urgent legislative procedure, adopted Act XXV of 2017 amending the 2011 Act (the 2017 Act).[5] This amendment introduced more restrictive requirements on foreign universities in Hungary.

First, under Article 76(1)(a) of the 2017 Act, a foreign higher education institution can operate in Hungary and issue diplomas if its activities are supported by an international agreement between the government of Hungary and the government of the State in which the foreign higher education institution has its seat. Where the foreign higher education institution is operating in a federal State and the latter does not have the power to conclude such an agreement, a preliminary agreement between the federal government and the government of Hungary is needed. The requirement of an international agreement does not apply to foreign higher education institutions situated in the EU/EEA. Second, under Article 76(1)(b) of the 2017 Act, foreign higher education institutions – including those in EEA countries – must operate and perform education activities in the country of their seat. Furthermore, under Articles 9(2a) and 9(2b), the name of foreign higher education institutions may not be misleading or confusing and may not be different from the name recognized in Hungary. Lastly, the 2017 Act reintroduced the requirement of work permits for third-country national staff of certain foreign higher education institutions.

4. Act No. CCIV of 2011 on national higher education. An English translation is available, from the Hungarian Accreditation Agency, <old.mab.hu/web/images/doc/hac/regulations/Nftv_angol_2Sept2016_EMMI%20forditas.pdf>.

5. Act XXV of 2017 on the amendment of Act No. CCIV of 2011 on national tertiary education, in English, available at <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)029-e>.

The international agreement requirement and the rule on names had to be fulfilled by foreign higher education institutions by 1 January 2018.[6] This deadline was later extended to 1 January 2019 by the Hungarian Parliament. The conclusion of the preliminary agreement with federal governments had to be done by 11 October 2017. After 1 January 2018, no new students could be admitted in the first year of studies. Ongoing courses on 1 January 2018 would have to be completed no later than the academic year 2020–2021[7] under the same conditions as before.

2.2. *Political context*

The amendments to the law on higher education took place in a context of general rule of law backsliding in Hungary. Following the April 2010 general elections, Fidesz and the Christian Democratic People's Party obtained a two-thirds majority that allowed them to initiate a major change in the Hungarian constitutional landscape; first through amendments to the 1989 Constitution, and later on through the adoption with their own votes of a new Constitution – the Fundamental Law of 18 April 2011.[8] In its Opinion following the adoption of the new Fundamental Law, the Venice Commission voiced concerns about the lack of transparency of the constitution making process, the use of cardinal laws (organic laws) for "cementing" cultural, religious, moral and socio-economic policies, a limitation of powers of the Constitutional Court in budgetary matters, the general nature of the new constitutional framework, including rules on the judiciary and the lack of more precise guarantees on fundamental rights.[9]

The new constitutional framework was the first step towards the rule of law crisis. What followed did not concern one specific area or institution, but a "heterogenous multitude of separate topics",[10] including "separate attacks on public institutions, such as the judiciary or ombudsman, unforeseeable interference with the market economy, the exploitation of a situational vulnerability of exposed actors in the public sphere, such as in the case of the

6. See section 4, Act XXV.

7. Act XXV.

8. For an excellent summary of this transformation see Uitz "Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary", 13 I-CON (2015), 279–300. The adoption of the new Fundamental Law was viewed with concern by the Venice Commission. See Opinion No. 614/2011 of the Venice Commission, 26 March 2011, paras. 14–19, available at <www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)001-e>.

9. Opinion No. 621/2011 of the Venice Commission, 20 June 2011, paras. 144–148, available at <www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)016-e>.

10. Bogdanowicz and Schmidt, "The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU", 66 CML Rev. (2018), 1061–1100, at 1086–1087.

'Lex NGO', or the use of 'hidden single-case laws' such as in the 'Lex CEU'".[11] Hungary was brought before the ECJ for its legislation on the retirement age of judges and prosecutors, and the independence of the central bank and data protection supervisor.[12] In the meantime, the European Parliament expressed concerns on media law in Hungary, on political developments, and the situation of fundamental rights.[13]

In May 2015, triggered by the migration crisis, the Hungarian Government launched a national consultation on immigration and terrorism. Its content and language were, according to the European Parliament, "highly misleading, biased and unbalanced, establishing a biased and direct link between migratory phenomena and security threats;...".[14] The Hungarian Government took a strict approach to refugees, trying to stop the flow of migrants through its territories[15] or refusing to participate in the EU reallocation scheme.[16] The refugee crisis propelled the already existing campaigns against NGOs that were critical of government policies. In June 2017, the Hungarian Parliament adopted a law on the Transparency of Organizations Receiving Support from Abroad, supposedly aimed at preventing money laundering or terrorism through the financing of NGOs. On 7 December 2017, the European Commission started infringement proceedings against Hungary for the adoption of that law.[17]

It was against this background that the amendments to the law on higher education were adopted. Although the requirements in the law were neutral and referred to foreign higher education institutions in general, it was clear that the main target was CEU, the university founded by Hungarian-born

11. Ibid.

12. See Case C-286/12, *Commission* v. *Hungary*, EU:C:2012:687, in which the ECJ found a breach by Hungary of provisions of Council Directive 2000/78/EC, O.J. 2000, L 303/16, on equal treatment in employment. Nearly 2 years later, the Court declared that Hungary had failed to fulfil its obligations under EU law by removing the data protection supervisor before the end of the term: Case C-288/12, *Commission* v. *Hungary,* EU:C:2014:237. The infringement procedure concerning the independence of the Hungarian central bank was closed on 19 July 2012 following amendments passed by the Hungarian Parliament.

13. Resolution of the EP of 10 March 2011 on media law in Hungary; Resolution of the EP of 5 July 2011 on the Revised Hungarian Constitution; Resolution of the EP of 16 Feb. 2012 on the recent political developments in Hungary; Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the EP Resolution of 16 Feb. 2012).

14. Resolution of the EP of 10 June 2015, para 5, available at <www.europarl.europa.eu/doceo/document/TA-8-2015-0227_EN.html>.

15. See e.g. "Hungary races to build border fence as migrants keep coming", *BBC News*, available at <www.bbc.com/news/world-europe-33802453>.

16. See Case C-643/15, *Slovak Republic and Hungary* v. *Council of the European Union*, EU:C:2017:631.

17. Case C-78/18, *Commission* v. *Hungary*, EU:C:2020:476.

American philanthropist and investor George Soros. The adoption of the law was accompanied by massive protests and support by the academic community.[18] Eight days after its adoption, the European Commission discussed the issue in the College of Commissioners and agreed to conduct a legal assessment; Vice-President Timmermans noted that the law "is perceived by many as an attempt to close down the Central European University".[19] On 27 April 2017, the Commission sent a letter of formal notice to Hungary[20] which was followed by the reasoned Opinion on 14 July 2017. The Commission argued that the requirement of a prior international agreement breached Article XVII of the GATS and the requirement of offering education activities in the country of origin breached Article 16 of the Services Directive and Articles 49 and 56 TFEU; additionally, both requirements breached Articles 13, 14(3) and 16 CFR.

On 27 April 2017, the Parliamentary Assembly of the Council of Europe requested the Opinion of the Venice Commission on the compatibility of the 2017 Act with the Council of Europe standards and called on the Hungarian Government to suspend its application.[21] The European Parliament noted that the amendments represented a "direct threat to the Central European University" and called on the Hungarian Government to repeal the 2017 Act, to immediately suspend all deadlines therein, and to enable the CEU to continue its activity in Budapest.[22] On 12 September 2018, for the very first time, the European Parliament called on the Council to determine, based on Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the Article 2 TEU values.[23] The Council has not, however, taken any action.

18. See, *inter alia*, the statement by the European Association of Institutions in Higher Education, available at <www.eurashe.eu/library/mission-phe/1704-EURASHE-statement-on-CEU.pdf>.

19. See statement 12 April, available at <ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_966>.

20. See <ec.europa.eu/commission/presscorner/detail/en/MEX_17_1116> (the Press Release wrongly states 26 April).

21. See Council of Europe Parliamentary Assembly Resolution 2162 (2017), Assembly debate on 27 April 2017, "Alarming developments in Hungary: Draft NGO law restricting civil society and possible closure of the European Central University". The Venice Commission issued its Opinion 891/2017 on 9 Oct. 2017, available at <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)022-e>.

22. Resolution of the EP of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), available at <www.europarl.europa.eu/doceo/document/TA-8-2017-0216_EN.pdf>; see especially paras. 6 and 7.

23. Resolution of the EP of 12 Sept. 2018 on a proposal calling on the Council to determine, pursuant to Art. 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, available at <oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2017/2131>.

In October 2018, CEU announced the transfer of teaching activities to Vienna.[24]

3. Opinion of the Advocate General

Advocate General Kokott dealt with three legal issues: first, the ECJ's jurisdiction under Article 258 TFEU for infringements of the GATS; second, the admissibility of the infringement proceedings, and third, the substantive assessment of the failure to fulfil obligations by Hungary under the GATS, EU free movement rules, and the Charter.

The Advocate General was in favour of accepting jurisdiction. She opined first that the GATS is an integral part of EU law and as such binding on the EU institutions and Member States based on Article 216(2) TFEU.[25] Since the Lisbon Treaty, trade in services is part of the external exclusive competence of the Union within the framework of the Common Commercial Policy, so Hungary's obligations in the field were transformed into obligations under EU law.[26] Second, the EU may be held liable by a third country for an infringement of GATS obligations by a Member State before WTO dispute settlement bodies.[27] Third, a decision of the Court under Article 258 TFEU does not preclude the exclusive competence of WTO dispute settlement bodies to find infringements between two WTO Member States.[28] On the contrary, this jurisdiction strengthens the negotiating position of the EU *vis-à-vis* third countries by showing that its Court has the power to enforce WTO law internally.[29] As to admissibility, the Advocate General rejected both objections submitted by Hungary on the short pre-litigation period set by the Commission and the political motivation of the procedure for the same reasons as the Court (see below).

Turning to Hungary's specific obligations under the GATS, the Advocate General first noted that the Hungarian requirements under Article 76(1) do not fall within the scope of Article XVI:2 GATS which lists national measures that are precluded in the light of the market access requirement. Hungary was therefore free to introduce these requirements from the perspective of market

24. See "CEU to Open Vienna Campus for U.S. Degrees in 2019; University Determined to Uphold Academic Freedom", available at <www.ceu.edu/article/2018-10-25/ceu-open-vienna-campus-us-degrees-2019-university-determined-uphold-academic>.

25. Opinion of A.G. Kokott in Case C-66/18, *Commission* v. *Hungary*, EU:C:2020:172, para 41.

26. Ibid., paras. 43 and 47.

27. Ibid., para 51.

28. Ibid., paras. 58–59.

29. Ibid., paras. 65–66.

access. However, it had to apply these in compliance with the national treatment requirement under Article XVII GATS, because it had not inscribed any limitation to that principle.[30] Next, the Advocate General concluded that both requirements led to a modification of the conditions of competition in favour of domestic service suppliers by causing a difference in treatment contrary to Article XVII:3 GATS.[31] The requirement of an international treaty could not be saved on the basis of the Article XIV GATS exceptions, as it constituted a means of arbitrary discrimination.[32]

Subsequently, the Advocate General assessed the compatibility of Article 76(1)(b) of the 2017 Act with freedom of establishment under Articles 49 and 54 TFEU, freedom to provide services under Article 16 of the Services Directive, Articles 13 and 14(3) CFR, as well as Article XVII GATS. Starting with the Treaty provisions, Advocate General Kokott argued that Article 76(1)(b) constituted a case of "special treatment for foreign nationals" and thus discrimination based on the place of establishment which could not be justified on the basis of public policy consideration because Hungary failed to show that fundamental interests of society were affected.[33] Given the discriminatory nature of the national measure, the Advocate General did not take into consideration other overriding requirements in the public interest. Examining Article 16 of the Services Directive, she found the Hungarian requirement fell "at least partly" within its scope because it did not "distinguish between institutions which carry on teaching activities in Hungary permanently and those which do so only temporarily".[34] Advocate General Kokott concluded that the Hungarian provision was discriminatory and could not be justified on the basis of public policy. Judicially accepted justifications could not be invoked given the discriminatory nature of the Hungarian provision. In addition, the Hungarian requirement of teaching activities in the State of origin was an infringement of the national treatment

30. Ibid., paras. 95–110.

31. Art. XVII:3 of the GATS reads: "Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."

32. On this point, the A.G. argued that such a requirement was arbitrary, as compliance by foreign higher education institutions would depend on the willingness of the Hungarian Government to conclude such agreements. Second, in the case of federal States it was not certain whether their constitutional framework would allow for such an agreement if education is a competence of the federated States. Third, such a requirement was applicable also for institutions already operating in Hungary and according to the A.G. it was not clear how this would help in combating fraud. Opinion, paras. 119–124.

33. Ibid., paras. 158–161.

34. Ibid., para 168.

obligation under Article XVII GATS in conjunction with Article 261(2) TFEU which could not be "saved" by the list of exceptions in Article XIV GATS.

On the scope of application of the Charter, the Advocate General found Member States are "implementing Union law" in the sense of Article 51(1) CFR where they are "internally put[ting] into effect the European Union's obligations under international law on the basis of their own regulatory competence".[35] The Advocate General clarified that this does not mean that all Member State measures within the education sector are brought within the reach of the Charter. She explained that the measures must be "governed by EU law", which is in particular the case when "EU law imposes particular obligations".[36] The obligation is, in this case, national treatment resulting from Article XVII GATS, and the Charter is applicable because the Hungarian legislation is "not compatible with th[at] duty".[37] Additionally, the Advocate General found that paragraph 76(1)(b) of the 2017 Act constitutes a deficient transposition of the Services Directive, which triggers application of the Charter. The question whether there is a separate Charter infringement due to EU law applicability merely based on a restriction to a fundamental freedom did not arise for the Advocate General.[38]

Regarding the possible substantive Charter violations, the Advocate General conducted two separate fundamental rights analyses for the two Hungarian requirements, and in both cases tested their compatibility with the freedom to found educational establishments (Art. 14(3) CFR) and academic freedom (Art. 13 CFR). She found in all instances a violation.

The Advocate General found the requirement of an international agreement fell within the scope of protection of Article 14(3) CFR. She noted, based on the Explanations to the Charter, that Article 14(3) CFR is a *lex specialis* to the freedom to conduct a business (Art. 16 CFR) in the field of *privately* funded education. Therefore, no separate examination of Article 16 CFR was conducted. Second, since Article 14(3) CFR is an autonomous (from Art. 16 CFR) fundamental right, it protects not only the commercial aspects of establishing and operating higher education institutions, but their existence as such.[39] The scope of protection of Article 14(3) CFR is triggered because if the condition set out in paragraph 76(1)(a) of the Hungarian law is not fulfilled, both the foundation and the operation of a private institution are prohibited. Regarding possible limitations, the Advocate General noted that

35. Ibid., para 128.
36. Ibid., para 129.
37. Ibid.
38. Ibid., paras. 178–180.
39. Ibid., para 133.

Article 14(3) CFR guarantees the freedom to found educational establishments "in accordance with national laws governing the exercise of such freedom and right". However, this is still subject to the principle of proportionality (Art. 52(1) CFR). The Advocate General found the measure could not be justified in the public interest. She referred back to earlier explanations that expressing the "fundamental support for the activities" of the higher education institutions could also be achieved by a unilateral declaration and that the requirement of an international treaty carried the risk of arbitrary treatment.[40] The argument on quality assurance of teaching courses was rejected, since Hungary did not explain this, and existing institutions are subject to this requirement without the need to demonstrate quality deficiencies or prove how an international treaty would eliminate them.[41]

Next, the Advocate General moved on to the argument that this requirement infringes academic freedom (Art. 13 CFR) because higher education institutions not complying with it are not allowed (to continue) any teaching or research activities in Hungary. The Advocate General started by looking at the ECHR, which protects academic freedom as a manifestation of freedom of expression. However, that freedom is not directly affected by the Hungarian law. Rather, the problem is that academics working at universities are likely to be deprived of the infrastructure needed to exercise academic freedom. The Advocate General found that Article 13 CFR covers that problem, because it also includes an institutional dimension; so not only autonomous research and teaching is protected, but also the institutional and organizational framework.[42] The latter is a precondition for the former. The university provides the platform for academic discourse, and the network and infrastructure for members of the academic community as well as donors. Finally, the Advocate General noted that Article 14(3) CFR protects the institutional framework only for private educational establishments, so Article 13 retains its relevance. The Advocate General concluded that while Article 13 CFR "does not guarantee the continued existence of each individual educational institution . . . a rule which results in the closure of a higher education institution must be proportionate"[43] (Art. 52(1) CFR). The Advocate General then referred back to her analysis of Article 14(3) CFR[44] to conclude that the requirement is disproportionate.

40. Ibid., paras. 136–137.
41. Ibid., paras. 138–139.
42. Ibid., para 146.
43. Ibid., para 149.
44. Ibid., paras. 136–139.

The Advocate General then considered the requirement of genuine teaching activities in the State of origin (para 76(1)(b)). She found the situation fell within the scope of application of the Charter because of a deficient transposition of the Services Directive. While finding a separate (additional) Charter breach makes no particular difference here, she considered that this analysis would reflect the particular nature of this case more clearly. She established the interference with the fundamental right, with a reference back to her analysis of Article 13 CFR and Article 14(3) CFR; also here, it was found to be unjustified. She rejected the argument that the requirement is necessary to ensure the legality and integrity of the higher education programme. Other appropriate proof must also be accepted, especially in light of the importance of freedom of establishment, which gives companies the right to carry out their activities in a Member State other than that in which they have their seat.[45] The argument of quality control was rejected because its appropriateness was questionable, as it is not obvious how this aim would be met and Hungary had not explained it, and because it is not necessary: other quality control measures are necessarily applied upon an initial foundation of domestic higher education institutions.

4. Judgment of the Court

On admissibility, the ECJ followed the Advocate General in ruling that the length of the pre-litigation period was not unreasonable, given the urgency of the matter and the fact that the Member State had had the opportunity to defend itself in the procedure.[46] As for Hungary's argument that the Commission initiated these proceedings for political reasons, the Court reminded the parties of the discretion enjoyed by the Commission, which is not subject to review by the Court.[47]

As to its jurisdiction, the Court followed the Opinion, although at times with a different reasoning. First, rejecting Hungary's objection that higher education is a Member State competence, the Court noted that GATS commitments, including trade in private educational services, fall within the exclusive competence of the Union.[48] This is because, as ruled in Opinion 2/15, GATS commitments fall within the Common Commercial Policy which is covered by the exclusive competence of the Union under Article 3(1)(e) TFEU.

45. Ibid., para 185.
46. Judgment, para 52.
47. Ibid., para 56.
48. Ibid., para 74.

As to the use of infringement proceedings for breaches of the GATS, the Court again concurred with the Advocate General although the reasoning differed. Whereas the Advocate General maintained that this was settled by the Court in *Commission* v. *Germany*,[49] the Court held this was not so in the context of WTO law.[50] The Court recalled its settled case law on the impossibility for private persons to rely on WTO law before EU courts.[51] According to the Court, it has so far ruled on issues related to the implementation of various unfavourable WTO rulings for the EU.[52] In addition, the Court stated that the exercise of its jurisdiction in infringement proceedings was consistent with its obligations as a Member of the WTO. Lastly, the Court acknowledged the limits of the effects of a ruling in the present case: a finding of an infringement by Hungary of its GATS commitments would not affect any assessment by the Dispute Settlement Body (DSB); any assessment by the Court could not be a reason for the Union or Hungary to refuse to comply with a DSB ruling finding a conflict with WTO law. Moreover, in interpreting and applying the GATS, the Court is bound by customary rules of interpretation of international law.[53]

On substance, the Court structured its judgment in three parts. First, it assessed the compatibility with WTO law of the requirement of a prior international treaty. Second, it ruled on the compatibility with WTO law and EU law of the requirement to provide education in the State of the seat. Third, it assessed whether these requirements restricted in an unlawful manner the rights enshrined in the Charter.

Like the Advocate General, the Court ruled that the international agreement requirement modified the conditions of competition in favour of Hungarian suppliers of higher educational services and to the detriment of institutions having their seat in a non-EEA country member of the WTO.[54] The two exceptions invoked by Hungary, i.e. public order and prevention of deceptive practices, were not accepted. The first did not meet the high threshold of showing "a genuine and sufficiently serious threat affecting a fundamental interest of Hungarian society";[55] the second exception was rejected because the national rule constituted a means of arbitrary or unjustifiable discrimination, given that the conclusion of such an agreement depended on the political will of Hungary. In addition, the objective of

49. Case C-61/94, *Commission* v. *Germany*, EU:C:1996:313.
50. See judgment, para 77, and contrast with Opinion, para 63.
51. Case C-377/02, *Van Parys*, EU:C:2005:12; Joined Cases C-120 & 121/06P, *FIAMM and others* v. *Council and Commission*, EU:C:2008:476.
52. Judgment, paras. 79 and 80.
53. Ibid., paras. 87–92.
54. Judgment, paras. 118–121.
55. Ibid., paras. 130–132.

preventing deceptive practices could be achieved through alternative means, such as monitoring these activities in Hungary.[56]

As to the Article 76(1)(b) requirement, the ECJ ruled that this amounted to a competitive disadvantage for foreign higher education institutions, because they were obliged to establish an institution in the third country and offer higher education activities there, thus inhibiting primary establishment in Hungary and breaching the national treatment requirement under Article XVII GATS.[57] Hungary pleaded the same justification grounds as for the international treaty requirement, but to no avail.

This requirement was also assessed for its compatibility with freedom of establishment and free movement of services. According to the ECJ, the Hungarian rule breached Article 49 TFEU as it was liable "to render less attractive the exercise of the freedom of establishment in Hungary for nationals of another Member State who wish to establish themselves in Hungary in order to supply higher education services in that country".[58] None of the justifications pleaded by Hungary – i.e. public order, prevention of deceptive practices and ensuring the quality of higher education – were accepted by the Court. The Court then ruled that the requirement violated Article 16 of the Services Directive, because it limited the right of service providers to "first carry on their activity in Hungary rather than in the Member State in which they have their seat, or if they plan to carry on such an activity only in Hungary".[59] As to justifications in Article 16(3), the Court found that Hungary had failed to show the existence of a genuine, present and sufficiently serious threat to the fundamental interest of the society.[60] The Court concluded that Hungary had failed to fulfil its obligations under Article 16 of the Services Directive and a further consideration of Article 56 TFEU was not deemed necessary.

The Court was more concise about application of the Charter compared to the Advocate General. The Charter is applicable by virtue of the GATS. As the GATS forms part of EU law, when Member States are performing their obligations thereunder, including that of national treatment, they must be considered to be implementing EU law within Article 51(1) CFR. The Charter is also applicable when a Member State restricts a fundamental freedom and seeks to justify it by an overriding requirement in the public interest.

56. Ibid., paras. 133–138.
57. Ibid., paras. 148–149.
58. Ibid., para 169.
59. Ibid., para 200.
60. Ibid., para 204.

According to the Court, the same applies with respect to Article 16 of Directive 2006/123.[61]

The Court analysed the fundamental rights dimension of all the Hungarian measures together, first at the level of restriction, and then at the level of justification. It started its analysis of Article 13 CFR with a reference to the ECHR. It noted that academic freedom under the ECHR is associated in particular with the right to freedom of expression (Art. 10 ECHR), and this freedom of expression link is confirmed by the Explanations to the Charter. The Court followed the Advocate General in holding that academic freedom must, however, also include an institutional and organizational dimension. It cited key international soft law instruments to hold that autonomy is the institutional form of academic freedom, and Member States are obliged to protect higher education institutions from threats to their autonomy. The measures amount to a restriction, as they are "capable of endangering the academic activity of foreign higher education institutions concerned within [Hungary]" and deprive the universities at issue of their autonomous organizational structure necessary for research and teaching activities.[62] Regarding Articles 14 and 16 CFR, the Court examined Articles 14(3) and 16 CFR together, since the Explanations to the Charter provide that "the freedom to found public or private educational establishments is guaranteed as one of the aspects of the freedom to conduct a business." It easily found a restriction, because the measures are "such as to render uncertain or to exclude the very possibility of founding a higher education institution, or of continuing to operate an existing [one]."[63] The Court was equally quick in finding that there were no justifications. It did so by referring to its previous analysis on the GATS and the internal market, to hold that the measures are not justified by any of the objectives of general interest, and that the measures in any event do not meet those objectives. Thus, a violation of all three Charter rights was established.

5. Comment

5.1. *Jurisdiction of the Court in infringement proceedings for breaches of the GATS by Member States*

5.1.1. *ECJ jurisdiction in light of the division of competences between the EU and Member States*

The ECJ's finding on its jurisdiction to enforce GATS obligations as part of EU law was not surprising. The Court built on the evolution of the Union's

61. See Opinion, paras. 213–214.
62. Judgment, para 228.
63. Ibid. para 233.

competence throughout treaty amendments and its own previous case law on the division of competences between the EU and Member States concerning the GATS. Already in Opinion 1/94,[64] the ECJ faced the question of competences of the Community to conclude the Multilateral Agreements on Trade in Goods, the GATS and the TRIPs. For the GATS, the Court ruled that only the first mode of supply of services, namely the cross-frontier supply of services not involving any movement of persons, fell within the scope of the Common Commercial Policy (CCP), for which the Community had explicit exclusive competence. The other modes of supply of services were linked to other policy areas under the Treaties, namely the entry and movement of persons (natural or legal), which should be distinguished from the CCP.[65] As a result, in Opinion 1/94, the ECJ ruled that the GATS had to be concluded by the Community jointly with the Member States as a mixed agreement.

After the Treaty of Nice, trade in services – including all modes of supplies[66] – was included in the CCP (under Art. 133(5) EC), but trade in certain sensitive areas, including educational services, was explicitly considered by Article 133(6) EC as part of the shared competence between the Community and the Member States. This dichotomy was interpreted by the ECJ in its Opinion 1/08, on agreements for compensatory adjustments following modifications of commitments of "new" acceding Member States to the EU. According to the Court, because those agreements related also to the areas mentioned in Article 133(6), viz. trade in cultural and audio-visual services, educational services, and social and human health services, they had to be concluded jointly by the Community and the Member States.[67] Thus, until the Lisbon Treaty, joint action by the EU and the Member States was needed either because the trade agreements included different modes of supply (Opinion 1/94) or sensitive policy areas such as educational services (Opinion 1/08).

After Lisbon, we know that the above dichotomy does not hold, because the EU has exclusive competence in the CCP with no exception for trade with one or more third countries on educational services. As the Advocate General noted, Member States interests in sensitive fields such as education are protected through the unanimity needed in the Council to conclude such international agreements and through the exclusion of harmonization of national regulatory frameworks.[68]

64. Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, EU:C:1994:384.

65. Ibid, para 46.

66. See Opinion 1/08, *GATS – Schedules of specific commitments*, EU:C:2009:739, paras. 118–119.

67. See especially Opinion 1/08, paras. 117–150. See Adam and Lavranos, "Opinion 1/08 of the Court (Grand Chamber)", 47 CML Rev. (2010), 1523–1539, at 1529.

68. See Opinion, paras. 44–45.

As to the scope of the CCP exclusive competence, the ECJ has adopted a broad interpretation and it includes any EU act if "it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it".[69] This together with the previous finding in Opinion 1/08 – reinforced in Opinion 2/15[70] – that all four modes of supply of services fall within the CCP, imply that despite the retained competence of Member States in education policies, the GATS commitments of Member States concerning (private) educational services come within the exclusive competence of the EU.

Turning to the enforcement of GATS obligations, the WTO agreement (including the GATS) as an international agreement, is an "integral part" of EU law and, per Article 216(2) TFEU, it is binding on the institutions of the Union and the Member States. As such, infringement proceedings would be one tool to check Member States' compliance with these agreements.[71] Moreover, the ECJ has already ruled that when complying with international agreements concluded by EU institutions, "the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement".[72]

This interpretation by the Court is significant. First, thanks to a broad CCP, the EU may negotiate and conclude agreements even in areas of retained competence for the Member States, such as education, if the link with trade is established. Second, when Member States exercise their own competence, they "are still subject to obligations stemming from EU law, most notably the duty of loyalty (Article 4(3) TEU)".[73] Third, the confirmation of jurisdiction for the Court in infringement proceedings about GATS obligations for Member States may serve as a precedent for the enforcement of sustainability clauses in free trade agreements.[74] Both the GATS commitments and these

69. See Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland GmbH* v. *DEMO Anonimos Viomihaniki kai Emporiki Etairia Farmakon*, EU:C:2013:520; Case C-137/12, *Commission* v. *Council*, EU:C:2013:675, para 57; Opinion 3/15, *Marrakesh Treaty on access to published works*, EU:C:2017:114, para 61; Opinion 2/15, EU-Singapore FTA, EU:C:2017:376, para 36.

70. See Opinion 2/15, para 54. The EU-Singapore agreement included, among others, commitments related to educational services which did not inhibit the Court from ruling that the agreement could be concluded by the Union alone.

71. Mendez, "The enforcement of EU agreements: Bolstering the effectiveness of treaty law?", 47 CML Rev. (2010), 1719–1756, at 1737.

72. See Case 104/81, *Kupferberg*, EU:C:1982:362, para 13.

73. Van Vooren and Wessel, *EU External Relations Law. Text, Cases and Materials* (Cambridge University Press, 2014), at p. 105.

74. Bronckers and Gruni "Retooling the sustainability standards in EU Free Trade Agreements", 24 *Journal of International Economic Law* (2021), 25–51, at 45.

sustainability clauses[75] have been subsumed by the Court within the scope of the Union's exclusive competence. This speaks in favour of the Commission's power to bring infringement proceedings against Member States for the enforcement of sustainability clauses in EU free trade agreements.

5.1.2. *Jurisdiction of the Court in light of the features of WTO law*

It is by now settled case law that the validity of EU acts cannot be affected by GATT provisions, either in a preliminary ruling procedure or annulment procedure initiated by a State, because they lack direct effect. The Court has explained this by the great flexibility of GATT provisions and the underlying principle of negotiations to solve disputes.[76] Despite the strengthening of the judicial dimension of the dispute settlement system in the WTO compared to the GATT 1947, the Court has ruled that WTO law provisions may not be invoked directly by private parties in the context of preliminary rulings or by Member States in annulment proceedings as a means of reviewing the validity of EU acts.[77] On the other hand, the lack of direct effect of the GATT was "no stumbling-block"[78] for infringement proceedings against Member States.

For the Advocate General, the issue of jurisdiction in infringement cases was settled in *Commission* v. *Germany*.[79] The Court, however, claimed that the issue had not been settled yet in its case law on the relationship between WTO law and EU law.[80] This could be explained by the fact that *Commission* v. *Germany* concerned the review of a national measure in light of an international agreement concluded in the context of the GATT,[81] before the WTO was established. This is supported by the Court's statement that Hungary does not dispute the Court's jurisdiction under Article 258 TFEU in relation to international agreements generally, but argues that the particular WTO context precludes the Court's jurisdiction.[82]

75. See Opinion 2/15.

76. See Case C-280/93, *Germany* v. *Council*, EU:C:1994:367, paras. 103–112; Joined Cases 21–24/72, *International Fruit Company*, EU:C:1972:115, paras. 21–28.

77. See Case C-377/02, *Van Parys*, EU:C:2005:121; Joined Cases C-120 & 121/06, *P, FIAMM*; Case C-149/96, *Portugal* v. *Council*, EU:C:1999:574. As an exception to this rule, see Case 70/87, *Fediol*, EU:C:1989:254, and Case C-69/89, *Nakajima*, EU:C:1991:186. For a critical view of the Court's approach in *Portugal* v. *Council*, see Kuijper and Bronckers, "WTO Law in the European Court of Justice", 42 CML Rev. (2005), 1313–1355, at 1342–1350.

78. Eeckhout, annotation of Case C-61/94, *Commission* v. *Germany*, 35 CML Rev. (1998), 557–566, at 564.

79. Opinion, para 63.

80. See judgment, para 77.

81. The International Dairy Arrangement was concluded in 1979 by the Community with third countries in the context of the GATT; it established a system of minimum export and import prices for dairy products.

82. See judgment, para 76.

The Court's approach according to which EU secondary law is immune (with certain exceptions) whereas national law is not, has sparked the criticism of a double standard.[83] *Prima facie*, this approach seems to favour the powers of the Commission, to the detriment of the ability of Member States to rely on WTO law against EU institutions. Yet, it could be argued that one of the main reasons why Member States are precluded from challenging EU acts in light of WTO law is not present in the context of infringement proceedings. As explained by the Court in *Portugal* v. *Council*, by finding a breach of a WTO obligation by an EU institution the European judiciary would limit the EU's power to negotiate an alternative solution to the dispute. Such a risk would not be present in relation to the negotiating position of a Member State, especially in the case of a GATS obligation, since trade in services is now part of the CCP and as such, falls within the exclusive external competence of the Union. In fact, as Advocate General Kokott rightly stated, infringement proceedings could be seen as a tool which may strengthen the negotiating position of the Union *vis-à-vis* third countries "… as it thereby shows its negotiating partners that it can, if necessary, ensure internally that infringements of the WTO Agreement are effectively eliminated".[84] However, a tension can be discerned here between the finding that the ECJ might undermine the negotiating position of EU institutions and the principle of legality of Union acts. The Court's lack of jurisdiction in cases challenging the legality of EU law in the light of WTO law, leaves EU acts outside the scrutiny by courts. This "may be seen to condone certain violations of international law by the EU, which is at odds with its self-imposed pledge to the 'strict observance' of international law (Article 3(5) TEU)".[85]

Another double standard could be the Court's pronouncement on WTO law even in the absence of a DSB interpretation or of a channel of communication with the DSB, which has the exclusive jurisdiction in that regard.[86] The ECJ has ruled that potential interpretations of EU law by the European Court of Human Rights (should the EU accede to the Convention) and arbitration clauses in bilateral investment treaties between EU Member States, go against the principle of autonomy of EU law.[87] Both the Court and the Advocate General seem to pre-empt such a critique and state that the judgment of the

83. See e.g. Eeckhout, op. cit. *supra* note 78, at 565; Kuijper and Bronckers, op. cit. *supra* note 77, at 1348; and more recently Fontanelli, "GATS the way I like it: WTO law, Review of EU legality and fundamental rights", 10 *European Society of International Law Reflection* (2021), 1–12, at 6.

84. Opinion, para 66.

85. Van Vooren and Wessel, op. cit. *supra* note 73, at pp. 305–306.

86. Fontanelli, op. cit. *supra* note 83, at 8–10.

87. See Opinion 2/13 (Full Court) ECHR, EU:C:2014:2454, and Case C-284/16, *Slowakische Republik* v. *Achmea BV*, EU:C:2018:158.

Court in the present case does not prejudice any findings by the DSB should a case be brought before a panel by a third country.[88] In this regard, perhaps the double standard becomes less visible if one compares the two contexts: an ECtHR ruling interpreting EU law and possibly finding an infringement of the ECHR by the EU or a Member State, would be binding on the EU, including its Court who according to Article 344 has exclusive jurisdiction in settling disputes on the interpretation and application of the Treaties. In other words, an external ruling (by the ECtHR) would have internal effects in the EU legal order. The same cannot be said in cases such as the present case, because a declaratory judgment of the Court would not have any effects for the WTO DSB.

5.2. *Restrictions to EU fundamental freedoms*

The Court assessed Article 76(1)(b) of the 2017 Act also in light of freedom of establishment and free movement of services. The judgment is not ground-breaking in this regard, but some issues are worth considering.

First, Hungary contested the economic nature of education services if, especially as in the case of CEU, it is the service provider who finances the teaching activities.[89] This claim was based on the Court's previous case law which limits the freedom of establishment and free movement of services to economic activities provided for remuneration.[90] In *Humbel*, the ECJ carved out from the concept of services courses provided under the national education system.[91] However, Hungary's claim was refuted in this case as Article 76(1)(b) of the Hungarian Law was phrased in general terms, with no distinction in terms of its scope of application between educational programmes offered as gainful activity and the non-for-profit ones. If legislation had targeted only public universities[92] then Treaty provisions on establishment or services could not have been triggered due to the ECJ's above-mentioned case law.

Secondly, in its letter of formal notice of 27 April 2017, the Commission argued that Hungary had failed to fulfil its obligations under Articles 9, 10, 13, Article 14(3) and Article 16 of the Services Directive and alternatively

88. See judgment, paras. 89–91 and Opinion, para 58.

89. Judgment, paras. 157–158.

90. See e.g. Case C-153/02, *Neri*, EU:C:2003:614, para 39.

91. Case 263/86, *Belgian State* v. *René Humbel and Marie-Thérèse Edel*, EU:C:1988:451. See also Case C-109/92, *Stephan Max Wirth* v. *Landeshauptstadt Hannover,* EU:C:1993:916.

92. On 12 Oct. 2018, Gender Studies were removed from the list of accredited master's programmes in Hungary. This directly affected the public university Eötvös Loránd University (ELTE) and CEU.

under Articles 49 and 56 TFEU.[93] However, in the reasoned opinion of 14 July 2017, the legal basis of the infringement proceedings was limited to Article 16 of the Services Directive and, in any event, Articles 49 and 56 TFEU. Articles 9, 10 and 13 of the Services Directive limit the power of Member States in imposing authorization requirements for established service providers, that is those providers who pursue an economic activity for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out.[94] The reason why the Commission did not rely on these provisions could be that Article 76(1)(b) of the Hungarian law does not impose an authorization scheme, but it imposes a requirement in the meaning of Article 4(7) of the Services Directive, "covering, *inter alia*, any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States".[95] Similarly, Article 14(3) of the Services Directive, although relating to a prohibited requirement, would have not constituted an appropriate basis for infringement proceedings, since it prohibits Member State measures that restrict "the choice of a provider already established in a Member State as to the type of establishment he wants to have in another Member State".[96] This was not the case here. In addition, none of the requirements to be evaluated listed in Article 15 of the Services Directive applied to the Hungarian measure, therefore understandably the Commission turned to Article 49 TFEU.

Given the nature of infringement proceedings, the Commission was free to also invoke Article 16 of the Services Directive which applies to those providing services in a Member State other than that in which they are established. Article 76(1)(b) of the Hungarian law fell within the scope of Article 16 "only in so far as it makes the *temporary* provision of teaching activities leading to a degree subject to special conditions. Such business models are perfectly feasible, although the vast majority of higher education institutions offering qualifications undoubtedly do so through a permanent establishment."[97]

Lastly, Article 76(1)(b) of the Hungarian Law was assessed for its compatibility with Article 16 of the Directive. Article 16(1) allows Member States to adopt national requirements concerning the access or exercise of a

93. See judgment, para 26.

94. See Art. 4(5) of the Services Directive.

95. See Art. 4(6) of the Services Directive for the definition of authorization schemes and Art. 4(7) for the definition of requirements. For an interpretation of the Court see Joined Cases C-360/15 & 31/16, *College van B en W gemeente Amersfoort* v. *X BV* and *Visser Vastgoed Beleggingen BV* v. *Raad van de gemeente Appingedam*, EU:C:2018:44, paras. 113–120.

96. See Handbook on the implementation of the Services Directive, at p. 30, available at <op.europa.eu/en/publication-detail/-/publication/a4987fe6-d74b-4f4f-8539-b80297d29715>.

97. See Opinion, para 167 (emphasis added).

service activity provided that those requirements are non-discriminatory, necessary, and proportionate. According to Article 16(1)(b) and 16(3) of the Directive, those requirements must serve the protection of public policy, public security, public health or the environment. Two issues have not been settled by the Court yet: first, are the conditions in Article 16(1) cumulative? and, second, can the EU legislature restrict the grounds for justification in the Directive considering that other overriding requirements in the public interest may be invoked by Member States in the context of the application of the Treaties?

Regarding the first issue, we know by now that the conditions in Article 15(3) of the Services Directive, which are similarly phrased to those in Article 16(1), are cumulative.[98] The Court has not yet settled the issue regarding Article 16. Nor did it do so in this case, because it found the Hungarian measure constituted a restriction to the freedom to provide services and not a plainly discriminatory measure. This differed from Advocate General Kokott's categorization who argued that the Hungarian requirement had a discriminatory nature; moreover, she seemed to imply the cumulative nature of conditions in Article 16(1).[99] Arguably, there would be no reason to consider Article 16(1) conditions as non-cumulative given the similar wording of Article 16(1) and Article 15(3). The only difference between the two provisions is the open-ended nature of Article 15(3)(b) with regard to justifications based on an overriding reason relating to the public interest. However, this should not have a bearing on the cumulative nature of the conditions in Article 16(1).

The second unresolved issue is whether the list of justification grounds in Article 16(1)(b) of the Directive is exhaustive, or could include other overriding requirements in the public interest. This provision contrasts with Article 15 on requirements to be evaluated, or Article 9 on authorization schemes, which refer to overriding reasons in the public interest as possible justification grounds. In the present case, Hungary invoked public order as a justification and the Court rephrased this as public security and public policy, both justification grounds contained in Article 16. Thus, ultimately there was no need for the Court to tackle this issue in the present case, but it will have to address it sooner or later.[100]

Ultimately, it is a constitutional issue on the relation between primary and secondary law and the power of the EU legislature to limit justifications accepted under primary law. There are strong arguments for the Court to support a closed list of justifications, one of them being the deliberate choice

98. Case C-179/14, *Commission* v. *Hungary*, EU:C:2016:108, paras. 69 and 90.
99. See Opinion, para 172.
100. The question was left open in Case C-179/14, *Commission* v. *Hungary*, para 116.

of the EU legislature to narrow down the list of justifications in Article 16(1)(b) in contrast to Articles 9 or 15 of the Directive. According to Barnard, this may not be a coincidence, but would reflect the idea that the host State is given more space to justify limitations with respect to establishment than with respect to services, where the home State is the regulator.[101] In addition, the Court showed deference to the EU legislature in *Rina Services*, in which it ruled that requirements prohibited by Article 14 of the Directive could not be justified under the Treaty justifications.[102] This was despite Article 3(3) of the Directive, according to which Member States are to apply its provisions "in compliance with the rules of the Treaty on the right of establishment and the free movement of services". For Advocate General Szpunar, the ECJ's stance in *Rina Services* is that the "EU legislature may promote the freedom aspect of the fundamental freedoms at the inevitable expense of their justification aspect. . . . [I]n such a situation the 'winner' is the EU fundamental freedom, as well as the economic operator intending to rely on this freedom – which is fully in line with the objectives of the FEU Treaty."[103] The Court could choose to stick to this rationale when it finally decides to address the issue of the closed list of justifications in Article 16 of the Services Directive.

5.3. *Scope of application of the Charter*

The applicability of the Charter due to a restriction of fundamental freedoms, or a wrongful transposition/breach of a directive, is not a novelty, whereas its application by virtue of the GATS is. Tellingly, the Court did not cite any case law in support of this statement: "when Member States are performing their obligations under GATS, …, they must be considered to be implementing EU law within the meaning of Art. 51(1) of the Charter".[104]

One question that arises is the degree to which the constellation of the Charter being applicable by virtue of the GATS relates to the previous known categories of situations that were construed by the Court as being within the scope of application of the Charter/fundamental rights as general principles.

It is useful briefly to recall these: Member States are bound by EU fundamental rights when they are implementing or enforcing an EU measure,

101. Barnard, "Unravelling the Services Directive", 45 CML Rev. (2008), 323–394, at 366. See also Delimatsis, "From *Sacchi* to *Uber*: 60 years of services liberalization, ten years of the Services Directive in the EU", 37 YEL (2018), at 218; he also seems to support the narrow reading.

102. Case C-593/13, *Presidenza del Consiglio dei Ministri and others* v. *Rina Services SpA and others*, EU:C:2015:399.

103. Opinion of A.G. Szpunar in Joined Cases C-360/15 & 31/16, *Visser Vastgoed*, para 99.

104. See judgment, para 213.

thus acting as "agents" of EU law, as first proclaimed in *Wachauf*.[105] Member States are also bound by EU fundamental rights when they are derogating from EU rules or restricting EU rights: *ERT*[106] established that in such situations, Member States act "within the scope of EU law". The Charter's scope of application is set out in Article 51(1) CFR which states that it binds Member States only "when they are implementing EU law". *Åckerberg Fransson*[107] established that this wording is meant to cover all situations that fall "within the scope of EU law". *Åckerberg Fransson*, however, involved neither the implementation of an EU measure in the classic *Wachauf* sense, nor a derogation in the *ERT* sense. This and subsequent case law show there is a further much broader, yet elusive, category of actions that fall otherwise "within the scope of EU law"[108] and trigger the application of the Charter. These are situations where EU law places one or several specific obligations on the Member States,[109] or where the national situation is covered by a specific rule of EU law. There are criteria for further determining this, but they are not very sharply articulated, and appear non-exhaustive.[110]

In the present case, the Advocate General's approach is to construe Member State action that breaches the GATS as falling within Article 51(1) CFR via the *Wachauf* scenario: she considers Member States as agents of the Union. This is clear when she states that Member States are bound by the Charter when they use their own regulatory competence to put into effect the Union's obligations under international law. In doing so, according to the Advocate General, they "fulfil an obligation in relation to the European Union, which has assumed responsibility, externally, for the due performance of the agreement".[111] So, for the Advocate General, "applicability of the Charter

105. Case C-5/88, *Hubert Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft,* EU:C:1989:321.

106. Case C-260/89, *Elliniki Radiophonia Tileorasi (ERT) and Panellinia Omospondia Syllogon Prossopikou* v. *Dimotiki Etairia Pliroforrisis and Sotirios Kouvelas and Nicolaos Avdellas and others*, EU:C:1991:254.

107. Case C-617/10, *Åklagare* v. *Hans Åckerberg Fransson,* EU:C:2013:105.

108. For a detailed analysis see Dougan, "Judicial review of Member State action under the general principles and the Charter: Defining the 'scope of Union law'", 52 CML Rev. (2015), 1201–1246.

109. Case C-617/10, *Åckerberg Fransson*; compare Joined Cases C-609 & 610/17, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry* v. *Hyvinvointialan liitto ry* and *Auto- ja Kuljetusalan Työntekijäliitto AKT ry* v. *Satamaoperaattorit ry,* EU:C:2019:981, para 53 and case law cited therein, including Case C-198/13, *Hernandez and others* v. *Reino de España and others*, EU:C:2014:2055; for a case pre-Charter see Case C-144/95, *Criminal Proceedings against Jean-Louis Maurin*, EU:C:1996:235; see also Lenaerts, "Exploring the limits of the EU Charter of Fundamental Rights", 8 EuConst (2012), 375–403.

110. See further Case C-206/13, *Cruciano Siragusa* v. *Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, EU:C:2014:126, para 24.

111. See Opinion, para 128.

ensures that the Member States do not infringe fundamental rights as 'representatives' of the European Union".[112] The Advocate General cites the Opinion in *Commission* v. *Hungary (Usufruct over agricultural land)* which in turn cites *Wachauf*.[113]

The relevant passage could be understood as extremely broad, namely covering all measures within the education sector of Member States that put into effect the GATS national treatment obligation. But the Advocate General is quick to point out that this would not be the case. She does so with reference to *Siragusa*[114] and *Hernandez*[115] – cases that sought to clarify the scope of application of the Charter other than via the *Wachauf* (or *ERT*) scenario. For the Advocate General, the Hungarian legislation falls within the scope of application of the Charter because EU law imposes a particular obligation on Member States, namely, the national treatment obligation under the GATS, and, importantly, the Charter applies because the Hungarian legislation is *not* "compatible" with that duty. This language of "compatibility" may suggest that the Charter applies only once a GATS violation is established – so after it is established that it cannot otherwise be justified by an exception.[116] This would be a further limitation to the scope of application of the Charter.

This question of which stage of analysis triggers the scope of application of the Charter, and consequently where that fundamental rights analysis should be conducted, should also be considered regarding the fundamental freedoms in this case. The Advocate General leaves the question open whether a *separate* Charter infringement can be found merely by reason of a *restriction* on a fundamental freedom, as she considers it does not arise here.[117] The reason is that she finds the scope of application of the Charter triggered with regard to the requirement of genuine teaching activities in the State of origin (para 76(1)(b)) because it constitutes a deficient transposition of the Services Directive.[118] The fact that she also found a breach of Articles 49 and 54 TFEU does not seem to be relevant.

The Court's approach is less clear for two reasons. First, because it does not seem to clearly distinguish between the "derogation" and the "implementation" scenario. The Court first used the *ERT* formula (as

112. Ibid.

113. Opinion of A.G. Saugmandsgaard Øe in Case C-235/17, *Commission* v. *Hungary (Usufruct over agricultural land)*, EU:C:2018:971, para 91.

114. Case C-206/13, *Siragusa*, para 24.

115. Case C-198/13, *Hernandez*.

116. Admittedly, the term "compatibility" may at first sight not be an unequivocal indication of this per se, but the A.G. does use this term at the end of her analysis on the possible exception under Art. XIV GATS.

117. See Opinion, para 179.

118. Ibid., para 178.

confirmed by *Pfleger*[119] for the Charter) that Member States who are the author of a measure that restricts a fundamental freedom and argue that this must be justified by an overriding requirement in the public interest are "implementing EU law" within Article 51(1) CFR, and then it stated that "the same applies with respect to Article 16 of the Services Directive 2006/123".[120] Secondly, its formula seems to suggest that the Charter analysis should occur *within* the justification analysis of the fundamental freedoms or of Article 16 of the Services Directive. However, the Court conducted the Charter analysis only *afterwards* and separately. The Court's case law is at any rate not consistent on this point. For example, in *SEGRO*[121] the Court established a restriction of Article 63 TFEU which could not be justified based on the principle of proportionality and in light of overriding requirements of public interest resulting from the Treaties or case law. Because of that, it considered that a separate fundamental rights analysis of Articles 17 and 47 CFR was not necessary. In *Commission* v. *Hungary (usufruct over agricultural land)*,[122] the Court conducted the examination of Article 63 TFEU and Article 17 CFR side by side at the level of restriction first and then at the level of justification, and found a violation of these two provisions "in conjunction". In *AGET Iraklis*,[123] it considered the fundamental rights question at the level of justification of the Article 49 TFEU analysis.[124] It is at that level that it identified a restriction of Article 16 CFR and conducted a joint proportionality analysis of Article 49 TFEU and Article 16 CFR, eventually finding an infringement of the former, and "on identical grounds"[125] a violation of the latter. Notably, the concluding paragraph and the operative part of the judgment only speak of an Article 49 TFEU violation. In the present case, but also in *Pfleger,* the Court, even though it cited the *ERT* formula, found a violation of the fundamental freedoms first, and subsequently established a separate fundamental rights violation (in *Pfleger* of Arts. 15–17 CFR), for the same reasons it established the fundamental freedoms violation.

Advocate General Saugmandsgaard Øe made a convincing case in his Opinion in *Commission* v. *Hungary (usufruct over agricultural land)* that the *ERT* approach implies that an infringement of fundamental rights should be

119. Case C-390/12, *Robert Pfleger and others,* EU:C:2014:281.

120. Judgment, para 214.

121. Joined Cases C-52 & 113/16, *'SEGRO' Kft* v. *Vas Megyei Kormányhivatal Sárvári Járási Földhivatala* and *Günther Horváth* v. *Vas Megyei Kormányhivatal,* EU:C:2018:157.

122. Case C-235/17, *Commission* v, *Hungary (usufruct over agricultural land),* EU:C:2019:432.

123. Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis)* v. *Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis,* EU:C:2016:972.

124. Ibid., paras. 62 et seq.

125. Ibid., para 103.

identified within the justification analysis of the fundamental freedoms, and not lead to the finding of a separate fundamental rights violation. He rejected the Commission's formal approach to this question; that is, that the establishment of a restriction to a fundamental freedom acts as a *gateway* to applying the Charter.[126] The reason lies in the correct division of powers. In a derogation scenario, "EU law *frames* the Member States' competence to implement their national policy choices, *but that competence is not derived from EU law* [this is different from where EU legislation allows for discretion] *and EU law does not determine how it is exercised*."[127] Advocate General Saugmandsgaard Øe rather endorsed a functional understanding of the derogation scenario. EU fundamental rights apply to situations where Member States seek to derogate from the fundamental freedoms for three reasons: "(1) the requirement to ensure the uniform application and effectiveness of freedoms of movement, (2) the obligation to interpret the FEU Treaty, in all circumstances, in a manner that respects fundamental rights and (3) the need to give a ruling on those rights in order to resolve the dispute relating to those freedoms".[128] Based on this functional understanding, he rightly stated that none of this applies in cases where an incompatibility of the measure at issue with the fundamental freedoms has already been established. He also countered the Commission's argument that in cases such as the one at issue, it is important to conduct a Charter analysis "in order to ensure that the rule of law is respected in those States", to give concrete effect to the rule of law in cases of a Charter infringement, and to increase the visibility of the Charter and increase the legitimacy of EU law.[129] He did so based on a competence argument: the division of powers between the EU and the Member States is as important an aspect of the rule of law as the promotion of fundamental rights[130] and the legitimacy of the Court's intervention in national policy is at stake.

This aspect is of course of particular relevance in the present case. The factual background and political context analysis have shown just how central the rule of law and fundamental rights dimensions were. As will be shown below, Advocate General Kokott expressly noted the importance of the Court pronouncing on these aspects, even if that would have no particular repercussions in a case where the infringements of Article 49 TFEU and the Services Directive have already been established. It is for this reason that her

126. Opinion in Case C-235/17, *Commission* v. *Hungary (usufruct over agricultural land),* EU:C:2018:971, para 98.

127. Ibid., para 102.

128. Ibid., para 103.

129. Ibid., para 99.

130. Ibid., para 101.

solution, of applying the Charter because of a wrongful implementation of the Directive, appears to be the better approach.

Returning to the question of how the application of the Charter by virtue of the GATS fits previously known categories, the Court, unlike the Advocate General, merely noted that the GATS forms part of EU law. Thus, when Member States perform their obligations thereunder, including the national treatment obligation, this is within Article 51(1) CFR. Arguably, this scenario could be construed as more similar to *ERT* than *Wachauf* in conjunction with *Siragusa* and *Hernandez*: if GATS is part of EU law, then Hungary seeks to derogate (based on the GATS framework) from a rule of EU law, similar to situations where it may seek to derogate from internal market freedoms. However, as noted above, the Court did not cite any case law at all here; this may even be the better approach as – while similar to *ERT* – it is in fact a new scenario due to the GATS link. Still, the question remains of how wide the scope of application of the Charter is. From the Advocate General's analysis, it remains open whether a breach of the GATS (before considering the exceptions) or the establishment of a violation (after considering the exceptions) is necessary to trigger the application of the Charter. Whereas the Court only stated the very broad formula that when Member States perform their obligations under the GATS they are implementing EU law.[131]

5.4 *Substantive fundamental rights' violations*

This is the first time the ECJ has ruled on Article 13 CFR and Article 14(3) CFR. This is significant not only from the point of view of EU law, but for regional and international human rights law more generally, as there is not much hard (case) law on academic freedom.

Academic freedom, as enshrined in Article 13 CFR, and the wider, yet connected, rule of law issue stand centre stage in this case, even if the bulk of the judgment is devoted to the trade-related aspects. The reason for this is simple. The Charter applies only within the scope of EU law and trade is what brought the matter within that sphere.[132] The importance of the fundamental rights dimension is expressly reflected in the Advocate General's Opinion. After she found a deficient transposition of the Services Directive and an infringement of Article 49 TFEU, she noted that a separate finding of a fundamental rights breach would make no difference in this case. However,

131. Judgment, para 213.

132. Nagy compares this to Al Capone who "was not convicted for what he should have been but for what he could be (tax fraud)"; see "The Commission's Al Capone Tricks – Using GATS to protect academic freedom in the European Union", available at <verfassungsblog.de/the-commissions-al-capone-tricks/>.

for her, such an examination was warranted because it "reflects the particular significance and nature of the infringement more clearly",[133] especially insofar as the alleged fundamental rights breach goes beyond the economic dimension covered by the internal market rules.[134] The Venice Commission Opinion on the compatibility of the Hungarian law at issue with Council of Europe standards[135] must also have influenced the Advocate General and the Court to acknowledge this dimension. In 2017, the Venice Commission found that the requirements introduced by the Hungarian law are problematic for foreign universities that are already established in Hungary from the point of view of domestic and international standards of academic freedom, freedom of expression and assembly, the right to education and the principle of non-discrimination.[136]

5.4.1. *Article 13 CFR*

Article 13 CFR on freedom of the arts and sciences provides that "the arts and scientific research shall be free from constraint. Academic freedom shall be respected." The second sentence was at stake in this case. In order to give meaning to this right, the Court and the Advocate General started by considering the ECHR; that is logical. The Explanations to the Charter on Article 13 CFR refer expressly to the ECHR, and under Article 53(2) CFR the same meaning and scope must be given to corresponding Charter and ECHR rights. The ECHR does not include a separate right of academic freedom, but covers certain individual dimensions of this right through its freedom of expression provision. As the ECJ noted, citing the ECtHR's *Mustafa Erdoğan and others* case, it results from the ECHR regime that "academic freedom in research and teaching should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge without restriction".[137] The concurring opinion in *Mustafa Erdoğan* also clarified that academic freedom is a broader concept which "transcends the scope of Article 10 [ECHR] in certain areas".[138] It is precisely the scope beyond Article 10 ECHR that was at issue here, in this case the protection of the institutional and organizational framework of a university.

133. Opinion, para 180.
134. Ibid.
135. Venice Commission Opinion cited *supra* note 21.
136. Ibid., paras. 102 and 123.
137. Judgment, para 225, citing ECtHR, *Mustafa Erdoğan and others* v. *Turkey,* Appl. Nos. 346/04 and 39779/04, judgment of 27 May 2014.
138. Appl. Nos. 346/04 and 39779/04, *Mustafa Erdoğan* cited *supra* note 137, joined concurrent Opinion of judges Sajó, Vučinič and Kūris, para 3.

The Explanations to the Charter stipulate that Article 13 CFR "…is deduced primarily from the right to freedom of thought and expression".[139] In light of this, the Court could have chosen to put the emphasis on these sources and guarantee only the individual dimensions of this right flowing from freedom of expression.[140] Notably, this would not have implied that "generic" freedom of expression and speech for all on the one hand, and "academic" freedom of expression and speech on the other, would have to be equated. It has been suggested that since the latter "finds its foundation in the (presumed) quality of opinion and its (potential) contribution to the general interest [although including a 'right to err'] . . . it should enjoy a higher degree of protection than many other opinions and expressions".[141] That higher degree of protection can then be seen to cover a more limited scope, because it only concerns "the freedom to hold and express any belief, opinion or theoretical position and to espouse it in an appropriately academic manner".[142] The level of protection would then also vary in the case of speech based on the type at stake: whether it is intra-mural speech and purely academic, whether it is extra-mural speech, or whether it is off-topic speech, which is understood not to be covered by academic free speech.[143] Academic freedom of speech is also different to the extent that it is subject to "quality controls (e.g. peer review of publications or teaching assessments), for which there are no equivalent constraints in public discourse",[144] and frequently involves conduct rather than speech (e.g. scientific experiments).[145] However, these distinguishing features of "academic" freedom of expression and speech do not exclude the grounding of this individual dimension of academic freedom in the more general freedom of thought and expression.

At any rate, the ECJ did not limit itself to guaranteeing only these individual dimensions of academic freedom. Instead, it followed the Advocate General, expressly citing the Opinion. The Advocate General's approach is convincing. Her reasoning is that "from a schematic point of view", Article 13 CFR must

139. Explanations relating to the Charter of Fundamental Rights, O.J. 2007, C 303/17.

140. See Sayers writing before the delivery of this judgment: "…it is not yet clear whether Article 13 consists of anything more than specifically enumerated aspects of the right to freedom of expression". Sayers, "Article 13" in Peers, Hervey, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights – A Commentary* (Hart, Nomos, 2014), pp. 379–400, at p. 389.

141. League of European Research Universities (LERU) Report on "Academic Freedom as a Fundamental Rights", Advice Paper No. 6, Dec. 2010, at p. 14, available at <www.leru.org/files/Academic-Freedom-as-a-Fundamental-Right-Full-paper.pdf>.

142. Barrow, "Academic freedom: Its nature, extent and value", 57 *British Journal of Educational Studies* (2009), 178–190, at 180–181, as cited in LERU Report, ibid., at p. 14.

143. LERU Report, ibid.

144. Barendt, *Academic Freedom and the Law: A Comparative Study* (Hart Publishing, 2010), Ch. 2, "What is academic freedom", pp. 15–49, at p. 20.

145. Ibid., at p. 21.

include more than the elements of protection that flow from the (individual) freedom of expression dimension.[146] This makes sense given that the Charter includes a separate right to "freedom of the arts and sciences". As this right is autonomous from freedom of expression, it must differ from the latter. Turning to a contextual interpretation, the Advocate General looked at the inner logic of the right, too, to find that exercising the individual dimension (academic teaching, research, engagement with the community) presupposes the protection of the institutional dimension of a university. It may be noted here that this reasoning could perhaps give room for the ECtHR also to include such institutional protection within the scope of Article 10 ECHR. In any case, recognition of these other dimensions in addition to a procedural one is very much in line with German constitutional thinking,[147] which may be where this German Advocate General found inspiration.

It is noteworthy that the Advocate General does not cite any legal sources to back up her claims on the institutional and organizational dimension of Article 13 2nd sentence CFR. This may not seem necessary given her focus on the contextual and textual interpretation. At any rate, it would not have been easy in this case to follow the ECJ's classic approach in finding the content of "new" EU fundamental rights as general principles based on the constitutional traditions common to the Member States and international human rights sources, with the ECHR constituting a special source of inspiration.[148] At Member State level, there is very large divergence in terms of constitutional entrenchment of academic freedom. This is both in terms of whether it is actually constitutionally protected (although a significant number of European constitutions do contain specific provisions on academic freedom in one form or another) and, if so, what elements/dimensions of this freedom are protected.[149] At the international level, academic freedom is not protected as such in the ECHR, as we saw above, or in the two UN Covenants (ICCPR or ICESCR) or any other binding international law instrument. However,

146. Opinion, para 145.

147. See Barendt, op. cit. *supra* note 144, Ch. 5, "Academic freedom in Germany", pp. 117–160, at p. 118, with reference to Trute, *Die Forschung zwischen grundrechtlicher Freiheit und staatlicher Institutionalisierung* (JCB Mohr, 1994); Schmidt-Aßman, "Die Wissenschaftsfreiheit nach Art. 5, Abs 3 GG als Organisationsrecht" in Becker, Bull and Seewald (Eds.), *Festschrift für Werner Thieme* (Carl Heymans, 1993), pp. 697–714.

148. Although note the considerably varied practice in how the Court cites the ECHR as a source of EU fundamental rights in its case law. See Kosta and de Witte, "Human rights norms in the Court of Justice of the European Union" in Scheinin (Ed.), *Human Rights Norms in "Other" International Courts and Tribunals* (Cambridge University Press, 2019).

149. See Karran and Mallison, "Academic freedom in the UK: Legal and normative protection in a comparative context", Report for the University and College Union, 7 May 2017; Gärditz, "Auf dem Weg zu einem europäischen Wissenschaftsrecht?" in Funk, Gärditz and Pallme König (Eds.), *Wissenschaftrecht*, Beiheft 24 (Mohr Siebeck, 2016), at p. 22.

elements of it can find protection through a series of other Covenant rights, in particular Article 19 of the ICCPR on freedom of opinion and expression, Article 15 ICESCR and especially paragraph 3 on "the freedom indispensable for scientific research" and Article 13 ICESCR on the right to education.[150] In light of this it may not be surprising that the concurring judges in *Mustafa Erdoğan* noted that "[the meaning, rationale, and scope of academic freedom are not obvious, as the legal concept of that freedom is not settled".[151]

The ECJ, unlike the Advocate General, did cite international documents – albeit soft law instruments – in support of its findings on academic freedom and the protection of its institutional dimension. It cited the UNESCO Recommendation concerning the Status of Higher Teaching Personnel[152] as well as the Council of Europe Recommendation 1762 (2006) "Academic freedom and university autonomy".[153] The latter is relied on to support the view that academic freedom also includes an institutional and organizational dimension. The former is used to support two propositions. First, that institutional autonomy is a necessary precondition for higher education teaching personnel and institutions to fulfil their function.[154] Second, that Member States are obliged "to protect higher education institutions from threats to their autonomy coming from any source".[155] Even though these are soft law measures, having recourse to them appears sensible. The UNESCO Recommendation is the "primary source"[156] for defining academic freedom at the international level; while Recommendation 1762 (2006) can be said to reveal a certain European consensus, and was also cited by the ECtHR in *Mustafa Erdoğan*. The Venice Commission Opinion[157] also cited these soft law measures,[158] among many others[159] (as well as a series of hard law

150. See in more detail on this and presenting a longer list of rights which may protect aspects of academic freedom, Beiter, Karran and Appiagyei-Atua, "Academic freedom and its protection in the law of European States: Measuring an international human right", 3 *European Journal of Comparative Law and Governance* (2016), 254–345, at 261–265.

151. Concurring Opinion in Appl. Nos. 346/04 and 39779/04, *Mustafa Erdoğan,* cited *supra* note 138, para 4.

152. UNESCO Recommendation concerning the status of higher education teaching personnel, 11 Nov. 1997.

153. Recommendation 1762 (2006) adopted by the Parliamentary Assembly of the Council of Europe on 30 June 2006.

154. UNESCO Recommendation cited *supra* note 152, para 18, cited in judgment at para 227.

155. Ibid., para, 19, cited in judgment at para 227.

156. Sayers, op. cit. *supra* note 140, at p. 386.

157. Venice Commission Opinion cited *supra* note 21.

158. As also noted by Uitz, "Finally: The CJEU defends academic freedom", available at <bridgenetwork.eu/2020/10/07/1714/>.

159. Recommendation CM/Rec(2012)7 of the Committee of Ministers to Member States on the responsibility of public authorities for academic freedom and institutional autonomy; Recommendation Rec(2007)6 of the Committee of Ministers to Member States on the public

provisions).[160] Besides these instruments, the recognition of university autonomy has also traditionally been seen as a core element of academic freedom,[161] from which both a personal freedom of expression (in the sense of scholarly autonomy),[162] but also an organizational and institutional dimension can be derived.

From the Court's pronouncements above, it results that Article 13 CFR must include three dimensions: an individual rights dimension, an institutional and organizational dimension, but also an obligation on States not only to respect, but also to protect, this right.[163] What each of these dimensions further entails is for future case law to decide.

As for the institutional dimension, also known as "institutional autonomy", the UNESCO Recommendation defines it as "that degree of self-governance necessary for effective decision making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability".[164] Institutional accountability is important, but it should not, in its design and execution, harm academic freedom or institutional autonomy. Institutional autonomy further includes the principles of self-governance, including the right to participate in decision making and take part in the governing bodies of the university while maximally promoting the individual dimensions of academic freedom, as well as the principle of collegiality. Further requirements can flow from institutional autonomy as regards, for example, determining admissions criteria for students and codes of conduct; recruitment of academic staff based exclusively on academic merit, and decisions and guidelines on who may teach what and how.[165] Tensions may arise between the institutional and individual aspects of academic freedom, but according to the UNESCO

responsibility for higher education and research; Recommendation R(97)1 of the Committee of Ministers on the Recognition and Quality Assessment of Private Institutions of Higher Education, of 4 Feb. 1997; Magna Charta (a document that was signed by 388 rectors and heads of universities from all over Europe and beyond on 18 Sept. 1988, on the 900th anniversary of the University of Bologna); Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, (Lima, 10 Sept. 1988), Venice Commission Opinion cited *supra* note 21, para 48.

160. Art. 2 of Protocol No. 1 to the ECHR on the right to education; Arts. 10 and 11 ECHR; Arts. 13 and 14 ICESCR; Art. 19 ICCPR. Venice Commission Opinion cited *supra* note 21, paras. 39–47.

161. Cited *supra* note 138, para 4.

162. Ibid.

163. This is in line with the LERU Report cited op cit. *supra* note 141, which drew this conclusion based on a survey of international law instruments and national constitutions.

164. UNESCO Recommendation cited *supra* note 152, para 17. Accountability is further set out at para 22.

165. LERU Report cited *supra* note 141, at pp. 19–22.

Recommendation, "autonomy should not be used by higher education institutions as a pretext to limit the rights of higher-education personnel …".[166] Furthermore, according to the LERU report, "[e]ven more so that is the case with the freedom to teach, the institutional dimensions of the freedom of publication should not take precedence over their individual aspects", and where conflicts arise "a special consideration is to be given to the latter".[167]

In the case at hand, the Court found a limitation of Article 13 CFR because the measures at issue "are *capable of endangering* the academic activity of the foreign higher education institutions concerned . . . and, therefore of depriving the universities concerned of the autonomous organizational structure that is necessary for conducting their academic research and for carrying out their educational activities".[168] The threshold is therefore lower than that of an *actual* disruption and deprivation.

5.4.2. *Article 14(3) CFR*

There are two issues relating to Article 14(3) CFR where the Advocate General and the Court differ. First, and more importantly, the Advocate General considered that Article 14(3) CFR protects the institutional framework of universities only for private educational establishments and Article 13 CFR completes the protection for public ones.[169] The Court, by contrast, held that Article 14(3) relates to both public and private educational establishments. It did not derive this from the Charter text, which only speaks of the "freedom to found educational establishments", but from the Explanations to the Charter, which state in relation to Article 14(3) CFR that "the freedom to found educational establishments, *whether public or private*, is guaranteed as one of the aspects of the freedom to conduct a business…".[170] In principle, the ECJ cannot be criticized for duly taking into account the Explanations, as the Charter mandates (Art. 52(7) CFR), but it is not obvious why the freedom to found public educational establishments should be considered as part of the freedom to conduct a business (Art. 16 CFR).[171] This also raises the question as to the degree to which the institutional and organizational dimension of academic freedom should be covered by Article

166. UNESCO Recommendation cited *supra* note 152, para 20.

167. LERU Report cited *supra* note 141, at p. 22.

168. See judgment, para 288 (emphasis added).

169. Opinion, para 146.

170. Explanations to the Charter cited *supra* note 139, at p. 22 (emphasis added); judgment, para 232.

171. See similarly Morijn, "Hongarije, de Commissie en het Handvest in Zaken C-78/18 en C-66/18 – Tweemaal (allebei) in gebreke, toch een lachende derde", Annotation 16 Nov. 2020, European Human Rights Cases Updates, available at <www.ehrc-updates.nl/commentaar/211045?skip_boomportal_auth=1>.

14(3) CFR. The link between Article 14(3) and Article 16 CFR marks a further divergence between the Advocate General and the Court. Given that Article 14(3) CFR is construed as a specific expression – a *lex specialis* – to Article 16 CFR, the Advocate General considered there should be no separate examination of Article 16 CFR, whereas the Court examined Article 14(3) and Article 16 CFR together, without explaining why,[172] and in fact found three violations. From a doctrinal perspective, the Advocate General's approach appears more sound.

A further point regarding Article 14(3) CFR is that it provides for the freedom to found educational establishments "in accordance with the national laws governing the exercise of such freedom and right". The Court did not pay any attention to this aspect. The Advocate General acknowledged the point, stating that the principle of proportionality must still be complied with by the national legislature. She relied here on the Court's previous finding in *Sky Österreich*[173] on Article 16 CFR, which also contains a reference to "national law and practices". This appears consistent given the construction of Article 14(3) CFR as its *lex specialis*. Two points are notable, however. First, the Advocate General does not indicate what consequences follow from this wording. Arguably, it should lead to more discretion for the national legislature, though that may of course be diminished in the case of serious violations.[174] Second, the Advocate General took account of Article 14(3) CFR's reference to national laws at the level of examining limitations to this fundamental right. That is in principle logical and in line with *Sky Österreich*. However, it could be argued that in certain instances this aspect could be considered at the level of establishing the scope of protection.[175]

5.4.3. *Conflating market freedoms and fundamental rights at the justification stage*

A final comment on justifications is in order. This section of the judgment is strikingly short because the Court referred back to its previous passages from its GATS and internal market analysis, where it held that the Hungarian measures were not justified by any of the objectives of general interest upon which Hungary relied and did not meet those objectives. In other words, the measures failed the fundamental rights test at the stage of justification for the same reason that they failed the GATS/internal market test. In both cases, the

172. Judgment, para 232.

173. Case C-283/11, *Sky Österreich GmbH* v. *Österreichischer Rundfunk,* EU:C:2013:28.

174. Jarass, "EU Grundrechte Charta Art. 52 Tragweite und Auslegung der Rechte und Grundsätze", RN 80, in Jarass, *Charta der Grundrechte der EU*, 4th ed. (Beck, 2021).

175. Ibid. The A.G.'s own wording may also suggest that "the freedom to found educational establishments is guaranteed, in principle, only within the scope of the applicable legal requirements"; Opinion, para 134.

analysis turned on the question of proportionality. To the extent that the Hungarian measures were held not to meet legitimate objectives (public order; preventing deceptive practices) and thus failed at the suitability stage, the conflation of the two tests does not seem to make much difference, because at that stage the different protected interests (market freedoms and Charter rights respectively) do not weigh in the analysis yet. However, even at the stage of necessity (dealt with by the Court), but especially at the stage of actual balancing – proportionality *stricto sensu* – (not dealt with in this case), the outcome might be different based on the scope and weight ascribed to the protected interest. As a matter of principle, it is therefore better to conduct a separate proportionality analysis as the Advocate General did. It is not a given that the economic freedoms and the fundamental rights at stake are identical in that respect. Nevertheless, there are Charter articles that may suggest as much, viz Article 15 CFR on the freedom to choose an occupation and the right to engage in work (paragraph 2 also covers the right of establishment and to provide services in any Member State) and Article 16 CFR on the freedom to conduct a business. The Court has conflated the two concepts also in previous case law.[176] This may have a further effect for cases in which the internal market freedoms clash with fundamental rights,[177] namely to elevate the former to the same legal hierarchical level as the latter.[178]

5.5. *Academic freedom's race in the labyrinths of time*

Time was of crucial importance in the present case. The bill amending the Law on Higher Education, proposed on 28 March 2017, was adopted on 4 April 2017 by the Hungarian Parliament in an "extraordinary, accelerated and simplified procedure",[179] and within a few days signed into law by the President of Republic, despite calls on the latter not to do so. This law put higher education institutions in a race against time as they had to comply with the Article 76(1) requirements by 1 January 2018, a deadline which was later postponed to 1 January 2019. The prior agreement with federal governments

176. See Case C-230/18, *PI* v. *Landespolizeidirektion Tirol*, EU:C:2019:383.

177. Such as the landmark Case C-112/00, *Eugen Schmidberger Internationale Transporte und Planzüge* v. *Republic Österreich,* EU:C:2003:33, or the infamous Case C-438/05, *International ransport Workers' Federation and Finnish Seamen's Union* v. *Viking Line ABP and OÜ Viking Line Eesti,* EU:C:2007:772, and Case C-341/05 *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

178. Of course, this does not settle the question of hierarchy of fundamental rights *within* the Charter.

179. Bárd, "The open society and its enemies: An attack against CEU, academic freedom and the rule of law", CEPS paper No. 2017/14, April 2017, at 6.

had to be concluded within six months of the adoption of the law.[180] What is more, the conclusion of any international agreement depended on a decision by the Hungarian Government, and was thus "a factor outside of the reach of the University itself".[181]

On the other hand, judicial proceedings take time and "time is on the side of rogue governments attempting to dismantle the rule of law".[182] Within Hungary, a group of parliamentarians challenged the constitutionality of the 2017 Act, but on 5 June 2018 the Hungarian Constitutional Court, after having initially set up a working group on the issue, declared that it would suspend the procedure because the European Commission had launched infringement proceedings against Hungary.[183] According to Bárd, "this was just a pretext for a captured court to give more time to the government to destroy academic freedom and to thematize a political issue: George Soros allegedly waging a war against Hungarian national interests."[184]

At the EU level, the Commission acted swiftly: it sent the letter of formal notice to Hungary only 3 weeks after the adoption of the law by Parliament – and the reasoned opinion less than three months later. Infringement proceedings before the Court were initiated seven months later. In the meantime, the Commission engaged with Hungary perhaps in the hope of solving the issue through political negotiations. Neither expedited procedures nor interim measures were applied in the case.[185] This has led to criticism that the use of existing tools of enforcement does not "provide a meaningful check or introduce dissuasive and effective disincentives against rule of law

180. The Hungarian authorities informed the ECJ that such prior agreement with the USA was concluded before the said deadline. They considered as such agreement a letter of 15 June 2017 in which US Secretary of State de Vos explained that issues relating to the authority to grant degrees fell within the competences of State level authorities and not the US federal government. See Uitz, "Academic freedom in an illiberal democracy: From rule of law through rule by law to rule by men in Hungary", 13 Oct. 2017, available at <verfassungsblog.de/academic-freedom-in-an-illiberal-democracy-from-rule-of-law-through-rule-by-law-to-rule-by-men-in-hungary/>.

181. Bárd, op. cit. *supra* note 179, at 2.

182. Bárd, "A strong judgment in a moot case: Lex CEU before the CJEU", 12 Nov. 2020, available at <reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/>.

183. Ibid. For a critical view on the Hungarian Constitutional Court's approach see e.g. Halmai, "The Hungarian Constitutional Court betrays academic freedom and freedom of association", VerfBlog, 8 June 2018, available at <verfassungsblog.de/the-hungarian-constitutional-court-betrays-academic-freedom-and-freedom-of-association/>; Bárd and Pech, "How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The 'Hungarian model'", Reconnect working paper no. 4, Oct. 2019, available at <reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf>.

184. Bárd, op. cit. *supra* note 182.

185. The President of the Court gave priority to the case under Art. 53(3) of the Rule of Procedure of the Court.

breaches".[186] In rule of law infringement proceedings, the ECJ should automatically accelerate the case and apply interim measures.[187] In addition, the introduction of systemic infringement proceedings has been proposed which, together with the use of accelerated procedures and interim measures, could be an effective tool in addressing rule of law backsliding in Member States.[188]

Against this background, it is worth taking a closer look at the (legal) feasibility of expedited procedures and interim measures. According to Article 133 of the Court's Rules of Procedure (RoP), the President of the Court may decide on his/her motion or on a request by the applicant or defendant, and after hearing the parties, the Judge-Rapporteur and the Advocate General, that given the nature of the case, proceedings in a direct action, are dealt with within a short time. This implies that the parties may not lodge a reply or a rejoinder unless the President of the Court deems this necessary[189] and oral hearings take place. Requests for expedited procedures in direct actions are granted by the Court in exceptional situations and this is also reflected in the numbers: in the period 2016–2020, seven requests were made for expedited procedures in direct actions before the ECJ compared to 173 requests in preliminary rulings. In the same period, only 23 requests were granted by the Court, compared to 149 requests not granted.[190] The average duration of expedited procedures in direct actions in 2018 was 9 months and in 2019 10.3 months.[191]

An expedited procedure is granted in order "to avoid the risks that could be incurred if the case was judged by way of an ordinary procedure".[192] The

186. Bárd, op. cit *supra* note 182.

187. Bárd and Śledzińska-Simon, "Rule of law infringement procedures. A proposal to extend the EU's rule of law toolbox", CEPS Papers in Liberty and Security in Europe, No. 2019-09, May 2019, available at <www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf>.

188. Scheppele, "Enforcing the basic principles of EU law through systemic infringement actions" in Closa and Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); and Scheppele, Kochenov and Grabowska-Moriz, "EU values are law, after all: Enforcing EU values through systemic infringement actions by the European Commission and the Member States of the European Union", 39 YEL (2020), 3–121, at 19–24.

189. Art. 134 of the Rules of Procedure of the Court.

190. Court of Justice of the European Union, Annual Report 2020 Judicial Activity, available at <curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_jud_2020_en.pdf>, at p. 223.

191. Ibid., at p. 220.

192. See Barbier de La Serre, "Accelerated and expedited procedures before the EC courts: A review of the practice", 43 CML Rev. (2006), 783–815, at 804, referring to Order of the President of the Court of 21 Sept. 2004 in Case C-317/04, *Parliament* v. *Council*,

Court expects an argument for particular urgency to be made.[193] In the past, the Court has been reluctant to grant expedited procedures based solely on significant economic losses,[194] when fundamental rights are at stake, or when a great number of persons could potentially be concerned.[195] Expedited procedures have been granted in politically sensitive areas, such as for instance in the Stability Pact case[196] with potential impact on the Economic and Monetary Union or when the dismissal of judges and prosecutors was at stake.[197] More recently, in the case on the independence of the Polish Supreme Court, the ECJ based expedited procedures on the impact national law would have on the right to a fair trial and values in Article 2 TEU, as well as on the effect the lack of judicial independence would have on the preliminary ruling procedure.[198] In the case concerning the dismissal of judges and prosecutors in Hungary, the Commission argued urgency based on the "grave consequences" of the legislation on the careers of judges, prosecutors and notaries. It submitted data indicating the number of judges and prosecutors would be reduced by 10 percent and 5 percent in 2012. These effects would be drastic and immediate given the short deadlines in the national law.[199] The ECJ decided in favour of expedited procedures because those affected would suffer sudden and irreversible consequences on their professional career, and experience administrative burdens if they were to be re-integrated in their profession.[200]

It is difficult to say what the Court's approach might have been in the present case. It could be argued that the short timeframe within which foreign universities had to comply with the requirements of Article 76(1) of the 2017 Act and a potential administrative burden that foreign higher education institutions would have faced if they were to relocate back to Hungary, are arguments that could have been made, referring especially to *Commission* v. *Hungary (retirement age of judges and prosecutors)*. The fact that compliance

EU:C:2004:834, para 13, and Order of the President of the Court of 21 Sept. 2004 in Case C-318/04, *Parliament* v. *Council*, EU:C:2004:850, para 15.

193. See Lenaerts, Maselis, Gutman and Nowak (Eds.), *EU Procedural Law* (OUP, 2015), at p. 837, footnote 286.

194. Order of the President of the Court of 23 Oct. 2009 in Case C-69/09 P, *Makhteshim-Agan Holding and others*, EU:C:2009:658, para 10, referred to in Lenaerts et al., op. cit. *supra* note 193, at p. 837.

195. Barbier de La Serre, op. cit. *supra* note 192, 783–815, at 804–805.

196. Ibid., at 806.

197. Order of the President of the Court of 13 July 2012 in Case C-286/12, *Commission* v. *Hungary,* EU:C:2012:469.

198. See Order of the President of the Court of 15 Nov. 2018 in Case C-619/18, *Commission* v. *Poland*, EU:C:2018:910, paras. 19–22.

199. See Order of the President of the Court of 13 July 2012 in Case C-286/12, *Commission* v. Hungary, EU:C:2012:687, paras. 7–11.

200. Ibid, especially para 18.

with the international treaty requirement was beyond the control of the foreign universities, thus making the loss of their licences imminent, especially reinforced the need for quick action.

As for interim measures, they serve the purpose of ensuring full effectiveness of the final ruling in the proceedings.[201] There are three substantive requirements: the application in the main proceeding has a reasonable chance of succeeding; it is urgent; and the applicant's interests must outweigh the other interests in the case.[202] The ECJ seems to have relaxed the first criterion from an obligation to show that the main action is *prima facie* well founded, to an obligation to show that the main action is not obviously or manifestly unfounded.[203] It could be argued that this threshold might have been met in the present case, given the discriminatory and arguably disproportionate requirements imposed by Article 76(1) of the 2017 Act and the resulting violation of the national treatment principle, fundamental freedoms and Charter rights. However, if the judge hearing the application for interim relief were not convinced *in principle* about the Court's jurisdiction in infringement proceedings against Member States for failure to fulfil their obligations under the GATS, so that a determination by the Court was necessary, it is possible that a *prima facie* case could not have been made, at least with regard to the pleas on the GATS violation.

The requirement of urgency is satisfied when the party requesting interim relief shows that there is a need for an interlocutory order to avoid *serious and irreparable* damage to that party. The damage is irreparable if it cannot be eliminated by the final judgment. Purely financial damages are not regarded as irreparable unless the existence of the legal person/entity concerned is threatened.[204] In infringement proceedings, the Commission will have to show damage to the Union, to the interests of nationals of other Member States or of the Member State concerned.[205] Notable cases of infringement proceedings in which interim relief was granted relate to ecological damage to the common heritage of the Union,[206] or to the independence of the judiciary

201. See in that regard, Order of the President of the Court of 24 April 2008 in Case C-76/08 R, *Commission* v. *Malta*, EU:C:2008:252, para 31.

202. See Lenaerts et al., op. cit. *supra* note 193, at p. 591. See also Order of the President of the Court of 24 April 2008 in Case C-76/08 R, *Commission* v. *Malta*, para 21.

203. Lenaerts et al. ibid., at p. 598.

204. Ibid., at p. 600, referring primarily to preliminary rulings and direct actions against Union institutions either by Member States or legal persons, thus not infringement proceedings.

205. Ibid, at p. 612.

206. Ibid., referring to Case C-76/08 R, *Commission* v. *Malta*; Case C-503/06 R, *Commission* v. *Italy,* EU:C:2006:800; Case C-573/08 R, *Commission* v. *Italy*, EU:C:2009:775. See also Order of the Court of 20 Nov. 2017 in Case C-441/17 R, *Commission* v. *Poland*, EU:C:2017:877.

and more generally the rule of law crisis.[207] In these recent cases against Poland on the independence of the judiciary, the Court ruled that the inability to guarantee the independence of the judiciary in Poland "is liable to cause serious harm, which is by *nature irreparable*, to the EU legal order and, consequently, to the rights which individuals derive from EU law and to the values, set out in Article 2 TEU, on which that Union is founded, in particular, that of the rule of law".[208]

Thus, for the Commission to be successful in a claim for interim measures in the present case, it should have phrased the damage as being against the interests of the Union or the EU legal order or of EU citizens. It should have shown the irreparable nature of the damage not relying exclusively on potential financial difficulties for foreign higher education institutions in their efforts to relocate to Hungary once the Court had ruled in their favour. This remains quite a high threshold. In addition, it is not entirely clear whether both expedited procedures and interim measures would have avoided the risk of foreign universities – specifically CEU – leaving Hungary, given that the proper functioning of their programmes requires some long-term planning and certainty. There is reason to believe that even with interim measures or expedited procedures, these academic institutions would have relocated to another Member State.

6. Concluding remarks

The judgment was a defeat for the Hungarian Government; it had time on its side, however, and the judgment made no difference to CEU's situation in practice.[209] Moreover, while it is arguable – although not unequivocally clear – that expedited procedures and interim measures could have been granted, it is doubtful whether these tools would have altered the final outcome, namely CEU's move out of Hungary.

This case retains its importance, though, as the first ECJ judgment defining academic freedom as an EU fundamental right. Recognizing an institutional dimension, next to an individual dimension (in that sense going beyond the ECHR), while not immediately obvious from the explicit wording of Article 13 CFR and the Explanations to the Charter, is convincing. The Court's construction of Article 14(3) CFR as a *lex specialis* to the freedom to conduct

207. Order of the Court of 17 Dec. 2018 in Case C-619/18, *Commission* v. *Poland*, EU:C:2018:1021; Order of the Court of 8 April 2020 in Case C-791/19 R, *Commission* v. *Poland* (Disciplinary Chamber of the Supreme Court), EU:C:2020:277.

208. Case C-791/19 R, *Commission* v. *Poland* (Disciplinary Chamber of the Supreme Court), para 92.

209. Bárd has called it "a strong judgment in a moot case", op. cit. *supra* note 182.

a business for both private and *public* educational establishments is comprehensible when reading the Explanations to the Charter. However, it is questionable in principle and moreover it begs the question whether the institutional framework of universities (the institutional dimension of academic freedom) could then not also (or instead) be protected by Article 14(3) CFR.

For the Court to pronounce on those rights, it had to establish first that the Charter is applicable (Art. 51(1) CFR). This part of the judgment also includes a novelty. It is now established that when Member States perform their obligations under the GATS, they are implementing EU law. However, it is not entirely clear how far that reaches. It is not clear whether a GATS breach is necessary (before considering the exceptions) or a GATS incompatibility (after considering the exceptions). Or whether "performing obligations" under the GATS does not even require a breach. The current case, in which GATS incompatibility was established, suggests that the latter is probably not the case, but this is not evident from the Court's formulations.

The fact that the Charter is triggered by virtue of Member States derogating from the fundamental freedoms (the *ERT* scenario) is not new, although it is notable here that the question whether a fundamental rights analysis can be conducted separately and outside the justifications stage of the fundamental freedoms analysis is not debated. The Court's approach suggests as much, but wider case law is not consistent on this point.

It seems that the Court has cleared any doubts on its jurisdiction in infringement proceedings against Member States for breaches of the GATS, even with the features of the WTO dispute settlement system. Perhaps the Court should have done more in distinguishing the present case from previous case law (*Commission* v. *Germany*). Furthermore, from a competence perspective, this was an unsurprising outcome seeing the development of competences on international trade under the Treaty framework and the Court's interpretation thereof. Even in areas where Member States have a retained competence – such as education – as long as a substantial link with international trade is made, the external exclusive competence of the Union is triggered. This has important implications for Member States, not only for the enforcement of obligations *vis-à-vis* third parties before EU courts but, as shown earlier, also for the application of the Charter.

Vasiliki Kosta and Darinka Piqani*

* Vasiliki Kosta is Associate Professor, Darinka Piqani is Assistant Professor, both at the Europa Institute, University of Leiden.

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