

## The CJEU in *Commission v Hungary Higher Education (C-66/18)* Defends Academic Freedom Through WTO Provisions

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The Court of Justice of the European Union's (CJEU) judgement in *Commission v Hungary Higher Education (C-66/18)* ruled that the legal conditions introduced to enable foreign higher education institutions to carry out their activities in Hungary are incompatible with EU law. The Commission referred Hungary to the CJEU, claiming that the amendments to the Higher Education Act of 2011 are incompatible with Hungary's commitments as a member of the EU within the following frameworks: the General Agreement on Trade in Services (GATS); the freedom of establishment; the free movement of services; the provisions of the EU Charter of Fundamental Rights relating to academic freedom; the freedom to found higher education institutions; and the freedom to conduct a business. The note explains that the C-66/18 case is the latest example of the ongoing efforts to undermine the rule of law and threaten academic freedom in the EU.

### INTRODUCTION

In *Commission v Hungary Higher Education (C-66/18)*,<sup>1</sup> the Grand Chamber of the Court of Justice of the European Union found that amendments to Hungary's Higher Education Act of 2011<sup>2</sup> placed new restrictions on higher education institutions operating in Hungary, and were incompatible with EU law. The action was brought by the European Commission against Hungary, following the adoption of the amendments in 2017,<sup>34</sup> and in the Opinion<sup>5</sup> issued on 5 March 2020, in which the Advocate General Juliane Kokott argued that the CJEU should strike down the new legislation on higher education, which limits the operations of foreign academic institutions in Hungary. The most interesting aspect of this case is that the Advocate

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<sup>1</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792.

<sup>2</sup> *Fanny v Barany*, 'Legislative History Analysis of the Operation of Foreign Higher Education Institutions in Hungary' [2018] Pecs Journal of International and European Law, Issue 1: 47 47-60.

<sup>3</sup> European Commission Press release, 'Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law', 7 December 2017; [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_5004](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5004).

<sup>4</sup> Miles R Maftan, 'The CEU Leaves – Hungarian Students are Left in the Lurch', VerfBlog, 2018/12/05, <https://verfassungsblog.de/the-ceu-leaves-hungarian-students-are-left-in-the-lurch/>, DOI: 10.17176/20181205-180917-0.

<sup>5</sup> Opinion of Advocate General Juliane Kokott: *Commission v Hungary Higher Education* [C-66/18] ECLI:EU:C:2020:172. [2020] <http://curia.europa.eu/juris/document/document.jsf?text=&docid=224125&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3755802>.

General’s Opinion and the CJEU implied that the Commission may enforce public international law treaties, such as the GATS, towards Member States to uphold the EU’s commitments to comply with international treaties, insofar as the EU has taken over the treaty obligations.<sup>6</sup> As discussed below, the CJEU closely followed the Advocate General’s Opinion, and used it as a guide to pursue its legal strategy in the assertion that the amendments to Hungary’s Higher Education Act were in breach of the WTO provisions of GATS rules, and in assessing how the new legal regulation of the terms of accreditation of universities under these amendments affected the institutional environment — and therefore, academic freedom.

The CJEU, in its judgment issued on 6 October 2020, found that the requirement that foreign higher education institutions establish an international treaty between Hungary and the country of origin was a violation of the WTO provisions of GATS rules.<sup>7</sup> This requirement also restricted the right to academic freedom, and the freedom to found higher education institutions and conduct business under the Charter of Fundamental Rights of the European Union (EU Charter). The CJEU observed that, as academic freedom protects ‘freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction’,<sup>8</sup> the restrictions endangered freedoms enshrined under Articles 10 and 13 of the EU Charter. Second, the CJEU found that by adopting the additional requirement that foreign higher education institutions offer educational services in the country of origin, Hungary failed to comply with their obligations under the GATS.

The next section will describe the background to the case, and explain some of the illiberal actions of the Hungarian government in attacking EU values and fundamental rights,<sup>9</sup> and following sections will go on to explain the reasoning of the CJEU in *Commission v Hungary Higher Education* (C-66/18).<sup>10</sup> The final part of the case note forms an analysis and commentary on how the CJEU developed its legal strategy to hold Hungary to account, and what this judgment means in bringing more life into the EU Charter, and protecting academic freedom in the Member States.

## FACTUAL AND LEGAL BACKGROUND

On 28 March 2017, the Hungarian Minister of Education submitted a new law in Parliament to amend the National Higher Education Act 2011, and introduced a new regulatory system for foreign-operating universities operating in Hungary.<sup>11</sup> The new law suggested that foreign universities may only operate if the Hungarian government has an agreement with the

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<sup>6</sup> Niels Kirst, ‘Academic Freedom protected via the CJEU? – The Advocate’s General Opinion in *Commission v Hungary*’ [C-66/18], *The European Law Blog*, <https://europeanlawblog.eu/2020/04/29/academic-freedom-protected-via-the-cjeu-the-advocates-general-opinion-in-commission-v-hungary-c-66-18/>.

<sup>7</sup> CJEU: Press Release [No. 25/20], 05/03/2020: Advocate General’s Opinion in Case C-66/18 | *Commission v Hungary*, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-03/cp200025en.pdf>.

<sup>8</sup> CJEU: Press Release [No. 66/20], 06/10/2020: Judgment in Case C-66/18 | *Commission v Hungary*, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-10/cp200125en.pdf>.

<sup>9</sup> Central European University: Newsroom, 06/10/2020: ‘Landmark Judgment — Lex CEU Struck Down by European Court of Justice’, <https://www.ceu.edu/article/2020-10-06/landmark-judgment-lex-ceu-struck-down-european-court-justice>.

<sup>10</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792.

<sup>11</sup> Petra Bárd, ‘The rule of law and academic freedom or the lack of it in Hungary’. *Eur Polit Sci* 19, 87–96 [2020].

university's country of origin.<sup>12</sup> In the case of the Central European University (CEU), based in Budapest — to which the case and the new law refers — the agreement must be between the US and Hungary. Furthermore, the new law suggested that existing and new non-EU academic staff of foreign universities would be required to apply for working permits. This requirement placed the CEU at a disadvantage, as it relies largely on non-EU faculty.<sup>13</sup>

The new amendments to the Higher Education Act were passed specifically to target the CEU, as the university is closely affiliated with the Open Foundation Society and its founder — who has been a harsh critic of the government in general, and in particular regarding the Prime Minister Viktor Orbán and his Fidesz Party.<sup>14</sup> However, it is a reasonable conjecture that the new law is more about further advancing the illiberal agenda that Orbán's government has promoted since coming into power, and a continuation of weak independent institutions in the country<sup>15</sup>. According to Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz's<sup>16</sup> essay on 'Enforcing EU Values', the Commission has brought forward a number of separate infringement actions to the CJEU, dealing with different aspects of the same problem related to the backsliding of the rule of law and liberal democracy in Hungary. In the last few years, the Commission has brought cases against Hungary to the CJEU concerning alleged infringements of EU law with regard to the migration and asylum system,<sup>17</sup> financing of non-governmental organisations,<sup>18</sup> early retirement age of judges,<sup>19</sup> and now higher education.<sup>20</sup>

The CEU expressed its opposition to the amendments in a statement, suggesting that 'the amendments to the Higher Education Act 2011 would make it impossible for the CEU to continue its operations as an institution of higher education in Budapest, home of CEU for 25 years', and that the 'CEU is in full conformity with Hungarian law'.<sup>21</sup> On 31 March 2017, Orbán stated that the future of 'Soros University' (referring to George Soros, founder and main benefactor of CEU) depends on the foreign policy talks between Hungary and the US.<sup>22</sup> Furthermore, the Hungarian government claimed that CEU was 'cheating' by awarding both Hungarian and American degrees, despite not operating abroad — meaning in the US and in other EU countries. Orbán also suggested that the CEU had unfair advantage over both the

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<sup>12</sup> Spike, Justin [29 March 2017]. 'CEU faces existential threat under proposed legislation'. *The Budapest Beacon*. Retrieved 20 July 2021. <https://budapestbeacon.com/ceu-faces-existential-threat-proposed-legislation/>.

<sup>13</sup> Petra Bárd, 'A Strong Judgment in a Moot Case: Lex CEU before the CJEU', 12 November 2020, RECONNECT <https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/>.

<sup>14</sup> Peter Plenta [2020] 'Conspiracy theories as a political instrument: utilization of anti-Soros narratives in Central Europe', *Contemporary Politics*, 26:5, 5.

<sup>15</sup> RD Kelemen, and L Pech, 2019. *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*. Cambridge: Cambridge University Press.

<sup>16</sup> Kim Lane Scheppele, Dimitry Vladimirovich Kochenov, Barbara Grabowska-Moroz, [2021] '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', *Yearbook of European Law*, 00:0, 1–121.

<sup>17</sup> *Commission v Hungary* (Asylum Procedures) [Case C-808/18], (pending).

<sup>18</sup> *Commission v Hungary* (NGOs) [Case C-78/18] [2020] ECLI: EU: C:2020:476.

<sup>19</sup> *Commission v Hungary* (Age Discrimination of the Judges)[Case C-286/12] [2012] ECLI: EU: C:2012:687.

<sup>20</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792.

<sup>21</sup> Shaun Walker, 'CEU opens Austria campus as Orbán's government strips it of ability to issue US degrees', *The Guardian*, 16 Nov 2019, <https://www.theguardian.com/world/2019/nov/16/ceu-classes-move-to-vienna-orban-hungary-ousts-university>.

<sup>22</sup> Franklin Foer, 'Viktor Orbán's War on Intellect', *The Atlantic*, June 2019 Issue, <https://www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070/>.

Hungarian and 21 other foreign universities in the country, and the law would provide an equal opportunity — a ‘level playing field’.<sup>23</sup> However, the vice chairman of the Fidesz Party, Szilard Nemeth, was more blunt, stating that civil society groups with funding from Soros should be ‘swept out’ of Hungary<sup>24</sup> (hence, the change of state laws about the operation and financing of civil society organisations and NGOs). In the case of *C-78/18, Commission v Hungary (Transparency of Associations)*<sup>25</sup> on 18 June 2020, the CJEU held that new Hungarian laws on NGOs were ‘discriminatory and unjustified’ and went against EU law.<sup>26</sup> The CJEU also said that these measures by Hungary have created ‘a climate of distrust’ towards civil society associations and foundations receiving financial support<sup>27</sup> — further evidence of Hungary’s backsliding in democratic governance and the rule of law.<sup>28</sup>

On 4 April 2017, the new amendments were adopted in Parliament to the National Higher Education Act 2011, which was heavily criticised, as it demonstrated the Hungarian government further consolidating its illiberal agenda and eroding the rule of law.<sup>29</sup> On 9 October 2017, the Venice Commission issued an Opinion (891/2017)<sup>30</sup> on the amendments of the Higher Education Act 2011, and evaluated the two main restrictions imposed by the new law: (1) the need for a treaty on academic cooperation between Hungary and the relevant third state; and (2) the requirement that foreign-based higher education institutions must also provide academic offerings in their home state. The Venice Commission concluded in its Opinion that the new law ‘will cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination’<sup>31</sup> — and overall, that it is highly problematic.<sup>32</sup>

The European Commission held discussions with Hungary about the legal implications of the amendments to the Higher Education Act 2011, and expressed concerns by further expanding

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<sup>23</sup> ‘PM Orbán: ‘CEU Enjoyed Unfair Advantage Over Hungarian Universities’ – Updated: Reaction by CEU & Statement By U.S. State Department!’. *Hungary Today*. 31 March 2017. Retrieved 20 July 2021, <https://hungarytoday.hu/pm-orban-ceu-enjoyed-unfair-advantage-hungarian-universities-63942/>.

<sup>24</sup> Marc Santora, [3 December 2018] ‘George Soros-Founded University Is Forced Out of Hungary’. *The New York Times*. ISSN 0362-4331. Retrieved 20 July 2021, <https://www.nytimes.com/2018/12/03/world/europe/soros-hungary-central-european-university.html>.

<sup>25</sup> *Commission v Hungary Transparency of Associations* [C-78/18] [2020] ECLI:EU:C:2020:476.

<sup>26</sup> *ibid* at [64]

<sup>27</sup> *ibid* at [58]

<sup>28</sup> Anna Gora and Pieter de Wilde, [2020] ‘The essence of democratic backsliding in the European Union: deliberation and rule of law’, *Journal of European Public Policy*, DOI: 10.1080/13501763.2020.1855465.

<sup>29</sup> Renáta Uitz, *Academic Freedom in an Illiberal Democracy: From Rule of Law through Rule by Law to Rule by Men in Hungary*, *VerfBlog*, 2017/10/13, <https://verfassungsblog.de/academic-freedom-in-an-illiberal-democracy-from-rule-of-law-through-rule-by-law-to-rule-by-men-in-hungary/>, DOI: 10.17176/20171016-093345.

<sup>30</sup> European Commission for Democracy through Law [Venice Commission] Hungary Opinion [891/2017] on Act XXV Of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education. Endorsed by the Venice Commission at its 111th Plenary Session [Strasbourg, 9 October 2017]. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\[2017\]022-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD[2017]022-e).

<sup>31</sup> para. 68 of the Venice Opinion, see [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\[2017\]022-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD[2017]022-e).

<sup>32</sup> Council of Europe Press Release, ‘Hungarian higher education law: requirements for already operating universities ‘highly problematic’ say Venice Commission experts’, 11 August 2017, [https://www.coe.int/de/web/portal/news-2017/-/asset\\_publisher/StEVosr24HJ2/content/hungarian-higher-education-law-requirements-for-already-operating-universities-highly-problematic-say-venice-commission-experts?\\_101\\_INSTANCE\\_StEVosr24HJ2\\_languageId=en\\_GB](https://www.coe.int/de/web/portal/news-2017/-/asset_publisher/StEVosr24HJ2/content/hungarian-higher-education-law-requirements-for-already-operating-universities-highly-problematic-say-venice-commission-experts?_101_INSTANCE_StEVosr24HJ2_languageId=en_GB).

on the Venice Commission Opinion, adding that the new law could ‘restrict scientific and academic freedom of thought, and our common values of openness, and that it may damage Hungary’s academic reputation and relationship with EU partners’.<sup>33</sup> Hungary replied, disputing any infringements. The Commission then decided to proceed by sending a formal letter to Hungary, informing the state that it will bring legal action before the CJEU, on the basis that the new Hungarian Higher Education Act breaches EU law.<sup>34</sup>

The Commission offered time for Hungary to take the necessary measures to comply with its arguments<sup>35</sup> — however, Hungary replied that there were no alleged infringements. As a result, on 1 February 2018, the Commission initiated proceedings against Hungary before the CJEU, on the basis that Hungary had breached the GATS:<sup>36</sup> the freedom of establishment (Article 49, Treaty on the functioning of the European Union (TFEU)); the freedom to provide services (Article 56 TFEU);<sup>37</sup> the Directive 2006/123/EC (Services Directive);<sup>38</sup> the EU Charter on the right to academic freedom Article 13; and the freedom to establish an educational institution (Article 14 (3)).<sup>39</sup>

The Advocate General (AG) Juliane Kokott, on 5 March 2020, delivered an Opinion<sup>40</sup> supporting the Commission’s arguments, suggesting that both restrictions imposed by the new law on academic institutions conflict with the GATS and the EU Charter, while only the latter restriction conflicts with the freedom to provide services in the internal market. The AG also suggested that the EU could be held liable by a third state for the infringement of GATS provisions by its Member States,<sup>41</sup> and the CJEU must act on the Commission proceeding to uphold EU values. The CJEU used the Advocate General’s Opinion as a guide in evaluating the legal issues that arose in the case, and in the way that the courts developed their legal strategies against Hungary for breaching WTO rules, including considering the institutional dimension of academic freedom as part of fundamental rights protected in the EU.

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<sup>33</sup> European Commission, ‘Remarks of First Vice-President Frans Timmermans after the College discussion on legal issues relating to Hungary’, 12 April 2017, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_17\\_966](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_966).

<sup>34</sup> European Commission Press release, ‘Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law’, 7 December 2017, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_5004](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5004).

<sup>35</sup> *ibid.*

<sup>36</sup> 94/800/EC: Council Decision [of 22 December 1994] concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations [1986-1994].

<sup>37</sup> Action brought on 1 February 2018 — *European Commission v Hungary* [C-66/18] [2018/C 211/10] see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=203056&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4487129>.

<sup>38</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006.

<sup>39</sup> Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities*. C 364/5. 18.12.2000.

<sup>40</sup> Opinion of Advocate General Juliane Kokott: *Commission v Hungary Higher Education* [C-66/18] ECLI:EU:C:2020:172 [2020] <http://curia.europa.eu/juris/document/document.jsf?text=&docid=224125&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3755802>.

<sup>41</sup> *ibid* [para. 48]

## JUDGMENT OF THE COURT

On 6 October 2020, the Grand Chamber of the CJEU issued its judgment on the case C-66/18 *Commission v Hungary (Higher Education)*<sup>42</sup> and held that the amendments to the Hungarian Higher Education Act 2011 are contrary to the GATS,<sup>43</sup> the Lisbon Treaty, the Services Directive 2006/123, and the EU Charter. The CJEU proceeded to examine the Commission complaints as following:

### 1. Requirement to conclude an international treaty before education may be carried out

The CJEU first examined the requirement under the new law on higher education against the backdrop of Article XVII of the GATS,<sup>44</sup> and assessed the effects ascribed to Hungary's obligation to the international treaty in respect of higher educational services. This requirement was assessed in light of Article XVII of the GATS,<sup>45</sup> that requires that service suppliers of any other member of the WTO receive treatment no less favourable than the state's own like service suppliers. The CJEU found that the condition 'is intended to cover all educational institutions, regardless of their origin, and therefore does not have any discriminatory component'.<sup>46</sup> Therefore, the CJEU held that there was no qualification of Hungary's commitments under Article XVII of the GATS in respect of higher education services.

The CJEU proceeded to consider the conditions of amendments to the Higher Education Act 2011 that requires foreign providers of higher education in Hungary to establish an international treaty, at the discretion of the state, in order to provide their educational services.<sup>47</sup> Furthermore, the CJEU found that the statutory requirement amounted to a modification of the conditions of competition, to the disadvantage of the foreign institutions operating in Hungary.<sup>48</sup>

The CJEU determined that the rationale provided by the Hungarian government concerning the purpose of the requirement of a prior international treaty was not sufficient to justify it, in the light of Article XIV of the GATS. The CJEU also found that Hungary had failed to present any arguments that would sufficiently demonstrate how, without such a treaty, such higher education institutions would constitute a 'genuine and sufficiently serious threat affecting a fundamental interest of Hungarian society'.<sup>49</sup> Furthermore, the CJEU held that in regard to the prevention of deceptive practices, the requirement of a prior international treaty constituted a means of arbitrary discrimination, as such a treaty depends 'solely on the political will of that Member State'.<sup>50</sup> Thus, the CJEU found that by adopting the requirement under Article 76(1)(a) of the law on higher education, Hungary failed to fulfil its obligations under Article XVII of the GATS.

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<sup>42</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792.

<sup>43</sup> *ibid* [para. 98]

<sup>44</sup> *ibid*

<sup>45</sup> *ibid* [para. 98]

<sup>46</sup> *ibid* [para. 111 – 114]

<sup>47</sup> *ibid* [para. 74 – 75]

<sup>48</sup> *ibid* [para. 112]

<sup>49</sup> *ibid* [para. 131]

<sup>50</sup> *ibid* [para. 136]

## 2. Requirement to carry out education in the state of origin

The CJEU considered the conditions of the new law on higher education adopted by Hungary, in which it required that a foreign institution must also provide education in the country of origin — against this new requirement, the CJEU evaluated Hungary’s commitment to ensure equal treatment of national and foreign providers of higher education services, under Article XVII of the GATS. The CJEU found that the requirement results in a ‘competitive disadvantage’<sup>51</sup> for foreign suppliers of services, and the new conditions benefited Hungarian providers and therefore undermined competition. Furthermore, the CJEU found that, insofar as the provision in Article 76(1)(b) of the new law on higher education targets higher education institutions established in a third country member of the WTO,<sup>52</sup> Hungary had failed to fulfil its obligations under Article XVII of the GATS.<sup>53</sup>

The CJEU also found that the requirement, insofar as it applied to foreign higher education institutions, is an unjustifiable restriction of the freedom of establishment guaranteed by Article 49 TFEU.<sup>54</sup> The CJEU, by referring to *Commission v Hungary Transparency of Associations*,<sup>55</sup> suggested that restriction of the freedom of establishment is permissible only if it is justified by an overriding reason in the public interest; is proportionate to the objective pursued; and does not exceed what is necessary to obtain it.<sup>56</sup> The CJEU also referred to the case of *Commission v Luxembourg*,<sup>57</sup> suggesting that reasons of public policy must be ‘genuine, present and sufficiently serious’ to be relied upon.<sup>58</sup> The CJEU found that the requirement does not pose a genuine, present and sufficiently serious threat to the fundamental interests of Hungarian society; nor did the requirement satisfy the objective of ‘ensuring high standards in the quality of higher education’, as the new law made no reference to the quality of education offered by a foreign institution.<sup>59</sup>

The CJEU further found that the requirement is an unjustified restriction of the free movement of services covered by Article 16 of the Services Directive 2006/123.<sup>60</sup> Under Article 16(1) of Directive 2006/123,<sup>61</sup> the Member State in which the service is provided must ensure the free exercise of a service activity within its territory. The present requirement, pursuant to Article 76(1)(b) of the law on higher education, requires that institutions offer higher education in their state of origin.<sup>62</sup> This requirement, when considered in the light of Directive 2006/123, insofar as it imposes an additional condition upon service providers established in another Member State, is capable of restricting the right of such providers to the free exercise of higher education

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<sup>51</sup> *ibid* [para. 149]

<sup>52</sup> *ibid* [para. 148]

<sup>53</sup> *ibid* [para. 149]

<sup>54</sup> *ibid* [para. 207]

<sup>55</sup> *ibid* [para. 101]

<sup>56</sup> *ibid* [para. 214]

<sup>57</sup> *Commission v Luxembourg* [C-319/06], EU:C:2008:350. [para 50]

<sup>58</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792. [para. 118]

<sup>59</sup> *ibid*.

<sup>60</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006.

<sup>61</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792. [para. 191–195]

<sup>62</sup> *ibid* [para. 196]

services in Hungary. Thus, the CJEU found that Hungary failed to fulfil its obligations under Article XVII of the GATS, and under Article 49 TFEU and Article 16 of Directive 2006/123.<sup>63</sup>

### 3. Academic freedom as a fundamental right

The CJEU examined the Commission's third complaint, as to whether the new requirement under the newly amended Higher Education Act 2011 was consistent with Articles 13, 14(3) and 16 of the EU Charter.<sup>64</sup> These articles refer to the freedom of the arts and sciences, and the right to education and freedom to conduct a business, respectively. The CJEU argued that Hungary was bound by the EU Charter as defined in Article 51(1), which states that the provisions of the EU Charter apply to Member States only 'when they are implementing EU law'.<sup>65</sup> The CJEU, in its analysis, noted that both the performance of obligations under an international agreement, including the GATS, and restrictions placed on a fundamental freedom guaranteed by the TFEU Treaty should be considered as implementing EU law within the meaning of Article 51(1).<sup>66</sup> Therefore, the new amendment to the Higher Education Act 2011 must comply with the fundamental rights enshrined in the EU Charter.<sup>67</sup>

The CJEU assessed Article 13 of the EU Charter, which states that 'academic freedom shall be respected'. Furthermore, the CJEU referred to the case law of the European Court of Human Rights in *Hasan Yazıcı v Turkey*,<sup>68</sup> and suggested that this freedom 'is associated with the right to freedom of expression enshrined in Article 10 of the ECHR'.<sup>69</sup> Therefore, academic freedom should protect 'freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction'.<sup>70</sup> In referencing the Recommendation 1762 (2006), 'Academic Freedom and Universal Autonomy' adopted by the Parliamentary Assembly of the Council of Europe on June 30, 2006, the CJEU found that 'academic freedom also incorporates an institutional and organisational dimension, a link to an organisational structure being an essential prerequisite for teaching and research activities'.<sup>71</sup> Consequently, the CJEU concluded that the measures imposed by the new amendments to the Higher Education Act 2011 were 'capable of endangering the academic activity of the foreign higher education institutions', and therefore, limiting academic freedom in Hungary under Article 13 of the EU Charter.<sup>72</sup>

Furthermore, the CJEU analysed the issue regarding the freedom to found educational establishments and to conduct a business, under Article 14(3) and Article 16 of the EU Charter. The CJEU found that the conditions of the new law allowed for the possibility of excluding the establishment of a higher education institution in Hungary, and could also prevent the continuation of their operation.<sup>73</sup> As such, the CJEU found that the new amendments to the

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<sup>63</sup> *ibid* [para. 203]

<sup>64</sup> *ibid* [para. 217]

<sup>65</sup> *ibid* [para. 214]

<sup>66</sup> *ibid*.

<sup>67</sup> *ibid* [para. 101]

<sup>68</sup> *Hasan Yazıcı v Turkey*, CE: ECHR:2014:0415JUD004087707. [paras 55 and 69]

<sup>69</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792. [para. 224]

<sup>70</sup> *ibid* [para. 225]

<sup>71</sup> *ibid* [para. 227]

<sup>72</sup> *ibid* [para. 228]

<sup>73</sup> *ibid* [para. 240]

Higher Education Act 2011 limited the freedoms guaranteed under both Article 14(3) and Article 16 of the EU Charter.<sup>74</sup> Furthermore, the CJEU held that Hungary failed to fulfil its obligations under the provisions of the EU Charter, as it could not be justified under Article 52(1) of the EU Charter.<sup>75</sup>

The CJEU concluded that Hungary, by its new amendments to the Higher Education Act 2011, had violated the freedom to provide services (Article 56 TFEU); the freedom of establishment (Article 49 TFEU); the Directive 2006/123/EC on services in the internal market (Article 16); the right of academic freedom; the right to education; and the freedom to conduct business; as provided by the EU Charter (Articles 13, 14, 16 respectively); as well as the Union's legal obligations under international trade law (GATS in the framework of the WTO).<sup>76</sup>

The CJEU judgment in this case is important case law, as in its interpretation it expanded 'the right to freedom of expression under Article 10 of the ECHR' by recognising the association of academic freedom. Therefore, academic freedom guarantees the right to freedom of expression, as well as the freedom to disseminate information, conduct research, and distribute knowledge and truth without restriction. The CJEU decision in this case is also important, because it held that 'freedom of expression' is not limited to 'academic or scientific freedom' but also extends to 'academics' freedom to express freely their views and opinions'.<sup>77</sup>

Therefore, the right to freedom of expression is associated with academic freedom in the EU; this case has expanded the understanding and definition of freedom of expression by also including academic freedom – thereby, striking down undue restrictions on the ability of foreign higher education institutions to provide their services within the European Union. The section below forms a commentary on what this ruling means, and how the CJEU established legal strategies to hold Hungary liable for failing to comply with EU law.

## COMMENTARY

The CJEU's in *Commission v Hungary Higher Education* followed closely the Opinion of the AG to require Hungary to strike down the Higher Education Act of 2011 because it established that with the new amendment to the Higher Education Act, Hungary breached the WTO provisions of the GATS rules.<sup>78</sup> Furthermore, the CJEU aligned with the AG's Opinion by adding that the European Union could also be held liable for a Member State that does not fulfil its obligations under the GATS and thus, acknowledged that WTO is an integral part of the EU law and for the function of the internal market. The CJEU closely followed the guidance of the AG's Opinion by assessing the legal issues as a trade-dispute-related case. In establishing the main arguments, the CJEU focused on fact that Hungary had violated the requirement of national treatment (prohibition of discrimination based on national origin) under the WTO's multilateral agreement covering trade in services under the GATS — thereby, the Higher Education Act was incompatible with EU law and must be struck down.

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<sup>74</sup> *ibid* [para. 237]

<sup>75</sup> *ibid* [para. 239]

<sup>76</sup> *ibid* [para. 239–244]

<sup>77</sup> *ibid* [para. 225]

<sup>78</sup> *ibid* [para. 225]

However, in reality, the case had little to do with international trade, as the CJEU judgment ruled in the end. When the Commission initially launched its infringement procedure action against Hungary in 2017, it was clear that by amending the Higher Education Act, Hungary failed to respect EU law — in particular Article 13 (freedom of the arts and sciences), Article 14(3) (freedom to found educational establishments), and Article 16 (freedom to conduct a business) of EU Charter.<sup>79</sup> However, the AG’s Opinion and the CJEU focused more on the breach of the obligations under the WTO, because the EU Charter does not clearly apply to Member States when acting in domestic matters. Furthermore, there are legal limitations under Article 165 of the Lisbon Treaty, which explicitly states that any action it takes has to respect a Member State’s responsibility for teaching content, educational system organisation, and cultural and linguistic diversity. In other words, the Lisbon Treaty acknowledges that an education system is an expression of national sovereignty.<sup>80</sup> Therefore, the AG’s Opinion was an indication to the CJEU to focus more on its legal arguments for the violation of internal market rules against Hungary, and less on the restriction of academic freedoms<sup>81</sup> — the EU is limited in its mechanism, and does not have the legal powers to regulate higher education within a Member State, as indicated under Article 165 of the Lisbon Treaty.

Under these constraints, the CJEU made the breach of WTO law central to its legal arguments to annul the new legal provision of the higher education legislation,<sup>82</sup> whilst giving effect to Article 13 of the EU Charter, along lines that had not previously been covered by the ECtHR. When evaluating the new accreditation criteria against the WTO rules, the CJEU also assessed how far the new criteria undermined academic freedom,<sup>83</sup> and found that the legal uncertainty created by the new accreditation criteria limited this freedom.<sup>84</sup> Thereby, the CJEU agreed with the AG’s Opinion that there is a broader scope to ‘academic freedom’ than simply the freedom of expression of university lecturers, as found within the ECtHR.<sup>85</sup> This approach was an interesting method of interpreting the EU Charter, and how it may be used to protect academic freedom. Since this time, the CJEU has used similar techniques and various legal strategies to overcome limitations and constraints under EU law, to enforce the EU Charter in order to hold Member States liable and ensure that the Charter is applied, often using the outer limits of EU rules and prohibitions. For example, according to Tamas Dezso Ziegler<sup>86</sup> the CJEU pursued a similar strategy in another case involving Hungary (*Case C-286/12*<sup>87</sup>) where judges were expelled from the judiciary — the EU infringement procedures were not based on the fact that Hungary was attacking the judicial system, although this was indeed the reality, with the intent to weaken the rule of law. Instead, the CJEU built its legal arguments on the basis of age

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<sup>79</sup> Ziegler, Tamas Dezso, *Academic Freedom in the European Union - Why the Single European Market is a Bad Reference Point* (January 17, 2019). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-03, Available at <http://dx.doi.org/10.2139/ssrn.3317406>.

<sup>80</sup> Raffaele Bifulco and Alessandro Nato, ‘The concept of sovereignty in the EU – past, present and the future’, 2020, *Reconnect*, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf>.

<sup>81</sup> *ibid* [para. 239–244]

<sup>82</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792. [para. 225]

<sup>83</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792. [para. 228]

<sup>84</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792. [para. 229]

<sup>85</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792. [para. 224–226]

<sup>86</sup> Tamas Dezso Ziegler, ‘Academic Freedom in the European Union – Why the Single European Market is a Bad Reference Point’ (January 17, 2019). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-03, Available at <http://dx.doi.org/10.2139/ssrn.3317406>.

<sup>87</sup> *European Commission v Hungary* [2012] EUECJ C-286/12.

discrimination to protect the judicial independency.<sup>88</sup> Similarly, when Slovakia impaired the language rights of national minorities, the courts objected to the law on the basis of endangering the EU internal market.<sup>89</sup> In another case involving Hungary in *C-78/18*<sup>90</sup>, the CJEU further extended this logic regarding freedom of association, and ruled that the restrictions imposed by Hungary on foreign financing of civil organizations thwarted the free movement of capital. These techniques used by the CJEU are what István Csongor Nagy calls the ‘Al Capone Tricks’, resonating with the US case that saw Al Capone convicted — not for the major crimes that he had committed, but for tax evasion.<sup>91</sup>

The CJEU legal strategy in *Commission v Hungary Higher Education* has made two new contributions for the future interpretation of EU legal instruments,<sup>92</sup> by using internal market rules to protect and enforce fundamental rights, including the freedom of academia. First, the WTO agreement and its legal provisions can be used as a legal instrument by the Commission to effectively protect fundamental liberties within a Member State, when it can establish a link (as was the case with the CEU) in not being able to provide services as a business. Second, the CJEU established that the Commission has the power to ensure that Member States must comply with WTO rules, and the EU could be held liable if its Member States do not do so. Therefore, the CJEU strategy to protect academic freedom and fundamental human rights was based on the fact that the amendments to the Higher Education Act were not in line with the rules of the internal market, and thus, did not comply with EU law.

This strategy worked in the case of CEU, because it was privately-owned university, classified as a business offering services. If it was a public university, or part public/part privately-owned,<sup>93</sup> the outcome of the case might have been different, and it is highly unlikely that the CJEU would have used the same strategy.<sup>94</sup> However, it must be noted that the CJEU’s judgment in *Commission v Hungary Higher Education*<sup>95</sup> is the first major judicial pronouncement by the court on protecting academic freedom as a fundamental right, and it represents a significant victory in the court for protecting academic freedom — and yet, at the same time, it shows that the CJEU has to rely on other legal methods to enforce the Charter. This case again showed that for the CJEU to uphold the rule of law and enforce EU fundamental rights and values, the Charter alone cannot fully safeguard protection of academic freedom in

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<sup>88</sup> Case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687 (Nov. 6, 2012).

<sup>89</sup> Opinion on the Implementing Principles to the Slovak State Language Law Prepared by the European Commission’s Legal Service (2010), <https://perma.cc/C5PJ-9G2G>. The internal market refers to the EU as a territory without internal borders and regulatory obstacles based on the free movement of goods, services, capital and persons.

<sup>90</sup> EU law is required to be interpreted, as far as possible, in a way that is in harmony with the EU’s international obligations, including WTO law. Furthermore, if an EU law instrument is meant to implement a WTO law obligation, WTO law may be applicable.

<sup>91</sup> CI Nagy, ‘Do European Union Member States Have to Respect Human Rights? The Application of the European Union’s “Federal Bill of Rights” to Member States’ (2017) 27 *Indiana International & Comparative Law Review* 9 et seq. For similar critique regarding the CEU case, see L Pech and KL Scheppele (note 1) 13.

<sup>92</sup> *ibid* [para. 239 –244]

<sup>93</sup> Drinóczi, Tímea: *Loyalty, Opportunism and Fear: The forced privatization of Hungarian universities*, *VerfBlog*, 2021/2/05, <https://verfassungsblog.de/loyalty-opportunism-and-fear/>

<sup>94</sup> Halmai, Gábor: *The Hungarian Constitutional Court betrays Academic Freedom and Freedom of Association*, *VerfBlog*, 2018/6/08, <https://verfassungsblog.de/the-hungarian-constitutional-court-betrays-academic-freedom-and-freedom-of-association/>, DOI: 10.17176/20180611-095505-0.

<sup>95</sup> *ibid*.

the EU. Furthermore, the CJEU was able to protect academic freedom only insofar as it was linked to violating internal market rules — which excludes from protection those cases in the future in which no market violations occur. In the past, the Commission and CJEU have not engaged in protecting academic freedom in the Member States, especially those public education institutions, as — according to the *Humbel*<sup>96</sup> case — publicly-funded education is not a service under EU law, and so it is not possible to find grounds for action. Therefore, this case leaves a grey area which is open to interpretation — in particular, for those public universities that are financed partly by students and partly by the state, as well as for those private universities receiving some state finance.

However, the case of *Commission v Hungary Higher Education* can serve as an opportunity for reflection for the CJEU and the EU — namely, that academic freedom and higher education autonomy are under threat in the Member States.<sup>97</sup> According to Tamas Dezso Ziegler, we require a new understanding of the ways and means by which this threat is taking place in Hungary — which goes beyond the CEU, and could occur in other Member States.<sup>98</sup> Ziegler argues that a much broader debate about protecting academic freedom under EU law should take place. The current interpretation of the rules may allow the shutdown of a public, state-funded university based on a Member State’s political agenda, without triggering any EU response whatsoever. In closing, the EU should take a strong stand — that goes further than activating legal infringement and trying to enforce the EU Charter<sup>99</sup> through internal markets — when addressing clear breaches of fundamental rights listed in the EU Charter, such as academic freedom. It is important that the EU tries to face the complexity of authoritarian changes in Hungary,<sup>100</sup> which go far beyond some of the issues seen in *Commission v Hungary Higher Education*, and the Union must take the problems of democratic backsliding and academic freedom more seriously.<sup>101</sup> Simply operating a minimalistic interpretation of the EU Charter, and opening a long list of proceedings against Hungary, is not sufficient in the light of the new type of autocracy<sup>102</sup> that is being shaped in the state.

## CONCLUSION

In *Commission v Hungary Higher Education*, the CJEU found that the amendments to the Higher Education Act 2011 violated the freedom to provide services (Article 56 TFEU); the freedom of establishment (Article 49 TFEU); the Directive 2006/123/EC on services in the

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<sup>96</sup> CJEU, Case 263/86, *Belgian State v René Humbel and Marie-Thérèse Edel* [1988] ECR 5365.

<sup>97</sup> L Parson and A Steele, 2019. ‘Institutional Autonomy and Academic Freedom in Hungary: A Historiography of Hungarian Higher Education’. *College and University*, 94[4], 10-23.

<sup>98</sup> Tamas Dezso Ziegler, ‘It’s Not Just About CEU: Understanding the Systemic Limitation of Academic Freedom in Hungary’, *VerfBlog*, 2019/3/26, <https://verfassungsblog.de/its-not-just-about-ceu-understanding-the-systemic-limitation-of-academic-freedom-in-hungary/>.

<sup>99</sup> Wojciech Sadowski, ‘Protection of the rule of law in the European Union through investment treaty arbitration: Is judicial monopolism the right response to illiberal tendencies in Europe?’, [2018], 55, *Common Market Law Review*, Issue 4, 1025-1060.

<sup>100</sup> Gall, L. Hungary Seeks to Ban Legal Gender Recognition for Transgender People, Human Right Watch, 3 April 2020, <https://www.hrw.org/node/340333/printable/print>.

<sup>101</sup> R Daniel Kelemen and Laurent Pech, *Of Red Lines and Red Herring: The EPP’s Delusions about Restraining Orbán*, *VerfBlog*, 2019/3/15, <https://verfassungsblog.de/of-red-lines-and-red-herring-the-epps-delusions-about-restraining-orban/>.

<sup>102</sup> R Daniel Kelemen and Kim Lane Scheppele, *How to Stop Funding Autocracy in the EU*, *VerfBlog*, 2018/9/10, <https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>.

internal market (Article 16); the right of academic freedom, the right to education and the freedom to conduct business as provided by the EU Charter (Articles 13, 14, 16 respectively); as well as the Union's legal obligations under international trade law (the General Agreement on Trade in Services in the framework of the World Trade Organisation). The case of *Commission v Hungary Higher Education* is an important case for the protection of academic freedom, as the CJEU recognised the association of academic freedom with the right to freedom of expression, under Article 10 of the ECHR. Therefore, academic freedom guarantees the right to freedom of expression, and to distribute knowledge without restriction. The CJEU held that this freedom is not limited to 'academic or scientific freedom', and thereby it extends to 'academics' freedom to express freely their views and opinions'.<sup>103</sup> Against the backdrop of the current rule of law crisis,<sup>104</sup> the CJEU's judgment in *Commission v Hungary Higher Education* is a further plank in the bulwark of a Union based not only on a formal but also a substantial rule of law — which includes fundamental rights such as academic freedom. However, the precedent set in *Commission v Hungary Higher Education* does not fully safeguard academic freedoms in the EU according to the judgment in this case, as currently, higher education institutions must establish that they are a business and classified as providing services (as CEU was able to establish in this case); only in this way are they protected by the EU internal market rules.

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<sup>103</sup> *Commission v Hungary Higher Education* [C-66/18] [2020] ECLI:EU:C:2020:792. [para. 225]

<sup>104</sup> Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz, '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', *Yearbook of European Law*, 2021. DOI: <https://doi.org/10.1093/yel/yeaa012>.