Enforcing WTO/GATS law and fundamental rights in EU infringement proceedings: An analysis of the ECJ’s ruling in Case C-66/18 Central European University

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Abstract
This article analyses the ECJ’s ruling in Case C-66/18 (Central European University), in which the Court found that two amendments to Hungary’s Law on Higher Education violate EU law and the WTO GATS Agreement. The ruling is remarkable in legal and political terms: it touches upon a series of fundamental issues, such as the EU’s efforts to protect European values, democracy and the rule of law in its Member States, infringement proceedings against Member States for their failure to comply with international agreements, the applicability of the Fundamental Rights Charter in EU external relations, the tension between the ECJ and the WTO dispute settlement system, national measures enacted to ward off ‘undesirable’ investments and other cross-cutting questions of EU law.

Keywords
EU Charter of Fundamental Rights, WTO law, GATS, external relations, free movement of capital, erga omnes effect, investment screening, state liability, Central European University, ECJ Case C-66/18

1. Introduction
On 6 October 2020, the Court of Justice (ECJ) handed down a ruling that is remarkable in legal and political terms: the Court found that two amendments to Hungary’s Law on Higher Education
violate EU law, including the WTO GATS Agreement. These 2017 amendments have also been
referred to as a ‘lex CEU’, as they were reportedly targeted at the Central European University
(CEU), which has meanwhile relocated most of its operations from Budapest to Vienna due to
this law.

The case touches upon a series of fundamental issues, such as the EU’s efforts to protect
European values, democracy and the rule of law in its Member States, infringement proceedings
against Member States for their failure to comply with international agreements, the applicability
of the Fundamental Rights Charter in EU external relations, the tension between the ECJ and the
WTO dispute settlement system, national measures enacted to ward off ‘undesirable’ investments
and other cross-cutting questions of EU law.

2. Background and facts of the case

According to the aforementioned amendments to Hungary’s Law on Higher Education, a foreign
higher education institution is only permitted to offer teaching services leading to a qualification in
Hungary if two conditions are fulfilled: first, higher education institutions established outside the
European Economic Area (EEA) may not offer education leading to a qualification in Hungary,
unless an international treaty on fundamental support for the activities in Hungary has been
concluded between the Government of Hungary and the government of the State in which the
foreign higher education institution has its seat (‘the requirement of an international treaty’). 1
Second, a foreign higher education institution carrying on activities in Hungary must be a State-
recognized higher education institution in the country in which it has its seat and must also
‘genuinely offer higher education’ in that country (‘country of origin requirement’). 2 As the CEU
was the only university in Hungary which did not fulfil these requirements at the time when the
amendments entered into force, the latter has also been referred to as a ‘lex CEU’. 3

The CEU had been founded in 1991, under the law of the State of New York, in order ‘to
promote critical analysis in the education of new decision-makers in the Central and Eastern
European States in which pluralism had previously been rejected’. 4 The CEU has never offered
teaching services in the US. Its main funders are the Open Society Foundations established by
George Soros. 5

In 2018, the European Commission initiated infringement proceedings against Hungary under
Article 258 TFEU before the ECJ, claiming that Hungary had failed to comply with its obligations
under EU law. In its enforcement action, the Commission argued first that the aforementioned
requirement of a prior international agreement violates the obligation to provide national treatment
under Article XVII of the GATS, which according to ECJ case law forms an integral part of EU

1. Case C-66/18 European Commission v. Hungary, EU:C:2020:792, para. 21; furthermore, according to the amendment,
in the case of a federal State in which the central government is not responsible for recognition of the binding effect of an
international treaty, the agreement has to be concluded with its central government.
2. Case C-66/18 Commission v. Hungary, para. 21 ff.
3. Compare Opinion of Advocate General Kokott in Case C-66/18 European Commission v. Hungary EU:C:2020:172,
para. 2 ff; see also C.I. Nagy, ‘Using GATS to Protect Academic Freedom in the European Union’, 20 November 2020,
https://verfassungsblog.de/the-commissions-al-capone-tricks/ (hereinafter Nagy, ‘Using GATS’); European Commis-
sion, ‘Migration and Asylum: Commission takes further steps in infringement procedures against Hungary’, Press
release, 19 July 2018, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4522.
4. Opinion of Advocate General Kokott in Case C-66/18 Commission v. Hungary, para. 3.
5. Ibid., para. 3.
law. Second, it submitted that the requirement to provide education services in the country of origin likewise disregards Article XVII of the GATS as well as the EU internal market freedom of establishment, the freedom to provide services and the EU Services Directive.\(^6\) Thirdly, the Commission requested the ECJ to declare that these requirements also violate Article 13 (freedom of the arts and sciences), Article 14(3) (right to education and freedom to found educational establishments) and Article 16 (freedom to conduct a business) of the EU Charter of Fundamental Rights (hereinafter: the Charter (FRC)).\(^7\)

### 3. Fundamental issues raised in this case

This case lies at the intersection of a series of significant legal and political developments. On the one hand, it has frequently been argued that some EU Member States such as Hungary are proceeding towards illiberal democracy. The primarily relevant safeguard in the form of proceedings under Article 7 TEU has, however, proved insufficient to effectively halt these developments. Therefore, instead of relying on Art 7 TEU, the Commission has brought a sequence of enforcement actions under Article 258 TFEU that target individual national measures violating EU law. These actions have \textit{inter alia} concerned the Hungarian law on the transparency of organizations which receive support from abroad (‘NGO law’),\(^8\) Hungarian legislation that criminalizes activities in support of asylum applications and further restricts the right to request asylum\(^9\) and the Hungarian scheme requiring compulsory retirement of judges.\(^10\) The present case is yet another one in this string of enforcement actions that have been instituted as a ‘substitute \textit{faute de mieux}’ for Article 7 TEU proceedings and other effective remedies.\(^11\)

Another facet of this case concerns the enforcement of international agreements, concluded by the EU with third countries, against EU Member States failing to comply with such agreements. Infringement proceedings of this type have been opened by the Commission several times in the past.\(^12\) However, this has rarely happened based on agreements forming part of GATT/WTO law before the present case.\(^13\)

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6. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376/36.
7. Case C-66/18 Commission v. Hungary, para. 1.
8. Case C-78/18 \textit{European Commission v. Hungary} EU:C:2020:476.
9. Compare European Commission, ‘Migration and Asylum: Commission takes further steps in infringement procedures against Hungary’, Press release, 19 July 2018, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4522 [accessed 8 January 2021].
10. Case C-286/12 \textit{European Commission v. Hungary} EU:C:2012:687.
11. On all of this compare also J. Bornemann, ‘Academic Freedom in Illiberal Times – A Bittersweet Victory for the Central European University’, European Law Blog (2020), https://europeanlawblog.eu/2020/10/21/academic-freedom-in-illiberal-times-a-bittersweet-victory-for-the-central-european-university/ [accessed 8 January 2021]; Nagy, ‘Using GATS’; D. Traudt, ‘Der EuGH als regionaler Ersatz für den Appellate Body der WTO?’, http://jean-monnet-saar.eu/?page_id=2490 (hereinafter Traudt, EuGH als Ersatz).
12. Cases 194/85 and 241/85 \textit{Commission v. Greece} EU:C:1988:95; Case C-61/94 \textit{Commission v. Germany} EU:C:1996:313; Case C-13/00 \textit{Commission v. Ireland} EU:C:2002:184; Case C-239/03 \textit{Commission v. France} EU:C:2004:598; Case C-173/05 \textit{Commission v. Italy} EU:C:2007:362; compare also Opinion of Advocate General Kokott in Case C-66/18 \textit{Commission v. Hungary}, para. 41 and fn 13.
13. But see Case C-61/94 Commission v. Germany; compare also P. Eeckhout, \textit{EU External Relations Law} (2nd edition, Oxford University Press, 2011), p. 301 ff.
Moreover, whereas annulment proceedings and preliminary reference procedures in which the validity of EU secondary law had been challenged on the basis of WTO law have not succeeded before the ECJ due to the fact that the ECJ denies direct effect of WTO law in the EU legal order, the ECJ has held that infringement proceedings for a Member State’s failure to comply with WTO law are permissible nonetheless. This means that (the lack of) direct effect is relevant in the first constellation, but does not appear significant in the second one. Hence, the present case also raises the question as to whether the Court would confirm the dichotomy of distinguishing between proceedings against the EU on the one hand and infringement proceedings against its Member States on the other hand.

Yet another important question concerns the relationship between the WTO dispute settlement system, EU law and the ECJ itself. In previous cases, the ECJ has had occasion to deal with the relationship between rulings issued in the WTO dispute settlement system and EU law in two types of situation: first, in the context of the assessment of the validity of EU secondary law on grounds of incompatibility with WTO law (within the preliminary reference procedure) and, second, in the context of possible non-contractual liability of the EU due to EU infringements of WTO law (within proceedings under Art 268 and 340 TFEU). In the present judgment, however, the Court has for the first time been called upon to deal with the relationship between the WTO dispute settlement system and enforcement action against a Member State in infringement proceedings under Article 258.

This issue arouses heightened interest not least due to the fact that the WTO dispute settlement system has been in crisis for a considerable time, given that the appointment of new members of the WTO Appellate Body has been blocked in particular by the US. Consequently, the Appellate Body does not have the requisite minimum number of members anymore and the WTO dispute settlement system is therefore currently not fully operative. To some degree this context may also be reflected in the question, addressed by Advocate General (AG) Kokott to the ECJ, as to ‘what extent infringement proceedings can serve as an instrument to enforce and increase the effectiveness of international trade law’.

An additional important issue concerns the applicability of the EU Fundamental Rights Charter in EU external relations: it seems to be the first time that the Commission has invoked the applicability of the Charter based on an alleged Member State violation of an international agreement.

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14. Case C-61/94 Commission v. Germany, para. 2, where the ECJ found that the Commission can bring an enforcement action based on the International Dairy Agreement, which was concluded in the GATT context; P. Eeckhout, EU External Relations Law, p. 301 ff; see also P. Koutrakos, EU International Relations Law (2nd edn, Hart Publishing, 2015), p. 219.
15. Case C-377/02 Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau EU:C:2005:121, para. 1 and 39 with further references.
16. Cases C-120/06 P and C-121/06 P FIAMM and Others v. Council and Commission EU:C:2008:476, para. 107; cited also in Case C-66/18 Commission v. Hungary, para. 78.
17. Case C-66/18 Commission v. Hungary, para. 78.
18. Compare e.g. M. Fiorini et al., ‘WTO Dispute Settlement and the Appellate Body Crisis’, www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/MT_WTO_Dispute_Settlement_and_the_Appellate_Body_Crisis_Survey.pdf; E.U. Petersmann, ‘How Should the EU and Other WTO Members React to Their WTO Governance and WTO Appellate Body Crises?’, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2018/71 (2018), https://ssrn.com/abstract=3300738 or http://dx.doi.org/10.2139/ssrn.3300738.
19. Opinion of Advocate General Kokott in Case C-66/18 Commission v. Hungary, para. 6.
Yet another facet of this ruling is its relevance for national measures against ‘undesirable’ investments. As is well known, one of the EU’s internal market freedoms, namely the free movement of capital, is equipped with *erga omnes* effect, which means that it can be invoked by third-country nationals. The other fundamental freedoms, such as the freedom of establishment, do not have such *erga omnes* effect. In this context, it should be recalled that the Court has found in earlier case law dealing with investors from third countries that investors cannot invoke the free movement of capital vis-à-vis the EU and its Member States, when such investors acquire definite influence over undertakings in the EU, as in such cases the free movement of capital is eclipsed by the freedom of establishment (which *cannot*, however, be invoked by third-country nationals).\(^{20}\) In short, the EU and its Member States can ward off ‘unwelcome’ investments from third countries without the possibility for third-country investors to directly rely on the *erga omnes* effect of the free movement of capital.\(^{21}\) To some degree, this hurdle may be overcome as a result of the present case: namely, insofar as the GATS can be invoked in infringement proceedings dealing with Member State measures restricting investments made by third-country investors; and, additionally, insofar as fundamental rights under the Charter could be invoked in proceedings dealing with such national measures.

### 4. Relevant features of the WTO/GATS framework

Before we move on, it may be helpful to briefly recall some of the features of the GATS which are relevant for this case. This agreement constitutes Annex 1B of the WTO Agreement that was concluded by the EU and its Member States as a mixed agreement in 1994. The WTO Agreement has been approved by Decision 94/800/EC and forms an integral part of EU law.\(^{22}\) With the entry into force of the Lisbon Treaty in 2009, the EU’s Common Commercial Policy (CCP) has been extended to fully cover trade in services so that the GATS as a whole now comes under the EU’s exclusive CCP competence.

The GATS relies on a so-called positive scheduling approach as regards two of its central provisions, namely the obligations to provide market access and national treatment (Articles XVI and XVII of the GATS, respectively). Accordingly, these obligations only apply to the extent that a given WTO Member has explicitly subjected (that is, positively listed) given services sectors in its country-specific schedule of GATS commitments.\(^{23}\) Importantly, as regards the education sector, Hungary had entered into a full commitment to offer national treatment to like services and like service suppliers from other WTO Members in its original national GATS schedule.\(^{24}\)

In 2019, the EU concluded several agreements with a series of WTO Members concerning adjustments of the national GATS schedules of its Member States that were necessary to take account of the EU accession of Hungary and other states. These agreements constituted a precondition for the entry into force of a new ‘Consolidated Schedule’ of EU-25 commitments under

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20. Case C-326/07 *Commission of the European Communities v. Italian Republic* EU:C:2009:193.
21. On this see e.g. E. Vranes, ‘State Measures Protecting Against “Undesirable” Foreign Investment. Issues in EU and International Law’, 67 *Zeitschrift für Öffentliches Recht* (2012), p. 639.
22. See below, text accompanying fn. 28.
23. Compare Article XVIII of the GATS.
24. Opinion of Advocate General Kokott in Case C-66/18 *Commission v. Hungary*, para. 13; for further details on this issue see also section 5.E of this article.
the GATS, which entered into force in 2019. It adopts Hungary’s former national commitments without modification.  

5. The ECJ’s judgment: analysis and comments

The following sections will focus on the ECJ’s reasoning concerning its jurisdiction for the GATS, its analysis of the GATS and the applicability of the Charter in cases where EU Member States implement or restrict the application of an international agreement such as the GATS. This analysis will also address arguments of AG Kokott that have not been dealt with by the Court.

A. International agreements, GATS and the jurisdiction of the Court under Article 258 TFEU

Hungary first claimed that the ECJ does not have jurisdiction to hear the case with respect to the Commission’s complaint concerning infringements of the GATS, given that the area of higher education does not fall within EU competence. According to Hungary, therefore, only the Member States concerned should be regarded as being responsible individually for any failure to comply with their GATS obligations concerning higher education services.  

In this context, it should be recalled that according to established ECJ jurisprudence international agreements concluded by the EU form an integral part of EU law as from their entry into force. They can therefore become relevant in several types of proceeding before the ECJ. In particular, due to their rank between primary and secondary law, international agreements concluded by the EU can serve as a standard of review for secondary law both in annulment proceedings and preliminary references questioning the validity of secondary law. Furthermore, in the latter procedure, the ECJ has jurisdiction to interpret such international agreements. Moreover, the ECJ has jurisdiction to find whether a violation of an agreement concluded by the EU gives rise to non-contractual liability of the EU.  

In addition, since international agreements concluded by the EU form an integral part of EU law ranking above national law, they can also serve as a standard of review in infringement proceedings against Member States under Article 258. As mentioned above, EU Member States have been subjected to such enforcement actions under Article 258 in several cases already, but only once in a case involving an agreement forming part of the GATT/WTO framework.

As indicated, the WTO Agreement (including the GATS as one of its annexes) has originally been concluded by the EU and its Member States, and the EU’s exclusive competence under the CCP was extended to the GATS in the 2009 Lisbon Treaty; furthermore, the original country-specific Hungarian GATS-commitments (which cover higher education services) were adopted by

25. Opinion of Advocate General Kokott in Case C-66/18 Commission v. Hungary, para. 13.
26. Case C-66/18 Commission v. Hungary, para. 58-59.
27. Case C-181/73 R. & V. Haegeman v. Belgian State EU:C:1974:41, para. 5 ff; on this and the following see also P. Eeckhout, EU External Relations Law, p. 327; P. Koutrakos, EU International Relations Law, p. 209.
28. Compare Articles 263, 267, 268 and 340 TFEU, respectively.
29. Compare Art 216(2) TFEU (‘Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States’); on this see e.g. P. Koutrakos, EU International Relations Law, p. 219; R. Streinz, Europarecht (11th edn, C.F. Müller, 2019) 197 ff.
30. Compare also Opinion of Advocate General Kokott in Case C-66/18 Commission v. Hungary, para. 41 and fn 13 with further references.
the ‘Consolidated EU-25 GATS Schedule’ without modification. Therefore, it was straightforward for the ECJ to find that Hungary has an obligation, arising under EU law, to comply with the relevant GATS obligations as concretized in the EU’s Consolidated GATS Schedule.\textsuperscript{31} Since this is an obligation under EU law, it does not come as a surprise that the ECJ rejected Hungary’s claim that its GATS commitments in the sector of higher education services neither fell within the competence of the EU nor the jurisdiction of the ECJ.\textsuperscript{32}

**B. WTO dispute settlement and the jurisdiction of the Court under Article 258 TFEU**

It is particularly noteworthy how the ECJ has dealt with a second objection raised by Hungary. Still with regard to the Court’s jurisdiction, Hungary had submitted that the mere existence of the WTO dispute settlement system excludes the ECJ’s jurisdiction, under Article 258 TFEU, for violations of the GATS. The ECJ first pointed out that this question had not been addressed in its case law before: as mentioned above, previous rulings had either dealt with cases in which the validity of EU secondary law had been challenged on the basis of WTO dispute settlement decisions, or with cases in which the non-contractual liability of the EU had been invoked on grounds of WTO rulings that had been unfavourable for the EU.\textsuperscript{33} Whereas these ECJ judgments had thus been about EU law being challenged on the basis of WTO law, the present case concerned challenges against Member State law on grounds of its alleged breach of WTO law. Furthermore, in this case there was no prior WTO ruling giving rise to questions of the latter’s implementation in the EU.\textsuperscript{34}

The ECJ stressed that the objective of the infringement proceedings in the case at hand was the avoidance of international liability,\textsuperscript{35} given that ‘review undertaken as part of the WTO’s dispute settlement system may result in a legal finding that measures taken’ by the EU are not in conformity with WTO law.\textsuperscript{36} Furthermore, the ECJ recalled that WTO law obliges the EU to ensure compliance with WTO law ‘in its internal legal order’.\textsuperscript{37} Rejecting Hungary’s claim, the ECJ emphasized that the existence of a self-standing dispute settlement system in the WTO has no bearing on its own jurisdiction for infringement proceedings under Article 258: quite the contrary, ‘the exercise of that jurisdiction is entirely consistent with the obligation of each WTO member to ensure observance of its obligations under the law of that organisation’.\textsuperscript{38}

Furthermore, underlining that the EU is bound to observe international law in its entirety, the Court referred to the Articles on the Responsibility of States for Internationally Wrongful Acts,\textsuperscript{39}

\textsuperscript{31} Case C-66/18 Commission v. Hungary, para. 68 ff.
\textsuperscript{32} Ibid., para. 75.
\textsuperscript{33} Ibid., para. 76 ff, where the Court refers to its rulings in Case C-377/02 Van Parys, para. 1 and 39 (with further references), and Cases C-120/06 P and C-121/06 P FIAMM, para. 1 and 107.
\textsuperscript{34} Case C-66/18 Commission v. Hungary, para. 80.
\textsuperscript{35} Ibid., para. 81.
\textsuperscript{36} Ibid., para. 84 (italics added).
\textsuperscript{37} Ibid., para. 85.
\textsuperscript{38} Ibid., para. 86.
\textsuperscript{39} Draft articles on Responsibility of States for Internationally Wrongful Acts 2001 (text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10); Yearbook of the International Law Commission, 2001, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; of which the United Nations General Assembly took note in its Resolution 56/83 of 12 December 2001.
recalling first that whether an ‘act of State’ is unlawful under international law does not depend on
any characterization of the act under EU law, and second that the ‘responsible State’ may not rely
on the provisions of its internal law as justification for failure to comply with its obligations under
international law. Consequently, neither the EU nor its Member States could invoke an ECJ
judgment, issued in the enforcement procedure under Article 258 TFEU, on the international level
in order to refuse to comply with WTO rulings. Lastly, the ECJ stressed that it must take account of
the interpretation of WTO law in WTO dispute settlement decisions due to the principle of pacta
sunt servanda as laid down in Article 26 of the 1969 Vienna Convention on the Law of Treaties
(VCLT).

It is worth noting first that the ECJ explicitly held that a WTO ruling constitutes a ‘legal finding’
that can ultimately give rise to international liability. This stands in clear contrast to a 2005
judgment of the EU’s Court of First Instance (now the EU’s ‘General Court’), in which that Court
had found that the WTO ‘does not establish a mechanism for the judicial resolution of international
disputes by means of decisions with binding effects comparable with those of a court decision in
the internal legal systems of the Member States’; a reasoning that has been understood as having
been confirmed by the ECJ later on.

Secondly, in view of the Court’s aforementioned reasoning and express choice of words,
its rightly been observed that the ECJ, in the case at hand, appears to conceive of itself
as a court that – like a national court ensuring compliance with WTO law in the ‘internal
legal order’ – is subordinated to an international dispute settlement mechanism such as
the WTO dispute settlement system, rather than as a competing court on the international
level.

Third, it is remarkable that the ECJ, in its reasoning, refers to the Articles on the Responsibility
of States for Internationally Wrongful Acts (ASR) but not the Draft Articles on Responsibility of
International Organizations (DARIO). Likewise, it bears mentioning that the ECJ refers to the
1969 VCLT, which deals with treaties between states, rather than to the 1986 Vienna Convention
on the Law of Treaties between States and International Organizations or between International
Organizations. Of course, it can be argued that the UN General Assembly ‘took note’ of the
ASR, whereas the DARIO still constitutes a draft. Also, it can be submitted that the 1969 VCLT
is in force and incorporates rules of customary international law (the latter being binding for the EU
as well). In sum, however, it has rightly been argued that the aforementioned indications suggest
that the ECJ seems to conceive of the Union as being closer, on the level of international law, to a
federal state than to an international organization.

40. Case C-66/18 Commission v. Hungary, para. 87-90.
41. Ibid., para. 92 (referring to the Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations Treaty
Series, Vol. 1155, p. 331).
42. Case T-19/01 Chiquita v. Commission EU:T:2005:31, para. 162 (italics added).
43. P. Eeckhout, EU External Relations Law, p. 368-369, discussing the ruling in Chiquita (Case T-19/01 Chiquita v.
Commission; preceding footnote) and Case C-377/02 Van Parys, para. 42 ff.
44. Case C-66/18 Commission v. Hungary, para. 85.
45. Compare Traudt, EuGH als Ersatz.
46. This is also pointed out by Traudt, EuGH als Ersatz.
47. This is also stressed out by the ECJ (Case C-66/18 Commission v. Hungary, para. 88).
48. Case C-66/18 Commission v. Hungary, para. 92; see also Traudt, EuGH als Ersatz.
49. Traudt, EuGH als Ersatz.
C. Infringement proceedings and direct effect

As is well known, the ECJ has persistently taken the view that GATT/WTO law cannot be directly applied in the EU legal order. Consequently, private persons and companies cannot normally invoke WTO law in the EU. The ECJ famously extended this reasoning in the 1994 Germany/Council judgment, where it found that even Member States cannot challenge the validity of EU secondary law in annulment proceedings on the basis of WTO law either. Moreover, in FIAMM, the ECJ has denied the possibility of bringing claims for damages based on violations of WTO law against the EU.

As mentioned above, however, the Court has held in the 1996 Commission/Germany case (dealing with an agreement concluded in the GATT/WTO framework) that it may hear enforcement cases against EU Member States for their failure to comply with an international agreement, even if the latter does not have direct effect in EU law. This approach has been confirmed in the present case, in which the Commission has been regarded as being entitled to bring an enforcement action based on the GATS agreement against Hungary. In other words: The ECJ has clearly confirmed the apparent dichotomy that EU Member States cannot bring cases challenging the legality of EU secondary law on the basis of WTO law, but may be sued in infringement proceedings, if their own national legal acts disregard WTO law.

It is worth noting that the Advocate General has tried to provide additional reasons that are meant to explain these two differing approaches to what seem to be two sides of the same coin: she first recalled that the ECJ has rejected the direct applicability of WTO law in actions for annulment and in references for preliminary rulings on the validity of EU acts (thereby preventing WTO law from serving as a standard of review for EU legal acts) in order to ensure that the EU’s position is not weakened by Court rulings during diplomatic negotiations that can take place in the framework of WTO dispute settlement proceedings. By contrast, according to the Advocate General, infringement proceedings brought by the Commission against a Member State on grounds of WTO law do not run counter to ‘the aims and particular character’ of WTO dispute settlement: since infringement proceedings before the ECJ can ensure the effective enforcement of WTO rulings in the EU, the possibility of triggering such enforcement proceedings actually strengthens the negotiating position of the EU in the WTO. Moreover, there could be cases where the EU itself might be convinced that a Member State is not complying with WTO law. Bringing infringement proceedings in such cases would also underline the EU’s willingness to adhere to WTO law.

50. See the extensive analyses by P. Eeckhout, EU External Relations Law, p. 300 ff and 331-355; and P. Koutrakos, EU International Relations Law, p. 280 ff.
51. There are two well-known exceptions to this principle: the ECJ will scrutinise an EU measure as to their conformity with WTO law, if the measure explicitly refers to WTO law or has been enacted in order to comply with an obligation arising under WTO law (see Case 70/87 EEC Seed Crushers’ and Oil Processors’ Federation (FEDIOL) v. Commission of the European Communities EU:C:1989:254, para. 19 ff; and Case C-69/89 Nakajima All Precision Co. Ltd v. Council of the European Communities EU:C:1991:186, para. 28 ff; on this see e.g. P. Koutrakos, EU International Relations Law, p. 301 ff). On all of this see this see e.g. P. Koutrakos, EU International Relations Law, p. 280 ff and p. 301 ff; S. Griller, ‘Judicial Enforceability of WTO Law in the European Union. Annotation to Case C-149/96, Portugal v. Council 3 Journal of International Economic Law (2000), p. 441 ff.
52. Case C-280/93 Federal Republic of Germany v. Council of the European Union EU:C:1994:367, para. 110.
53. Cases C-120/06 P and C-121/06 P FIAMM, para. 107; cited also in Case C-66/18 Commission v. Hungary, para. 116 ff; on this see below, text accompanying fn. 58 and fn. 59.
54. Case C-61/94 Commission v. Germany, para. 2.
55. Opinion of Advocate General Kokott in Case C-66/18 Commission v. Hungary, para. 56 ff (quote at para. 64).
56. Ibid., para. 65 ff.
Incidentally, it could be asked whether the Court’s approach in the case at hand may also have implications for the possibility of bringing claims for compensation against Member States that infringe their obligations under WTO law. In FIAMM, the Court had found that the ‘decisive factor’ for denying private persons the right to claim damages for violations of WTO law that are committed by the EU is the fact that such rulings could have the effect of undermining the EU’s position ‘in its attempt to reach a mutually acceptable solution’ in diplomatic negotiations within the framework of WTO dispute settlement proceedings. Furthermore, according to the Court, ‘there is (…) no reason to draw a distinction (…) according to whether the legality of [EU action] is to be reviewed in annulment proceedings or for the purpose of deciding an action for compensation’.57

Hence, if one brings together the Court’s reasoning in FIAMM and that of the ECJ and AG Kokott in the present case, then this could prima facie imply that private persons may be entitled to bring actions for state liability against Member States infringing WTO law: one reason being that claiming state liability may – similar to infringement proceedings under Article 258 – help ensuring the effective enforcement of WTO rulings in the EU (thereby avoiding international responsibility of the EU on the international level for violations of WTO law committed by its Member States); a second reason being that – again similar to infringement proceedings – the possibility of claiming state liability may strengthen the negotiating position of the EU in the WTO. This line of reasoning, however, encounters a limit ensuing from the ECJ’s case law on liability: according to the Court, state liability requires that the norm which is infringed by a Member State is meant to grant rights to private persons. Pursuant to the ECJ, however, WTO law does not confer such rights on individuals.59

D. Conflict avoidance techniques

Mention should also be made of the fact that AG Kokott made two suggestions as to how conflicting decisions of the ECJ on the one hand and WTO dispute settlement bodies on the other hand could be avoided. According to her point of view, infringement proceedings could be stayed as long as concurrent WTO proceedings are in progress. In addition, the ECJ could reduce its intensity of review to manifest violations of WTO law, so as to take account of the ‘ultimate jurisdiction’ of the WTO dispute settlement system.60 Incidentally, restricting the intensity of review to manifest breaches of WTO law had also been proposed in the literature before: thus, Eeckhout has argued that denying direct effect of WTO law (and thereby preventing challenges against EU law before

57. Cases C-120/06 P and C-121/06 P FIAMM, para. 116 ff (quotes at para. 116 and 117, respectively).
58. Ibid., para.120.
59. Case C-307/99 OGT Fruchthandelsgesellschaft mbH v. Hauptzollamt Hamburg-St. Annen (Order of the Court) CLI: EU:C:2001:228, para. 25-26; Cases C-120/06 P and C-121/06 P FIAMM, para.132. Also, it would be difficult to see how one could justify – also from a fundamental rights perspective – denying the extra-contractual liability of the EU for violations of WTO law on the one hand, while accepting state liability for violations of EU law on the other hand (see also Case C-352/98 Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission of the European Communities EU:C:2000:361, para. 41, where the recalled ‘The Court has stated that the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage’).
60. Opinion of Advocate General Kokott in Case C-66/18 Commission v. Hungary, para. 59.
the ECJ) may not constitute the most adequate instrument to be applied by the ECJ in its effort to guarantee sufficient room for manoeuvre to the EU Commission in WTO negotiations. According to Eeckhout, a more appropriate tool could consist in the reduction of the intensity of judicial review in the EU.61

It is submitted that the reason given by AG Kokott for her proposal of reducing the intensity of review (namely that WTO dispute settlement bodies ultimately have jurisdiction over questions of WTO law) is not fully convincing. It would amount to a type of ‘inverted judicial subsidiarity’, which is not practised in other constellations either: thus, one would hardly argue that the intensity of review of domestic tribunals for example in fundamental rights cases should be reduced in view of the ‘ultimate jurisdiction’ of an international specialized tribunal such as the European Court of Human Rights (that may – or may not – come into play ex post in a given case). Similarly, the mere existence of a dispute settlement system on the international level within the WTO framework does not per se justify reducing the intensity of review in cases decided in the EU. Furthermore, there is no guarantee that the WTO dispute settlement procedure will be triggered, later on, in a case that is being dealt with by the ECJ. By contrast, the reasons put forward by Eeckhout appear more persuasive, as they are connected not only to the prominent role of negotiations in WTO proceedings, but also to corresponding underlying questions of institutional balance between the EU’s legislative, executive and judiciary.62

E. Substantive legal assessment

Having examined Hungary’s schedule of GATS commitments,63 the ECJ found that Hungary had undertaken a full commitment regarding higher education services under the national treatment obligation contained in Article XVII of the GATS. Since Article XVII requires WTO Members not

61. P. Eeckhout, EU External Relations Law, p. 383.
62. Ibid., p. 383 points out that cases in which EU or national law is questioned on the basis of international agreements usually involve judicial review of general legislation. Since such judicial review is constitutional in nature, the institutional balance does not necessarily justify strict judicial review.
63. As mentioned above, the GATS’ national treatment obligation (contained in Article XVII) and its market access obligation (Article XVI) function on the basis of a positive scheduling approach, according to which each WTO Member is required to specify in its country-specific schedule which commitments it undertakes under Articles XVI and XVII, respectively (see Article XX of the GATS). With respect to sectors where commitments are undertaken, each WTO Member’s schedule must specify relevant terms, limitations and conditions on market access in one column, and conditions and qualifications on national treatment in a second column (see Article XX para. 1). A WTO Member’s measures that are inconsistent with both Articles XVI and XVII shall be inscribed in that Member’s column relating to Article XVI. In such a case, the inscription is considered to provide a condition or qualification to Article XVII as well (see Article XX para. 2). This rule is meant to simplify the scheduling approach of the GATS (see Case C-66/18 Commission v. Hungary, para. 107 with further references to WTO case law). In accordance with WTO panel jurisprudence, the ECJ found that ‘it follows that a condition that is formally inscribed only under Article XVI of the GATS allows for derogation from the national treatment obligation only where the type of measures it introduces is inconsistent with both the obligation provided for in Article XVI and that provided for in Article XVII of the GATS’ (see Case C-66/18 Commission v. Hungary, para. 107 (emphasis added), with further references to WTO case law). Since Hungary had scheduled a condition relating to a requirement of prior licences that was meant to apply to all educational institutions, regardless of their origin, this condition was found by the ECJ not to contain any discriminatory element in the sense of Article XVII. Therefore, the rule laid down in Article XX para. 2 of the GATS was regarded, by the ECJ, as not applying in this case. Consequently, Hungary could not claim a derogation from the GATS’ national treatment obligation (see Case C-66/18 Commission v. Hungary, para. 103 ff). For a detailed explanation of scheduling under the GATS that is also used by the ECJ in this case see WTO, Guidelines for the
to modify the conditions of competition to the detriment of suppliers from third countries, it does not come as a surprise that the ECJ would find that Hungary’s ‘requirement of a prior treaty’ constitutes a violation of GATS Article XVII. According to the ECJ, this breach could not be justified under Article XIV (the GATS’s ‘General Exceptions’ clause that is structured in a manner similar to exception clauses such as Article 36 TFEU), given that the national measures were arbitrary and disproportionate.\(^{64}\) The same holds true for Hungary’s second measure, namely its requirement that the institution concerned provide education in the state where it has its seat.\(^{65}\) Furthermore, regarding this second measure, the Court found violations of Article 49 TFEU (freedom of establishment) and Article 16 of the EU Services Directive.\(^{66}\)

**F. Applicability of the EU Fundamental Rights Charter**

Conspicuously, although the ECJ had thus found violations of EU law, it went on to examine whether the EU Fundamental Rights Charter is applicable in the concrete case, that is in a constellation in which a Member State is bound by obligations under an international agreement that has been concluded by the EU.\(^{67}\)

This essential question must be seen against the background of the ECJ’s case law on the scope of application of EU fundamental rights. As is well known, the Court had found in *ERT*, namely already before the Charter came into existence, that Member States are bound by EU fundamental rights not only when they *sensu stricto* implement EU law (for example through the transposition of EU directives), but also when they try to justify restrictions of the fundamental freedoms of the EU internal market.\(^{68}\) Since the Explanations of the Charter explicitly refer to the Court’s former *ERT* case law, it is clear that Member States are also bound by their human rights obligations under the Charter, whenever they restrict internal market freedoms.\(^{69}\) Further extending this broad approach of the scope of Charter rights, the Court has notably held, when interpreting the term ‘implementing Union law’ in Article 51(1) of the Charter in *Åkerberg*, that Member States must respect the rights guaranteed by the Charter ‘in all situations governed by EU law’: in other words, ‘[t]he applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter’.\(^{70}\)

The Court has arguably tried to attenuate this controversial far-reaching formula in later cases. Thus, it has clarified that the term ‘implementing Union law’ ‘presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other’.\(^{71}\) Consequently, ‘the mere fact that a national measure comes within an area in which the European

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\(^{64}\) Case C-66/18 Commission v. Hungary, para. 135 ff and 154 ff.

\(^{65}\) Ibid., para. 154 ff.

\(^{66}\) Ibid., para. 149 ff, 167 ff.

\(^{67}\) Ibid., para. 212 ff.

\(^{68}\) Case C-260/89 *Elliniki Radiophonia Tiléorassi (ERT) AE and Panellinia Omospondia Sylogon Prossopikou v. Dimotiki Etairia Pliroforissis and others* EU:C:1991:254, para. 43.

\(^{69}\) Compare the Explanation on Article 51 in the *Explanations relating to the Charter of Fundamental Rights [2007]* OJ C 303, p. 17.

\(^{70}\) Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson* EU:C:2013:105, para. 19.

\(^{71}\) Case C-198/13 *Victor Manuel Julian Hernández and Others v. Reino de España* EU:C:2014:2055, para. 34.
Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable’. Despite these attempts at clarification, it has rightly been submitted that the Court’s approach towards the scope of application of the Charter remains ‘elusive’ and that further elucidation in case law is necessary.

Arguably, the present case provides some additional clarity, given that the Court underlines that ‘when the Member States are performing their obligations under [the GATS], they must be considered to be implementing EU law, within the meaning of Article 51(1) of the Charter’. It is questionable, however, whether the reasoning of the Court, which consists of two short sentences only, is fully convincing: it is difficult to see how a mere violation of a non-discrimination provision such as that contained in Article XVII of the GATS (or the attempt to justify such a violation) amounts to an ‘implementation’ of that provision. Hence, this judgment can arguably be regarded as an effort to transpose the Court’s ERT-type case law, in which it had found that the attempt to justify restrictions of EU fundamental freedoms triggers the applicability of EU fundamental rights, from fundamental freedoms to international agreements. Alternatively, since the Court’s reasoning is so terse, it could even be regarded a transposition of the ECJ’s Åkerberg approach to international agreements: in other words, similarly to Åkerberg, the mere applicability of an international agreement concluded by the EU would then trigger the applicability of the Charter. Seen in this light, the ruling would stand in tension with the aforementioned attempts of the Court to clarify and restrict its contentious wide-ranging Åkerberg jurisprudence.

6. Further implications of the judgment

One can of course read the Court’s move of making the Charter applicable in cases where an EU Member State violates an international agreement concluded by the EU as an attempt to highlight that the state has not ‘merely’ violated obligations under a prima facie technical provision in an international trade agreement, but has also breached EU fundamental rights, such as academic freedom, that are foundational for an open society. Such a reading of the judgment indeed recalls that this case is yet another one in the sequence of enforcement actions of the Commission aiming to prevent that individual Member States undermine fundamental European values in some Member States.

Additionally, this ruling should also be seen in the broader context of measures restricting ‘undesirable’ investments. As mentioned above, in previous cases, the ECJ effectively has made it impossible for third-country investors to invoke the erga omnes effect of the EU fundamental freedom of free movement of capital, whenever the investor acquires definite influence in an undertaking in the EU. Given that investors from third countries cannot invoke the freedom of establishment (as the latter is not equipped with an erga omnes effect), the obstacle erected by the

72. Case C-198/13 Hernández v. Reino de España, para. 36 with further references to relevant case law.
73. On all of this see also P. Craig and G. de Burca, EU Law (7th edn, Oxford University Press, 2020), p. 446 ff (quotation at 449).
74. Case C-66/18 Commission v. Hungary, para. 213.
75. ‘In the present case, first, as has been noted in paragraph 71 of the present judgment, the GATS forms part of EU law. It follows that, when the Member States are performing their obligations under that agreement, including the obligation imposed in Article XVII(1) thereof, they must be considered to be implementing EU law, within the meaning of Article 51(1) of the Charter’ (Case C-66/18 Commission v. Hungary, para. 213; at para. 214 the Court refers back to former case law).
76. See above, text accompanying fn. 21.
ECJ vis-à-vis third-country investors constitutes a very effective—perhaps overly effective—
barrier.

To some extent this restrictive approach is mitigated by the ECJ in the present case, which
makes it possible to scrutinize national measures against allegedly ‘undesirable’ third-country
investments under the GATS and guarantees laid down in the EU Fundamental Rights Charter
such as the freedom to conduct a business. Nonetheless, it should be noted that this approach does
not fully offset the lack of the applicability of the free movement of capital: if the free movement
of capital were applicable in such cases, then this fundamental freedom (and its erga omnes effect)
could be invoked by investors from third countries themselves. By contrast, the right to initiate
infringement proceedings—in which the Charter is invoked in conjunction with an international
agreement against a Member State—is restricted to the Commission and fellow Member States
under Article 258. Even this hurdle could be overcome, however, if one severs the connection
between the restriction of WTO/GATS law (which cannot be challenged by private persons due to
the lack of direct effect of WTO law) and the violation of Charter rights: national measures giving
rise both to violations of WTO law and the Charter could then arguably be challenged by investors
invoking the Charter, since the latter is directly applicable.

Furthermore, since the applicability of an international agreement such as the GATS is
regarded, by the ECJ, as prompting the applicability of the Charter, national measures restricting
the GATS, which at the same time violate Charter rights, could give rise to state liability.

Finally, one should also reflect on the question, mentioned by way of introduction, in
which the Advocate General asked the Court to consider whether infringement proceedings
can serve as an instrument to enforce and increase the effectiveness of international trade
law. The degree to which WTO law can effectively be enforced on the regional level of the
EU depends not least on the extent to which the ECJ is prepared to actually take into account
relevant interpretations of the WTO dispute settlement bodies. Although the Court in the
present case referred to WTO case law on the functioning of GATS schedules, it is conspic-
uous that it did not refer to other WTO rulings dealing with relevant substantive issues arising
under the central GATS provision (Article XVII) in this case, such as the question of the
‘likeness’ of domestic and foreign services and providers of services (in fact, the ECJ dis-
regarded this question altogether). Also, the fact that the Court recently seems to take less
account of the jurisprudence of another prominent international court, the European Court of
Human Rights, is not overly promising either.

77. Compare the critique in E. Vranes, 67 Zeitschrift für Öffentliches Recht (2012), p. 639, 657 ff.
78. Compare Article 16 of the Charter.
79. Arguably, one would then have to decide whether only third-country investors that have already made investments in
the EU could invoke the Charter regarding such investments or whether even third-country investors seeking access to
the EU could invoke the Charter.
80. Opinion of Advocate General Kokott in Case C-66/18 Commission v. Hungary, para. 6.
81. Compare e.g. the critical analyses of L.R. Glas and J. Krommendijk, ‘From Opinion 2/13 to Avotins: Recent
Developments in the Relationship between the Luxembourg and Strasbourg Courts’, 17 Human Rights Law Review
(2017), p. 567 (who refer to the ‘increasing Charter centrism and the tendency in the CJEU to autonomously interpret
the Charter without reference to the ECHR and the case law of the ECtHR, a trend that can be contrasted with the
CJEU’s past practice’); and G. de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a
Human Rights Adjudicator?’, New York University School of Law Public Law and Legal Theory Research Paper
Series, Working Paper 13-51 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319175.
7. Concluding remarks

The ruling in this case is noteworthy for several reasons. On the one hand, as regards the relationship between WTO law and EU law, the ECJ has confirmed its dichotomous approach of holding that EU Member States cannot bring cases challenging the legality of EU secondary law on the basis of WTO law, but may be sued in infringement proceedings, if their own national legal acts disregard WTO law. Furthermore, it transpires from the Court’s reasoning in this case that it appears to conceive of itself as a court that – similar to a national court ensuring compliance with WTO law in the ‘internal legal order’ – is subordinated to the dispute settlement mechanisms of the WTO, rather than as a competing court on the international level.82

On the other hand, this ruling is also remarkable as regards fundamental rights protection, since the ECJ has taken the view that – similarly to its controversial approach in Akerberg – the mere applicability of an international agreement concluded by the EU seems to trigger the applicability of the EU Charter of Fundamental Rights.

This approach of the ECJ is also highly relevant for the EU’s policy of regulating foreign direct investments from third countries: to some extent, the ECJ’s approach in the present case mitigates its restrictive stance in the scrutiny of ‘undesirable’ investments by third-country investors, since the Commission can invoke the GATS and, in conjunction with the latter, the Charter of Fundamental Rights in infringement proceedings against a Member State restricting such investments. Moreover, it appears conceivable that national measures giving rise both to violations of WTO law and the Charter could be challenged by investors invoking the Charter themselves, as the latter is directly applicable. Finally, such cases could lead to state liability under the Charter.

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Supplemental material

Supplemental material for this article is available online.

82. Traudt, EuGH als Ersatz.