Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 5 March 2020[1]

Case C-66/18

European Commission
v

Hungary

(Infringement proceedings — Article 258 TFEU — Jurisdiction of the Court — Infringement by a Member State of obligations under the General Agreement on Trade in Services (GATS) — Freedom to provide services — Directive 2006/123/EC — Article 16 — Article 56 TFEU — Freedom of establishment — Article 49 TFEU — Education services — Higher education — Service suppliers who are third-country nationals — Legal conditions for the supply of education services in a Member State — Requirement of an international treaty with the State of origin — Requirement of genuine teaching activities in the State of origin — Applicability of the Charter of Fundamental Rights of the European Union — Article 13 — Academic freedom — Article 14(3) — Freedom to found educational establishments)

I. Introduction

1. These infringement proceedings concern two amendments to the Hungarian Law on higher education in 2017. Following those amendments, higher education institutions from States outside the European Economic Area (EEA) are required, in order to commence or continue their activities in Hungary, to prove the conclusion of an international treaty between Hungary and their State of origin, which, in the case of federal States, must be concluded by the central government. In addition, the activity of all foreign higher education institutions is conditional on higher education also being offered in their State of origin.

2. According to critics, by introducing this law the Hungarian Government has the sole aim of preventing the activity of the Central European University (CEU) in Hungary. It has therefore sometimes been referred to in the public debate as a ‘lex CEU’.

1 Original language: German.

3. The CEU was founded in 1991 through an initiative which, by its own account, sought 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. The CEU is a university founded under the law of New York State and holding an operating licence issued by that State ('the absolute charter'). The main funders are the Open Society Foundations established by the Hungarian-born US businessman George Soros, a controversial figure in some circles.[2] Because of its specific remit, the CEU has never undertaken any teaching or research activities in the United States.

4. Of the six foreign higher education institutions which carried on activities subject to a licence in Hungary at the time of the amendment of the Law on higher education, the CEU was, on account of its particular model, the only one that was unable to fulfil the new requirements. It therefore ceased operation in Hungary. In November 2019 a new campus opened in Vienna.

5. Against this background, the Commission considers the new rules to be not only a restriction of freedom to provide services, but in particular an infringement of academic freedom, as enshrined in the Charter of Fundamental Rights of the European Union.

6. Furthermore, as one of the two new requirements applies only to higher education institutions from States outside the EEA, the case takes on a further special dimension, as the Commission alleges that Hungary infringed the law of the World Trade Organization (WTO), specifically the GATS. In this case, the Court will therefore also have to decide to what extent infringement proceedings can serve as an instrument to enforce and increase the effectiveness of international trade law.

II. Legal framework

A. EU law

1. Council Decision 94/800/EC concerning the conclusion of the agreements reached in the Uruguay Round multilateral negotiations

7. By Decision 94/800/EC 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),[3] the Council approved the Agreement establishing the WTO and the Agreements in Annexes 1, 2 and 3 to that Agreement, which include the General Agreement on Trade in Services ('GATS').

8. Article I of the GATS provides:

'1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

2 His foundations are affected by another piece of Hungarian legislation adopted alongside this, Law LXXVI of 2017 on the transparency of organisations receiving foreign support, which imposes certain enforceable obligations of registration, declaration and transparency on civil society organisations receiving foreign financial support. The law is the subject of infringement proceedings in Case C-78/18, *Commission* v *Hungary (Transparency of associations)*.

3 OJ 1994 L 336, p. 1.

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

…'

9. Article XIV of the GATS, under the heading 'General Exceptions', provides:

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;[4] …

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts, …

(iii) safety; …'

10. Article XVI of the GATS appears in Part III of the Agreement on 'Specific Commitments'. That provision, headed 'Market Access', stipulates as follows:

'1. With respect to market access … each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. …'

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt … are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

4 'The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society' (footnote in the original).

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.'

11. Article XVII of the GATS, headed 'National Treatment', provides:

'1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

…

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.'

12. Article XX of the GATS provides:

'1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

(a) terms, limitations and conditions on market access;

(b) conditions and qualifications on national treatment; …

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.'

2. Council Decision (EU) 2019/485 on the conclusion of the relevant Agreements under Article XXI of the General Agreement on Trade in Services

13. By Council Decision (EU) 2019/485 of 5 March 2019 on the conclusion of the relevant Agreements under Article XXI of the General Agreement on Trade in Services with Argentina, Australia, Brazil, Canada, China, the Separate customs territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Colombia, Cuba, Ecuador, Hong Kong China, India, Japan, Korea, New Zealand, the Philippines, Switzerland and the United States, on the necessary compensatory adjustments resulting from the accession of Czechia, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Austria, Poland, Slovenia, Slovakia, Finland and Sweden to the European Union,[5] the Council approved the

5 OJ 2019 L 87, p. 1.

Agreements described in the title, which was a condition for the entry into force of the 'Consolidated Schedule' of EU-25 GATS commitments. The Consolidated Schedule entered into force on 15 March 2019. It adopts Hungary's commitments from its Schedule of Specific Commitments [6] without modification. [7]

14. The Schedule of Specific Commitments for Hungary consists of two parts, Part I concerning limitations relating to horizontal commitments and Part II concerning limitations on certain vertical (sector-specific) commitments.

15. Part II of the Schedule lists the sectors in which specific commitments under Article XVI (market access) or Article XVII (national treatment) of the GATS are made. For higher education services [8] it is stated, with regard to market access for the third mode of supply ('commercial presence'), which is relevant here: 'Establishment of schools is subject to licence from the central authorities'. In the national treatment column no limitations were inscribed ('None').

3. Charter of Fundamental Rights of the European Union

16. Article 13 of the Charter of Fundamental Rights of the European Union ('the Charter'), [9] which is headed 'Freedom of the arts and sciences', provides:

'The arts and scientific research shall be free of constraint. Academic freedom shall be respected.'

17. Article 14(3) of the Charter reads as follows:

'The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.'

18. Article 16 of the Charter states:

'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.'

4. Directive 2006/123/EC

19. Under Article 2(1) thereof, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ('the Services Directive') [10] applies 'to services supplied by providers established in a Member State'.

20. Article 4(1) of that directive defines 'service' as 'any self-employed economic activity, normally provided for remuneration, as referred to in Article [57 TFEU]'.

6 Hungary Schedule of Specific Commitments, WTO Doc. GATS/SC/40 of 15 April 1994.

7 WTO Doc. S/C/W/273, pp. 166 and 167. With regard to entry into force, see the Communication of 7 March 2019 from the European Union to the Members of the WTO.

8 Hungary Schedule of Specific Commitments, WTO Doc. GATS/SC/40 of 15 April 1994, p. 19 (section 5.C.).

9 OJ 2007 C 364, p. 1.

10 OJ 2006 L 376, p. 36.

21. Article 16 of the Services Directive provides:

'1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.…

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. …'

B. National law

22. Hungarian higher education law is regulated in Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény (Law CCIV of 2011 on national higher education). That law was revised in 2017 by Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény módosításáról szóló 2017. évi XXV. törvény (Law XXV of 2017 amending Law CCIV of 2011 on national higher education, 'the Law on higher education').

23. Under Paragraph 76(1)(a) of the Law on higher education, a foreign higher education institution may carry on teaching activities leading to a qualification in the territory of Hungary only if 'the binding application of an international treaty on fundamental support for the activities in Hungary, concluded between the Government of Hungary and the State responsible on the basis of the seat of the foreign higher education institution — 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, on the basis of a prior agreement with the central government — has been recognised by the parties'.

24. Under Paragraph 77(2) of the Law on higher education, that requirement applies to foreign higher education institutions having their seat in a State outside the EEA.

25. Under Paragraph 76(1)(b) of the Law on higher education, a foreign higher education institution may carry on teaching activities leading to a qualification in the territory of Hungary only if 'it is classified, in the State responsible on the basis of its seat, as a higher education institution recognised by the State and carrying on genuine higher education teaching activities there'.

26. Under Paragraph 77(3), that requirement also applies to foreign higher education institutions having their seat in an EEA State.

27. Paragraph 115(7) of the Law on higher education, in the version applicable at the time of the Commission's reasoned opinion, provided that the requirement under Paragraph 76(1)(a) of the law had to be fulfilled by 1 January 2018. In the case of federal States, the agreement with the central government was to be concluded within six months following the promulgation of Law XXV of 2017. Paragraph 115(7) also makes clear that foreign higher education institutions which do not comply with the legal requirements when the period expires will forfeit their licence. In that case, they may not admit any new entrants to a course of study in Hungary after 1 January 2018, while courses already in progress on that date are to be concluded no later than the 2020/2021 academic year, with no change in conditions.

28. On 18 October 2017 Hungary informed the Commission that the Law on higher education had been amended again by Law CXXVII of 2017. It extended the period prescribed for fulfilling the requirements under Paragraph 76(1) of the Law on higher education until 1 January 2019 and the other periods under Paragraph 115(7) and (8) likewise by one year.

III. Background to the dispute and pre-litigation procedure

29. On 28 March 2017, the Hungarian Government introduced a draft law revising Law CCIV of 2011 in the Hungarian National Assembly. The draft was adopted a few days later, on 4 April 2017, in an urgent legislative procedure as Law XXV of 2017.

30. By letter of 27 April 2017, the Commission informed Hungary that it considered that, by adopting Law XXV of 2017, Hungary had infringed Articles 9, 10 and 13, Article 14(3) and Article 16 of Directive 2006/123, in the alternative Articles 49 and 56 TFEU, Article XVII of the GATS and Article 13, Article 14(3) and Article 16 of the Charter, and invited Hungary to submit its observations. Hungary replied by letter of 25 May 2017, in which it disputed the abovementioned infringements.

31. On 14 July 2017 the Commission issued a reasoned opinion in which it maintained its position. After the Commission had refused a request made by Hungary for an extension of the period for replying, Hungary replied by letters of 14 August 2017 and 11 September 2017 in which it stated that the alleged infringements did not exist.

32. On 5 October 2017 the Commission issued a supplementary reasoned opinion. On 6 October 2017, Hungary submitted supplementary information to the letters of 14 August and 11 September 2017.

33. On 18 October 2017 Hungary replied to the supplementary reasoned opinion and, by letter of 13 November 2017, submitted further supplementary information.

IV. Forms of order sought and procedure before the Court

34. By the present action for failure to fulfil obligations, which was received by the Court on 1 February 2018, the Commission claims that the Court should:

– declare that Hungary has failed to fulfil:

  – its obligations under Article XVII of the GATS by requiring, in Paragraph 76(1)(a) of Law CCIV of 2011, as amended, the conclusion of an international agreement between Hungary and the State of origin for foreign higher education institutions outside the EEA as a condition for supplying education services;

– its obligations under Article 16 of Directive 2006/123 and, in any event, under Articles 49 and 56 TFEU and under Article XVII of the GATS by requiring foreign higher education institutions, in Paragraph 76(1)(b) of Law CCIV of 2011, as amended, to offer higher education in their countries of origin;

– its obligations under Article 13, Article 14(3) and Article 16 of the Charter of Fundamental Rights, in relation to the restrictions described above;

– order Hungary to pay the costs.

35. Hungary contends that the Court should:

– dismiss the action brought by the Commission as being inadmissible;

in the alternative

– dismiss the action brought by the Commission as being unfounded;

– order the Commission to pay the costs.

36. The Commission and Hungary presented oral argument at the hearing on 24 June 2019.

V. Legal assessment

37. In these infringement proceedings it must be considered whether two conditions to which the Hungarian Law on higher education, as amended, makes subject teaching activities by foreign higher education institutions in Hungary are compatible with EU law. These are, first, the requirement of the conclusion of an international treaty between Hungary and the State of origin of the higher education institution. Second, a foreign higher education institution must now also genuinely carry on teaching activities in its State of origin.

38. As the first of those rules applies only to higher education institutions having their seat in third countries outside the EEA, the Commission alleges in particular a breach of the principle of national treatment under Article XVII of the GATS. With regard to that allegation, it is necessary first to examine the Court's jurisdiction under Article 258 TFEU (see under A). Second, the admissibility (see under B) and the substance (see under C) of the action for failure to fulfil obligations in other respects must be assessed. In addition to infringements of the GATS, the Commission considers the conditions described above to constitute infringements of the Services Directive, the fundamental freedoms and the Charter.

A. The Court's jurisdiction in respect of the allegation of an infringement of the GATS

39. The Court's jurisdiction to hear an action is a matter of public policy, which may be considered of its own motion.[11]

11 Judgment of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753, paragraph 37).

1. The GATS as an integral part of EU law

40. An action for failure to fulfil obligations can have as its subject, according to the case-law on the first paragraph of Article 258 TFEU, only infringements of obligations under EU law.[12] Hungary considers, however, that any obligation under Article XVII of the GATS in conjunction with the specific commitment for the education sector is not an obligation for Hungary under EU law, but its own obligation under international law.

41. Infringements by the Member States of certain obligations under international law have certainly already been the subject of infringement proceedings.[13] The Court has consistently held that international agreements concluded by the Union are, as from their entry into force, an integral part of the legal order of the European Union.[14] They are therefore binding upon the institutions of the Union and on its Member States pursuant to Article 216(2) TFEU.

42. According to case-law, that binding force applies to mixed agreements at least in so far as the provisions of that agreement fall within the external competence of the Union.[15]

43. The Court has ruled, with regard to Article 133 EC, that trade in services, including in services relating to particularly sensitive sectors such as health and education, falls within the external competence of the Union.[16] By Article 207 TFEU, which replaced Article 133 EC under the Treaty of Lisbon, the external competence of the Union for trade in services was expanded even further and now forms part of its exclusive competence within the framework of the common commercial policy (CCP).

44. This holds even though the Member States retain an extensive internal competence in education, as Hungary mentions. This is taken into account by point (b) of the third subparagraph of Article 207(4) TFEU.[17] Under that provision, the Council may unanimously conclude international agreements on trade in education services only where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them. Such unanimity is necessary because inevitably the Member States are internally responsible for implementing the obligations entered into. The Union has only a competence to coordinate in the area of education in accordance with Article 6(e) TFEU.

45. Furthermore, Article 207(6) TFEU provides that the exercise of the competences conferred by Article 207(1) TFEU does not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation. As far as the education sector is concerned, Article 166(4) TFEU contains such a prohibition on harmonisation. However, this does not call into question at all the existence of an external competence of the Union per se.

12 Judgment of 19 March 2002, *Commission* v *Ireland* (C-13/00, EU:C:2002:184, paragraph 13).

13 Judgments of 25 February 1988, *Commission* v *Greece* (194/85 and 241/85, EU:C:1988:95); of 10 September 1996, *Commission* v *Germany* (C-61/94, EU:C:1996:313); of 19 March 2002, *Commission* v *Ireland* (C-13/00, EU:C:2002:184); of 7 October 2004, *Commission* v *France* (C-239/03, EU:C:2004:598); and of 21 June 2007, *Commission* v *Italy* (C-173/05, EU:C:2007:362).

14 Judgments of 30 April 1974, *Haegeman* (181/73, EU:C:1974:41, paragraphs 2/6); of 30 September 1987, *Demirel* (12/86, EU:C:1987:400, paragraph 7); and of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraph 30).

15 Judgments of 7 October 2004, *Commission* v *France* (C-239/03, EU:C:2004:598, paragraph 25); of 16 November 2004, *Anheuser-Busch* (C-245/02, EU:C:2004:717, paragraph 41); of 11 September 2007, *Merck Genéricos — Produtos Farmacêuticos* (C-431/05, EU:C:2007:496, paragraph 33 et seq.); and of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraph 31 et seq.).

16 At that time, the European Union still shared that external competence with its Member States; see Opinion 1/08 *(Agreements modifying the Schedules of Specific Commitments under the GATS)* of 30 November 2009 (EU:C:2009:739, paragraph 135).

17 See my Opinion in *Commission* v *Council* (C-13/07, EU:C:2009:190, point 124).

46. Accordingly, the agreements with third countries necessary for the entry into force of the Consolidated Schedule of EU-25 GATS commitments were approved by the Union without participation by the Member States.[18] The Schedule adopts Hungary's commitments in respect of higher education without modification.

47. The obligation at issue under the GATS, which was originally entered into by Hungary, was therefore transferred to the European Union by the Treaty of Lisbon at the latest and thus constitutes an obligation under EU law the infringement of which can be the subject of infringement proceedings.[19]

2. Liability of the Union in international law for infringements of the GATS by Member States

48. The Court's jurisdiction to find infringements of the GATS by the Member States in infringement proceedings is further suggested by the fact that the European Union may be held liable by a third country for such an infringement before the WTO dispute settlement bodies.[20]

49. This follows, first, from the fact that the GATS is fully binding upon the European Union externally. It is true that under Article 1(1) of Council Decision 94/800 the consent of the European Union is intended to relate only to the portion of the WTO Agreement and its Annexes which falls within its competence. However, the allocation of competences has not been disclosed, unlike in the case of other mixed agreements,[21] and does not therefore lead to any limitation of the binding force. Article 46(1) of the Vienna Convention on the Law of Treaties (VCLT) makes clear in this regard that 'a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance'.[22]

50. In any case, the European Union has an extensive competence in the field of the CCP under the Treaty of Lisbon.

51. Second, the Member States' actions within the scope of the GATS can be attributed to the European Union. The European Union cannot directly influence the Member States' action in all the areas covered by the GATS because compliance with the Union's obligations under the WTO Agreement depends largely on how the Member States exercise their own regulatory competences. Nevertheless, the European Union has undertaken to be fully bound by that Agreement from an external point of view. The conduct of its Members must therefore be attributed to it.

18 See Council Decision (EU) 2019/485 of 5 March 2019 (OJ 2019 L 87, p. 1). Prior to the entry into force of the Treaty of Lisbon, the Court had ruled in Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009 (EU:C:2009:739) that that modification fell within the shared competence of the Union and its Member States and participation by the Member States was necessary.

19 See Opinion 2/15 *(Free Trade Agreement with Singapore)* of 16 May 2017 (EU:C:2017:376, paragraph 248).

20 The WTO dispute settlement procedure is laid down in the Understanding on Rules and Procedures governing the Settlement of Disputes (DSU) in Annex 2 to the WTO Agreement. It provides for the establishment of panels to settle certain disputes, which report to the Dispute Settlement Body (DSB). On that basis, it produces a final report, which is binding on the parties unless an appeal is made to the Appellate Body (AB) within 60 days.

21 See, for example, Article 6(1) of Annex IX to the United Nations Convention on the Law of the Sea, signed on 10 December 1982 at Montego Bay (*United Nations Treaty Series*, Vol. 1833, 1834 and 1835, p. 3).

22 The same provision is made, *mutatis mutandis*, in Article 46(2) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO) with regard to an international organisation's internal distribution of competences.

52. Consequently, in practice the European Union assumes responsibility, even in respect of national measures, for negotiations with the other WTO Members and for defending a measure in the dispute settlement procedure.[23]

53. According to the Court's case-law, in the internal implementation of an international agreement the Member States fulfil an obligation in relation to the European Union, which has assumed responsibility, externally, for the due performance of the agreement.[24]

54. This obligation is an expression of the duty of sincere cooperation under Article 4(3) TEU, which acts as a limit on the exercise of competence. Hungary thus remains free to exercise its internal competence to regulate higher education, but only in so far as the relevant rules do not infringe obligations under the WTO agreements. This would not only render the European Union liable in international law, but also expose the other Member States to the risk of countermeasures. This risk is clearly illustrated by recent developments in the dispute concerning subsidies granted to Airbus by France, Spain, Germany and the United Kingdom. The United States punitive tariffs approved by the WTO as a countermeasure relate to Parmesan cheese from Italy, among other things.

55. Compliance with this duty of sincere cooperation can also be enforced in infringement proceedings.

3. Relationship between infringement proceedings and the WTO dispute settlement procedure

56. This conclusion is also not called into question by the other objections raised by Hungary.

57. In this regard, Hungary highlights above all the specific character of the WTO dispute settlement procedure and the special role played by the WTO dispute settlement bodies.

58. However, first, a judgment delivered by the Court in infringement proceedings does not in any way call into question the exclusive competence of the WTO dispute settlement bodies to find infringements of that agreement in proceedings between two Members,[25] as infringement proceedings are a purely internal regulatory instrument. The judgment is thus binding only as between the European Union and the Member State and does not prevent the WTO bodies from finding an infringement of the WTO Agreement upon application by a third country, even if the Court has previously rejected such an infringement.

59. In practice, conflicting decisions can be avoided by staying infringement proceedings and awaiting the decision of the WTO bodies if concurrent proceedings are in progress before the WTO. In addition, consideration can be given to restricting the intensity of review of the Court to manifest infringements to take account of the fact that the WTO dispute settlement bodies ultimately have jurisdiction on particularly contentious issues.[26]

23 Examples from the practice of the WTO dispute settlement organs: WTO Appellate Body Report of 5 June 1998, adopted by the DSB on 1 July 1998, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, European Communities — Computer Equipment, concerning certain Irish and British measures; WTO Appellate Body Report of 12 March 2001, adopted by the DSB on 5 April 2001, WT/DS135/AB/R, European Communities — Asbestos, concerning a French decree; most recently, WTO Appellate Body Report of 15 May 2018, WT/DS316/AB/RW, European Union — Large Civil Aircraft.

24 Judgments of 26 October 1982, *Kupferberg* (104/81, EU:C:1982:362, paragraphs 11 and 13); of 30 September 1987, *Demirel* (12/86, EU:C:1987:400, paragraph 11); of 19 March 2002, *Commission* v *Ireland* (C-13/00, EU:C:2002:184, paragraph 15); and of 7 October 2004, *Commission* v *France* (C-239/03, EU:C:2004:598, paragraph 26).

25 See Article 23(1) of the DSU [the WTO Dispute Settlement Understanding].

26 See below, point 90 of this Opinion.

60. Second, it is true that, relying on the particular importance of negotiations within the framework of the WTO, the Court has rejected the direct applicability of WTO law in settled case-law.[27] This merely means, however, that Member States, in an action for annulment, or the parties in a reference for preliminary ruling on the validity of an EU act, may not rely on the incompatibility of an EU act with the WTO Agreement.[28]

61. These considerations follow from the specific features of the WTO dispute settlement mechanism. In such a procedure, it is conceivable that, in negotiations with third countries, the European Union declares its willingness to withdraw a certain measure or act if the third country makes other commitments to it in return. If a concurrent action for annulment brought by a Member State or a reference for preliminary ruling on the validity of an EU act could be based directly on an infringement of WTO law, the European Union's negotiating position would be weakened, as at the end of such proceedings the EU act in question could be declared to be void.[29] The European Union's action would thereby be unilaterally undermined by a Member State or even by a party in the preliminary ruling procedure.

62. However, this only means that WTO law cannot, as a rule, serve as the standard of review for *EU acts* in proceedings before the EU Courts. It is a different question whether the EU Courts may review *national measures* in the light of WTO law.

63. The Court has already answered that question in the affirmative in *Commission* v *Germany*, where it reviewed a national measure in the light of an agreement concluded within the framework of the General Agreement on Tariffs and Trade (GATT).[30] In doing so, it did not follow the proposal made by Advocate General Tesauro, who had argued that no distinction should be made between national and EU measures as far as the standard of review is concerned.[31]

64. I consider that the Court was essentially correct in its view in that decision that the considerations on the basis of which a review of EU acts in the light of the WTO Agreement is precluded cannot be applied to infringements of WTO law by Member States. The possibility of bringing infringement proceedings against a Member State does not run counter to the aims and particular character of dispute settlement in the WTO.

65. First, the possibility of basing infringement proceedings on an infringement of WTO law can ensure the effective enforcement of any negative ruling by the WTO dispute settlement bodies. If the European Union was not able to bring infringement proceedings against Member States in such cases, the internal implementation of international trade law would even be seriously jeopardised. Yet this is particularly important against the background of threatened sanctions for uninvolved Member States and the European Union.

66. Second, infringement proceedings can take on a significance of their own within the framework of negotiations with third countries in the dispute settlement procedure. The European Union takes responsibility for negotiations with third countries, on the basis of its extensive competence, even for national measures, in the field of the CCP.[32] Where it defends a Member State's measure on account of legal, political or other considerations, it will not seek of its own motion to bring infringement proceedings against the Member State in question.[33] However, infringement proceedings give it an

27 Judgments of 12 December 1972, *International Fruit Company and Others* (21/72 to 24/72, EU:C:1972:115); of 23 November 1999, *Portugal* v *Council* (C-149/96, EU:C:1999:574); and of 9 January 2003, *Petrotub and Republica* (C-76/00 P, EU:C:2003:4).

28 Judgment of 5 October 1994, *Germany* v *Council* (C-280/93, EU:C:1994:367, paragraph 109).

29 See the first paragraph of Article 264 TFEU.

30 Judgment of 10 September 1996 (C-61/94, EU:C:1996:313, paragraph 16).

31 Opinion of Advocate General Tesauro in *Commission* v *Germany* (C-61/94, EU:C:1996:194, points 23 and 24).

32 See points 49 to 52 of this Opinion.

33 The Airbus dispute can be mentioned again as a prominent, current example.

instrument in relation to third countries which strengthens its negotiating position, as it thereby shows its negotiating partners that it can, if necessary, ensure internally that infringements of the WTO Agreement are effectively eliminated. Its credibility is therefore increased and account is taken of the need for prompt united external action.

67. Lastly, there may be cases like the present one where the European Union itself is convinced that a national measure is unlawful. By bringing infringement proceedings against the Member State concerned in such cases, it manifests its decision to be responsible for compliance with the WTO Agreement. Where, however, the European Union 'has intended to implement a particular obligation assumed in the context of the WTO, or where the [Union] measure refers expressly to the precise provisions of the WTO agreements', according to settled case-law, it is for the Court to review the legality even of EU acts in the light of the WTO rules.[34] This must apply a fortiori to the measures of a Member State.

68. Neither the specific character of the WTO dispute settlement procedure nor the special role played by the WTO dispute settlement bodies therefore precludes the present infringement proceedings.

4. Conclusion

69. The first ground of complaint thus falls within the Court's jurisdiction.

B. Admissibility of the action for failure to fulfil obligations

70. The objections raised by Hungary to the admissibility of the action should now be examined.

71. Hungary asserts in this regard, first, that the periods granted to it by the Commission in the pre-litigation procedure were too short and its rights of defence were thereby restricted. Second, Hungary alleges that the Commission breached its duty of independence and impartiality and initiated the procedure for purely political reasons, taking into account individual interests on one side.

1. Setting of periods in the pre-litigation procedure

72. The objective of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under EU law or to avail itself of its right to defend itself against the complaints made by the Commission.[35] The Commission must therefore allow Member States a reasonable period to reply to the letter of formal notice and to comply with a reasoned opinion or, where appropriate, to prepare their defence. If the period was so short that the Member State's right to an effective defence is impaired without sufficient justification, the consequence is that the pre-litigation procedure was not validly carried out and the action brought by the Commission must be dismissed as being inadmissible.[36]

34 See judgments of 22 June 1989, *Fediol* v *Commission* (70/87, EU:C:1989:254, paragraphs 19 to 22); of 7 May 1991, *Nakajima* v *Council* (C-69/89, EU:C:1991:186, paragraph 31); of 30 September 2003, *Biret International* v *Council* (C-93/02 P, EU:C:2003:517, paragraph 53); of 23 November 1999, *Portugal* v *Council* (C-149/96, EU:C:1999:574, paragraph 49); and of 1 March 2005, *Van Parys* (C-377/02, EU:C:2005:121, paragraph 40).

35 Judgments of 5 November 2002, *Commission* v *Austria* (C-475/98, EU:C:2002:630, paragraph 35), and of 18 July 2007, *Commission* v *Germany* (C-490/04, EU:C:2007:430, paragraph 25).

36 Judgment of 2 February 1988, *Commission* v *Belgium* (293/85, EU:C:1988:40, paragraph 20).

73. As master of the procedure, the Commission enjoys broad discretion in setting the periods.[37] In order to determine whether the period allowed is reasonable, furthermore, account must be taken of all the circumstances of the case. According to case-law, very short periods may be justified especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts.[38]

74. In the case at issue, the Commission set a period of one month in both the letter of formal notice and the reasoned opinion. It is true that the Commission generally sets two-month periods in the pre-litigation procedure. Nevertheless, a one-month period is not a 'very short' period within the meaning of the case-law cited in point 73.[39] It should also be stated that there were around three and a half months between the letter of formal notice of 27 April 2017 and the expiry of the second one-month period in mid-August of that year in which the Hungarian Government was aware of the Commission's views and, accordingly, had time to assess the possibilities of defending itself and preparing its letter in reply.

75. Furthermore, in this case the Commission rightly relies on the urgency of the matter. It has not expressly explained to Hungary the reasons for urgency. However, the reasons are immediately clear from the circumstances of the case, in particular from the fact that, according to the original version of Paragraph 115(7) of the Law on higher education, higher education institutions which did not fulfil the conditions under Paragraph 76(1) of that law were to have their licence withdrawn and were to be prohibited from admitting new students on 1 January 2018.

76. It was only on 18 October 2017 that Hungary gave notification that this period had been extended by one year, that is, after the relevant periods for the pre-litigation procedure had been set. Therefore, the fact that the Commission did not bring the action for failure to fulfil obligations until February 2018 also fails to rebut the presumption of urgency in setting the periods allowed, contrary to the view taken by the Hungarian Government.

77. Last, according to case-law, consideration is to be given to whether the Member State's ability to defend itself against the Commission's complaints was essentially restricted.[40] Even a 'too short' period does not result in the action being inadmissible if the Commission has taken into consideration a late defence submission and the Member State was therefore able to defend itself adequately against the Commission's complaints.[41]

78. In this case, in addition to its letters of 14 August 2017 and 18 October 2017, the Hungarian Government submitted three further letters by which it replied to the original and the supplementary reasoned opinion. The Commission closely examined all those letters and took them into account in its decision to bring an action.

79. For this latter reason, it is also irrelevant that the Commission also set one-month periods in two other sets of infringement proceedings initiated concurrently against Hungary. It is true that it is conceivable that, as a result of a cumulation of multiple proceedings with short time limits, such a burden is placed on a Member State that it can no longer effectively exercise its rights of defence.

37 See Opinion of Advocate General Mischo in *Commission* v *France* (C-1/00, EU:C:2001:467, point 57). See also, to that effect, judgment of 10 July 1985, *Commission* v *Netherlands* (16/84, EU:C:1985:309, paragraph 10).

38 Judgments of 2 February 1988, *Commission* v *Belgium* (293/85, EU:C:1988:40, paragraphs 13 and 14); of 2 July 1996, *Commission* v *Luxembourg* (C-473/93, EU:C:1996:263, paragraphs 19 and 20); of 28 October 1999, *Commission* v *Austria* (C-328/96, EU:C:1999:526, paragraph 51); and of 13 December 2001, *Commission* v *France* (C-1/00, EU:C:2001:687, paragraphs 64 and 65).

39 In the case in which the judgment of 2 February 1988, *Commission* v *Belgium* (293/85, EU:C:1988:40) was delivered, the periods were 8 and 14 days; in *Commission* v *France* (C-1/00, EU:C:2001:687), the periods were 15 days and 5 days; in *Commission* v *Austria* (C-328/96, EU:C:1999:526), the periods were one week and 15 days; in the case in which the judgment of 31 January 1984, *Commission* v *Ireland* (74/82, EU:C:1984:34) was delivered, a period of five days was at issue.

40 Judgment of 10 July 1985, *Commission* v *Netherlands* (16/84, EU:C:1985:309, paragraph 10).

41 Judgment of 31 January 1984, *Commission* v *Ireland* (74/82, EU:C:1984:34, paragraph 13).

The Commission must also take that possibility into consideration when it sets the relevant periods. However, provided the necessary reasons for the correspondingly short periods apply and the rights of defence of the Member State are not eroded — for which Hungary does not submit any evidence in this case — this fact alone cannot mean that the setting of the relevant periods in an individual case is unlawful.

2. The allegation of political motivation

80. Hungary takes the view, furthermore, that the Commission brought infringement proceedings for purely political reasons, in breach of its duty of impartiality. The proceedings are, it is contended, solely in the interests of the CEU in Budapest.

81. As far as this allegation is concerned, it is questionable, first of all, whether it can be concluded from the fact that the CEU was mentioned once in the letter of formal notice that the proceedings are solely in the interests of that university. There is no doubt that the Commission must be able to single out and name specific affected institutions as examples.

82. In any case, the considerations which led the Commission to bring infringement proceedings cannot in themselves call into question the proper conduct of the pre-litigation procedure or therefore affect the admissibility of the action under Article 258 TFEU.[42] While the Commission must explain why it considers there to be an infringement of EU law, it does not have to state the reasons why it is bringing an action for failure to fulfil obligations.[43]

83. On these grounds, the objections of inadmissibility raised by the Hungarian Government should be rejected in their entirety.

C. Substance of the action for failure to fulfil obligations

84. I will now examine first the Commission's complaints concerning the requirement of the conclusion of an international treaty between Hungary and the State of origin of a foreign higher education institution (see under 1) and then the complaints concerning the requirement of genuine teaching activities in the State of origin (see under 2).

1. Requirement of the conclusion of an international treaty, Paragraph 76(1)(a) of the Law on higher education

85. With regard to the condition of an international agreement between Hungary and the State of origin of a foreign higher education institution on the provision of education services by higher education institutions having their seat outside the EEA, as laid down in Paragraph 76(1)(a) of the Law on higher education, the Commission alleges an infringement of Article XVII of the GATS in conjunction with the specific commitment for the higher education sector and under Article 13, Article 14(3) and Article 16 of the Charter.

42 Judgment of 3 March 2016, *Commission* v *Malta* (C-12/14, EU:C:2016:135, paragraph 24).

43 Judgment of 3 March 2016, *Commission* v *Malta* (C-12/14, EU:C:2016:135, paragraph 26).

(a) Infringement of Article XVII of the GATS in conjunction with Article 216(2) TFEU

86. An infringement of Article XVII:1 of the GATS in conjunction with Hungary's specific commitment for the higher education sector would also constitute an infringement of its obligation under Article 216(2) TFEU. [44]

(1) Intensity of review

87. As regards the examination of infringements of customary international law, the Court has acknowledged in the past that its review is limited to establishing manifest infringements. [45] It is true that it has rejected this, in principle, for the review of international agreements concluded by the European Union. [46]

88. In the present case, however, limiting the Court's intensity of review to manifest infringements of the GATS could be contemplated in view of two arguments which Hungary raised against the jurisdiction of the Court.

89. First, the specific implementation of the obligations under the GATS in this case is based on the Member States' own internal competence in the education sector. In such sensitive sectors, the Member States are intended to retain a degree of organisational freedom which can be taken into account by decreasing the intensity of review.

90. Second, the specific character of the WTO dispute settlement procedures and the fact that the WTO dispute settlement bodies ultimately have jurisdiction for the binding determination of infringements of the WTO Agreement are conducive to leaving the resolution of particularly contentious and difficult questions to those specialised bodies and limiting the review of the GATS for 'internal purposes' to manifest infringements. [47]

91. As far as the present case is concerned, however, I take the view that there is a manifest infringement of the GATS, as I will explain below.

(2) Higher education activities as a service within the meaning of the GATS

92. Hungary asserts that the CEU, in the sole interest of which, in reality, the infringement proceedings were initiated, is a non-profit-making organisation and its activities are not therefore covered by the GATS. It is correct that, in Article I:3(b), the GATS excludes from its scope services which are supplied neither on a commercial basis nor in competition with other services.

93. The Commission does not, however, object to the specific treatment of the CEU, but to Paragraph 76(1)(a) of the Law on higher education. [48]

94. The Hungarian Government itself states in this regard that Paragraph 76(1)(a) of the Law on higher education is applicable to all higher education institutions, but does not deny that it also covers institutions which offer services for remuneration, and therefore undoubtedly carry on an economic activity.

44 In such a case, the Court finds an infringement not only of the international treaty in question, but also of Article 216(2) TFEU (formerly Article 300(7) EC); see judgments of 19 March 2002, *Commission* v *Ireland* (C-13/00, EU:C:2002:184), and of 7 October 2004, *Commission* v *France* (C-239/03, EU:C:2004:598).

45 Judgments of 25 January 1979, *Racke* (98/78, EU:C:1979:14, paragraph 52), and of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 110).

46 Judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 110).

47 See point 59 of this Opinion.

48 See, to that effect, judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 49).

(3) Substance of Hungary's specific commitments for the education sector

95. Because the condition in Paragraph 76(1)(a) of the Law on higher education applies only to foreign service suppliers, it might breach the principle of national treatment.

96. Under Article XVII:1 of the GATS, however, the obligation of each WTO Member to accord service suppliers of any other Member treatment no less favourable than that it accords to its own like service suppliers is subject to any conditions and qualifications set out for the sector concerned in the Schedule of Commitments.

97. In other words, the national treatment obligation under the GATS is a specific commitment which must have been assumed definitely and in some measure by a Member, unlike under the GATT, for example, where it stems directly from Article III thereof. Under Article XX:3 of the GATS, the schedules of commitments of each Member are annexed to the Agreement and form an integral part thereof.

98. In Hungary's specific commitments [49] for higher education services, the condition 'Establishment of schools is subject to licence from the central authorities' is inscribed in the third mode of supply ('commercial presence') in the market access column, whilst no limitations were stipulated for national treatment ('None').

99. The parties in this case disagree as to whether and, if appropriate, to what extent the prima facie unlimited obligation of Hungary to accord national treatment is restricted by the limitation on market access relating to licences.

100. It follows from Article XX:2 of the GATS that the inscription 'None' in the national treatment column does not necessarily establish an obligation to accord comprehensive national treatment. Under that provision, 'measures inconsistent with both Articles XVI [on market access] and XVII [on national treatment] shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well'.

101. According to the decision-making practice of the WTO dispute settlement bodies, Article XX:2 of the GATS is a simplification rule. [50] Thus, for measures inconsistent with *both* the market access obligation *and* the national treatment obligation, it is sufficient to inscribe the limitation for market access only. This then covers any difference in treatment between domestic and foreign service suppliers also caused by the measure. [51]

49 Hungary Schedule of Specific Commitments, WTO Doc. GATS/SC/40 of 15 April 1994, p. 19 (section 5.C.). See now the Consolidated Schedule of Specific Commitments of the European Union and its Member States of 15 March 2019, WTO Doc. S/C/W/273, pp. 166 and 167 (section 5.C.).

50 WTO Panel Report of 16 July 2012, adopted by the DSB on 31 August 2012, WT/DS413/R, China — Electronic Payment Services, section 7.658. '… [T]he special rule in Article XX:2 provides a simpler requirement: a Member need only make a single inscription of the measure under the market access column, which then provides an implicit limitation under national treatment.'

51 WTO Panel Report of 16 July 2012, adopted by the DSB on 31 August 2012, WT/DS413/R, China — Electronic Payment Services, section 7.661: '… Article XX:2 provides … that the measure inscribed in the market access column encompasses aspects inconsistent with both market access and national treatment obligations … [This thus permits] China to maintain measures that are inconsistent with both Articles XVI and XVII. With an inscription of "Unbound" for subsector (d) in mode 1 under Article XVI, and a corresponding "None" for Article XVII, China has indicated that it is free to maintain the full range of limitations expressed in the six categories of Article XVI:2, whether discriminatory or not.'

102. It should be stated in this regard that Article XVI of the GATS does not prohibit all conceivable measures affecting market access. In fact, only six precisely defined categories of limitations are incompatible with Article XVI of the GATS. They are set out in Article XVI:2 of the GATS and are of a mainly quantitative nature. [52] Only if one of those categories is concerned does a condition inscribed in the 'market access' column also characterise the national treatment obligation.

103. As for measures which are not incompatible with Article XVI:2 of the GATS, on the other hand, the inscription 'None' in the national treatment column in this case means that the Member concerned is fully required to grant national treatment. [53]

104. There may certainly be licence-related limitations which are of a quantitative nature and thus fall within one of the categories referred to in Article XVI:2 of the GATS. For example, the grant of a licence may be made dependent on a needs test. On the basis of the inscribed limitation on market access, Hungary is permitted to maintain and introduce such measures. Furthermore, under Article XX:2 of the GATS such measures may also be discriminatory as, according to that provision, the limitation inscribed for market access also applies to the national treatment obligation.

105. A licence-related limitation can, however, also be of a qualitative nature, such as where the grant of the licence is subject to certain substantive criteria being met. Such a measure is not prohibited a priori by Article XVI of the GATS. Therefore, Article XX:2 is also not applicable to it. Qualitative licence-related limitations should therefore be (also) inscribed in the column on limitations on national treatment. Otherwise, the national treatment obligation would remain fully applicable to such measures, following from the inscription 'None'. [54]

106. As regards the measure at issue, it should be stated that the requirement of the conclusion of an international treaty, like the requirement of the existence of teaching activities in the State of origin, does not seek a quantitative restriction. Nor does it constitute a requirement as to legal form (see Article XVI:2(e) of the GATS). Consequently, the measures are not such as to fall under Article XVI:2 of the GATS. Thus, Article XX:2 of the GATS is also not applicable to them.

107. It follows that Hungary is free to introduce such requirements from the point of view of market access. Nevertheless, this holds only if they are applicable without distinction as, by the inscription 'None', Hungary has committed itself fully to national treatment.

108. It would have been perfectly possible under the GATS opt-in system for Hungary to inscribe such a limitation for national treatment. That option was not taken, however.

109. It must therefore be stated that, with regard to the contested measures, Hungary is fully obliged to accord national treatment.

110. This conclusion is also to be regarded as manifest in accordance with the standard of review described above, in the light of the existing decision-making practice of the WTO dispute settlement organs. [55]

52 WTO Panel Report of 16 July 2012, adopted by the DSB on 31 August 2012, WT/DS413/R, China — Electronic Payment Services, section 7.652: 'Unlike Article XVII, however, the scope of the market access obligation does not extend generally to "all measures affecting the supply of services". Instead, it applies to six carefully defined categories of measures of a mainly quantitative nature. The issue thus arises whether the scope of these measures, and thus the extent of China's absence of obligation with respect thereto, extends to discriminatory measures in the sense of Article XVII.'

53 WTO Panel Report of 16 July 2012, adopted by the DSB on 31 August 2012, WT/DS413/R, China — Electronic Payment Services, section 7.663: '… Due to the inscription of "None", China *must grant national treatment with respect to any of the measures at issue that are not inconsistent with Article XVI:2*' (emphasis added).

54 See, *mutatis mutandis*, footnote 53.

55 See above, points 88 and 90 of this Opinion.

(4) Existence of a difference in treatment

111. The requirement of the conclusion of an international treaty for higher education institutions having their seat in third countries leads to a difference in treatment between institutions having their seat in Hungary and institutions having their seat in third countries. The same applies, moreover, to the requirement of offering teaching courses in the State of origin.

112. This conclusion is not called into question by the fact that domestic service suppliers naturally would not be able to fulfil the requirement in question. Under Article XVII:3 of the GATS, less favourable treatment requires only a modification of the conditions of competition on the domestic market in favour of domestic services or service suppliers. Through the introduction of additional requirements, however, competition is modified to the detriment of higher education institutions having their seat in third countries.

(5) Exception under Article XIV of the GATS?

113. Lastly, it must be examined whether an exception under Article XIV of the GATS applies to the requirement of the conclusion of an international treaty.

114. The Hungarian Government maintains in this regard that the measure is necessary to guarantee public policy and public security and to prevent deceptive and fraudulent practices. Those aims are expressly mentioned in Article XIV(a) and (c)(i) of the GATS.

115. Under Paragraph 76(1)(a) of the Law on higher education, the treaty must be concluded with the State responsible, while in the case of a federal State in which the central government is not responsible for recognition of higher education institutions, a prior agreement must be concluded with the central government. Substantively, the treaty must relate to fundamental support for the activities of the institution concerned in Hungary from the government of the State of origin.

116. The conclusion of international treaties, in particular on recognition of qualifications, is a common instrument of international cooperation in higher education. With a view to preventing fraudulent practices, a treaty relating to the activities of a certain educational establishment in the host State, concluded with the government of the State of origin, performs a kind of guarantee function in principle. It makes it clear to the host State that the State of origin considers the establishment to be credible and supports its activities.

117. However, Article XIV of the GATS provides that exceptions are not to be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services'.

118. Against this background, the requirement of the conclusion of an international treaty cannot, on closer examination, be regarded as a permissible exception as, in its specific form, it appears to be a means of arbitrary discrimination within the meaning of Article XVI of the GATS.

119. First, the Commission rightly asserts that the conclusion of an international treaty necessarily involves the exercise of political discretion, which is not fully amenable to judicial review. Paragraph 76(1)(a) of the Law on higher education thus makes the grant of an operating licence for higher education institutions having their seat in third countries subject to a condition the fulfilment of which is ultimately in the control of Hungary. In the final analysis, this amounts to a 'subject to licence' condition. Hungary did not impose any such condition when it entered into its obligation to

offer treatment equal to that afforded to nationals.[56] In any event, the Hungarian Government can arbitrarily delay the conclusion of the treaty, which can result in a higher education institution being refused an operating licence solely due to the short period under Paragraph 115(7) of the Law on higher education.

120. As, under Paragraph 76(1)(a) of the Law on higher education, the necessary treaty relates only to fundamental support for the activities of the higher education institution concerned in Hungary, it is also unclear why that requirement could not also be met by a unilateral declaration made by the government of the State of origin.

121. Second, Paragraph 76(1)(a) of the Law on higher education specifies the requirements for international treaties with federal States, providing that a prior agreement with the central government is necessary if it is not responsible for recognition of the binding effect of an international treaty. This particular requirement is a condition that possibly cannot be fulfilled and is thus ultimately arbitrary. It is at any rate uncertain whether the constitutional framework of the federal State in question actually permits the required agreement with the central government where higher education is the responsibility of the constituent States.[57]

122. Lastly, it clear from the fact that the condition at issue is also imposed on higher education institutions already operating in Hungary that it is not an objective requirement for combating fraud. It is not evident how fraudulent activity by such an institution could be countered by an agreement with the central government of its State of origin.

123. Paragraph 76(1)(a) of the Law on higher education cannot therefore be justified as an exception under Article XIV of the GATS.

124. Given the arbitrary character of the measure, this conclusion is also to be regarded as manifest.

125. In the light of the foregoing, the requirement of the conclusion of an international treaty is not compatible with the obligations entered into by Hungary in the light of Article XVII:2 of the GATS and the specific commitment for the education sector. By adopting Paragraph 76(1)(a) of the Law on higher education, Hungary therefore infringed Article XVII of the GATS in conjunction with Article 216(2) TFEU.

(b) Infringement of Article 14(3) of the Charter

126. The Commission further asserts that the condition of the conclusion of an international treaty with the State of origin in order for higher education institutions having their seat in third countries to commence or continue their activities in Hungary constitutes an infringement of the freedom to found educational establishments enshrined in Article 14(3) of the Charter. It also infringes the freedom to conduct a business enshrined in Article 16 of the Charter.

(1) Applicability of the Charter

127. As has already been shown, the individual commitments under the GATS constitute obligations on the European Union under international law. Under Article 51(1) of the Charter, the EU institutions are bound by the Charter in implementing all their obligations.

56 See above, points 107 to 109 of this Opinion.

57 This applies, for example, to the conclusion of an international treaty with US States, whose area of responsibility includes higher education.

128. The Member States, on the other hand, are bound by the Charter, under Article 51(1) of the Charter, only 'when they are implementing Union law'. There is precisely such implementation of Union law where the Member States internally put into effect the European Union's obligations under international law on the basis of their own regulatory competence. In doing so, they fulfil an obligation in relation to the European Union, which has assumed responsibility, externally, for the due performance of the agreement.[58] The applicability of the Charter ensures that the Member States do not infringe fundamental rights 'as representatives' of the European Union.[59]

129. That naturally does not mean that measures within the education sector of the Member States are generally to be assessed by reference to the fundamental rights of the European Union. Only measures that are governed by EU law are subject to those fundamental rights.[60] That applies in particular to measures in relation to which EU law imposes particular obligations on the Member States. In the present case Article XVII GATS imposes on Hungary a comprehensive duty of national treatment. The application of the Charter is a consequence of the fact that the Hungarian legislation is not compatible with the duty of national treatment imposed by Article XVII of the GATS.

(2) Infringement of Article 14(3) of the Charter

130. Article 14(3) of the Charter establishes the freedom to found educational establishments. This must necessarily include the subsequent operation of the educational establishment, otherwise its foundation is pointless. It is clear from the Explanations relating to the Charter that Article 14(3) of the Charter represents a specific expression of the freedom to conduct a business under Article 16 of the Charter in the field of privately financed education.[61]

131. This means, first, that Article 16 of the Charter, which is also relied on by the Commission, should not be examined separately in this case, as Article 14(3) of the Charter is more specific in this regard.

132. Second, it means that Article 14(3) of the Charter in any case protects the business side of the private higher education institution's activities, that is to say, the commercial aspects of establishing and operating a higher education institution.

133. A condition like the one laid down in Paragraph 76(1)(a), whereby, if it is not fulfilled, the foundation and operation of such a private institution are prohibited, therefore falls within the scope of protection offered by Article 14(3) of the Charter, especially since the creation of an autonomous fundamental right to found private educational establishments suggests that, over and above the economic aspect, it is intended to afford specific protection to the existence of private educational establishments as such. In my view, this indicates that Article 14(3) of the Charter is intended to guarantee the continued existence of private educational establishments alongside State colleges and universities, and ultimately a diversity of education opportunities.

58 See points 53 and 47 of this Opinion.

59 See also, in this respect, Opinion of Advocate General Saugmandsgaard Øe in *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2018:971, point 82).

60 To this effect, judgments of 6 March 2014, *Siragusa* (C-206/13. EU:C:2014:126, paragraph 25 et seq.), and of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 36 et seq.).

61 OJ 2007 C 303, p. 22.

(3) Possibility of limitation in the present case

134. As regards the possibility of limiting Article 14(3) of the Charter, it is clear from its wording that the freedom to found educational establishments is 'in accordance with the national laws governing the exercise of such freedom and right'. This means that the freedom to found educational establishments is guaranteed, in principle, only within the scope of the applicable legal requirements for their foundation. In other words, the legislature may, in principle, lay down the conditions for the foundation and operation of educational establishments by statute without infringing Article 14(3) of the Charter. However, as is clear from Article 52(1) of the Charter, it must in any case respect the principle of proportionality. [62]

135. The aims cited by Hungary as justification are, first, protection of public policy, in particular against deceptive and fraudulent practices, and, second, assurance of the quality of teaching courses.

136. As far as the first of these aims is concerned, it has already been explained that 'fundamental support for the activities' of the higher education institution concerned, as required under Paragraph 76(1)(a) of the Law on higher education, can also be expressed by a unilateral declaration made by the State [63] and the conclusion of an international treaty is therefore not necessary.

137. In addition, as has also already been discussed, in its specific form, the rule entails the risk of arbitrary treatment, [64] as the special requirement relating to the conclusion of a treaty by the central government does not ensure that it can actually be fulfilled. In addition, the conclusion of the treaty, and in particular the time when it is done, is entirely at the discretion of the Hungarian Government. This factor is even more significant since the operation of previously lawful educational establishments is also subject to supplementary conditions, the fulfilment of which is not in the control of the institutions concerned and which they could not have foreseen. [65]

138. As regards the second aim of quality assurance, Hungary has not explained how the mandatory conclusion of an international treaty with the central government of the State of origin of a foreign higher education institution might help to further that aim.

139. This holds all the more since that requirement is also imposed on existing institutions, without the need to demonstrate quality deficiencies or to provide evidence of how they might be eliminated through the conclusion of an international treaty with the institution's State of origin.

140. Paragraph 76(1)(a) of the Law on higher education cannot therefore be regarded as a lawful limitation of the freedom to found educational establishments. Accordingly, I conclude that the adoption of Paragraph 76(1)(a) of the Law on higher education also constitutes an infringement of Article 14(3) of the Charter.

(c) Infringement of the second sentence of Article 13 of the Charter

141. Because higher education institutions which do not fulfil the requirement laid down in Paragraph 76(1)(a) of the Law on higher education are, as a consequence, also not permitted to carry out any teaching or research activities in Hungary or must cease such activities, if appropriate after the expiry of a transitional period, the Commission also alleges an infringement of the second sentence of Article 13 of the Charter. Under that provision, academic freedom must be respected.

62 See, with regard to the similarly worded Article 16 of the Charter, judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 47).

63 See points 116 and 119 of this Opinion.

64 See points 118 to 121 of this Opinion.

65 See also point 122 of this Opinion.

142. As far as is apparent, the Court has not yet had an opportunity to take a view on the scope of protection offered by the second sentence of Article 13 of the Charter.

143. One possible point of reference is Article 52(3) of the Charter, under which the meaning and scope of the rights of the Charter which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is the same as those laid down by the ECHR. In the case-law of the European Court of Human Rights (ECtHR), academic freedom is treated as a manifestation of freedom of expression under Article 10 ECHR,[66] to which the Explanations on Article 13 of the Charter also refer.[67] This includes, according to the case-law of the ECtHR, in particular the freedom to conduct academic research and to adopt and disseminate academic opinions.[68]

144. The legal rule regarding the conclusion of an international treaty in Paragraph 76(1)(a) of the Law on higher education does not limit that freedom directly. It is nevertheless likely to deprive academics working at the universities concerned of the infrastructure needed to exercise academic freedom.

145. From a schematic point of view, academic freedom can be found in Article 13 of the Charter together with the protection of freedom of the arts, which, according to the case-law of the ECtHR, is also a manifestation of the freedom to hold opinions. It follows that academic freedom under the second sentence of Article 13 of the Charter can also be regarded as a fundamental right of communication. Academic freedom is not, however, restricted to mere communication.

146. Rather, the Charter, unlike the ECHR, contains a fundamental right to freedom of the arts and sciences which is autonomous of the general freedom to hold opinions. This includes not only substantively autonomous research and teaching that is free from State interference, but also its institutional and organisational framework. Affiliation with a State or private university is, in practice, an essential condition for academic research. The university serves as a platform for academic discourse and a network and infrastructure for teaching staff, students and donors. The freedom to found educational establishments enshrined in Article 14(3) of the Charter protects only part of that institutional framework, namely in so far as private educational establishments are concerned.

147. A requirement which, if not fulfilled, means that no teaching or research activities can take place at a university or must be ended thus also falls within the scope of protection offered by the second sentence of Article 13 of the Charter.

148. As regards the possibility of limiting the second sentence of Article 13 of the Charter, it is clear from the Explanations relating to the Charter that it is subject to the limitations authorised by Article 10 ECHR. These are limitations which are prescribed by law and are necessary in a democratic society in order to safeguard certain aims listed therein. They include, for example, the protection of public safety and the prevention of disorder and crime. These requirements are essentially the same as those in Article 52(1) of the Charter.

149. It should be noted that the second sentence of Article 13 of the Charter, in so far as it also protects the institutional and organisational framework for research and teaching, does not guarantee the continued existence of each individual educational institution. Nevertheless, a rule which results in the closure of a higher education institution must be proportionate, as is already evident from Article 52(1) of the Charter.

66 ECtHR, judgments of 23 June 2009, *Mustafa Erdoğan v. Turkey* (CE:ECHR:2009:0623JUD001708903), and of 15 April 2014, *Hasan Yazıcı v. Turkey* (CE:ECHR:2014:0527JUD000034604).

67 OJ 2007 C 303, p. 22.

68 ECtHR, judgment of 15 April 2014, *Hasan Yazıcı v. Turkey* (CE:ECHR:2014:0527JUD000034604, § 40).

150. For the reasons already mentioned, the requirement in Paragraph 76(1)(a) of the Law on higher education is to be regarded as disproportionate and, consequently, also cannot justify a limitation of the second sentence of Article 13 of the Charter. [69]

(d) Conclusion

151. In summary, I therefore suggest that the Court find that, by adopting Paragraph 76(1)(a) of the Law on higher education, Hungary infringed its obligations under Article XVII of the GATS in conjunction with Article 216(2) TFEU and under the second sentence of Article 13 and Article 14(3) of the Charter.

2. Requirement of the existence of genuine teaching activities in the State of origin, Paragraph 76(1)(b) of the Law on higher education

152. With regard to Paragraph 76(1)(b) of the Law on higher education, which makes the establishment and continued operation of a foreign higher education institution in Hungary dependent on the existence of genuine teaching activities in the State of origin, the Commission alleges infringements of Article 16 of Directive 2006/123, Articles 49 and 56 TFEU, Article 13, Article 14(3) and Article 16 of the Charter and Article XVII of the GATS. Unlike the requirement of the conclusion of an international treaty that has just been examined, the condition now under review also applies to higher education institutions having their seat in another Member State of the European Union or the EEA.

(a) Infringement of Article 49 TFEU in conjunction with Article 54 TFEU

153. It is first necessary to consider the alleged infringement of freedom of establishment. It must be assumed that 'teaching activities leading to a qualification', which are subject to special requirements under Paragraph 76(1) of the Law on higher education, are offered in the vast majority of cases by a permanent establishment in Hungary.

(1) Limitation of freedom of establishment

154. According to the Court's case-law, the organisation of remuneration of university courses falls within the scope of freedom of establishment when that activity is carried on by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State. [70]

155. It is settled case-law that Article 49 TFEU includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. On the other hand, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment within the meaning of the first paragraph of Article 49 TFEU must be regarded as constituting restrictions on that freedom. [71]

69 See points 136 to 139 of this Opinion.

70 Judgment of 13 November 2003, *Neri* (C-153/02, EU:C:2003:614, paragraph 39).

71 Judgments of 11 July 2002, *Gräbner* (C-294/00, EU:C:2002:442, paragraph 38), and of 13 November 2003, *Neri* (C-153/02, EU:C:2003:614, paragraph 41).

156. By these standards, Paragraph 76(1)(b) of the Law on higher education limits the freedom of establishment of foreign higher education institutions in Hungary, as they are impeded in commencing higher education activities and are required to cease those activities after the expiry of the transitional period if they do not offer higher education in their State of origin.

(2) Justification of the limitation

157. As regards the justification for this measure, Article 52(1) TFEU provides that special treatment for foreign nationals may be justified only on grounds of public policy, public security or public health.

158. There is a case of 'special treatment for foreign nationals' here, as only foreign higher education institutions are required to prove the existence of an institution in their State of origin in order to commence or continue teaching activities in Hungary. Domestic higher education institutions are naturally unable to provide such proof because they do not have a seat in another Member State. This does not mean, however, that foreign higher education institutions would not be comparable in this respect with domestic higher education institutions.[72] Having a seat in another Member State cannot be a permissible criterion for differentiation in this connection. The discriminatory character of the rules resides precisely in the fact that the activities of foreign higher education institutions are subject to additional conditions because they have their seat in another Member State.

159. Hungary also relies on the protection of public policy and claims that the requirement at issue is necessary to prevent deceptive and fraudulent practices. In addition, it is contended, it is the only way to assure teaching quality.

160. The justification of public policy means protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society. Although the importance of the aims of preventing deceptive and fraudulent practices and assuring high teaching quality should not be dismissed, no fundamental interests of society are affected within the meaning of this definition.[73]

161. It should be pointed out in this regard that the Court has ruled that Article 49 TFEU prohibits Member States, in principle, from prohibiting the formation of a branch solely on the ground that the company concerned has not carried on business activities in the State in which it has its seat.[74] It is another matter whether the Member State may impose requirements for the activities of the branch and, if so, which.

162. Moreover, a justification for other overriding reasons in the public interest can be taken into consideration only in the case of restrictions of freedom of establishment which are applied without discrimination on grounds of nationality.[75]

163. By adopting Paragraph 76(1)(b) of the Law on higher education, Hungary therefore infringed Article 49 TFEU.

72 The fundamental freedoms are specific prohibitions of discrimination which thus prohibit only different treatment of comparable situations; see judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 30).

73 The Court considered, for example, the prevention of serious offences as affecting one of the fundamental interests of society; see judgment of 13 July 2017, *E* (C-193/16, EU:C:2017:542, paragraph 20).

74 Judgments of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 38), and of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraph 97).

75 See, for example, judgments of 9 March 2017, *Piringer* (C-342/15, EU:C:2017:196, paragraph 53), and of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraph 51).

(b) Infringement of Article 16 of the Services Directive

164. The Commission also considers that the condition in Paragraph 76(1)(b) of the Law on higher education constitutes an infringement of the Services Directive.

(1) Applicability

165. Under Article 2(1) of the Services Directive, the directive applies to services supplied by providers established in a Member State, 'service' being defined in Article 4(1) of the directive as a 'self-employed economic activity, normally provided for remuneration'. According to case-law, courses provided by educational establishments financed essentially by private funds that do not come from the provider itself constitute services, since the aim of such establishments is to offer a service for remuneration.[76]

166. Article 2(1) of the Services Directive does not explicitly lay down any other requirements governing applicability. In particular, it does not have regard to the temporary nature of the activities, which is used in connection with the fundamental freedoms in distinguishing between freedom of establishment and freedom to provide services,[77] as the Services Directive also contains rules on freedom of establishment for providers.[78] I consider this distinction to be relevant in this case, however, as the Commission specifically alleges an infringement of Article 16 of the Services Directive, which is in Chapter IV on free movement of services.

167. Paragraph 76(1)(b) of the Law on higher education falls within the scope of Article 16 of the Services Directive only in so far as it makes the temporary provision of teaching activities leading to a degree subject to special conditions. Such business models are perfectly feasible, although the vast majority of higher education institutions offering qualifications undoubtedly do so through a permanent establishment.

168. In any event, Paragraph 76(1)(b) of the Law on higher education does not distinguish between institutions which carry on teaching activities in Hungary permanently and those which do so only temporarily. Nor does the rule distinguish between suppliers of privately financed education services and those whose activities are not for profit.

169. The rule therefore falls at least partly within the scope of Article 16 of the Services Directive.

(2) Lawful requirement for the purposes of Article 16(1) and (3) of the Services Directive?

170. Under Article 16(1) and (3) of the Services Directive, Member States may make access to or exercise of a service activity in their territory only subject to compliance with requirements which are non-discriminatory, necessary and proportionate. The requirements set out must, in accordance with point (b) of the third subparagraph of Article 16(1) and Article 16(3) of the directive, serve to maintain public policy, public security, public health or the protection of the environment.

171. In the present case, the requirement in Paragraph 76(1)(b) of the Law on higher education is not lawful because of its discriminatory character.[79]

76 Judgments of 11 September 2007, *Commission* v *Germany* (C-318/05, EU:C:2007:495, paragraph 69); of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492, paragraph 48); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 48).

77 Judgment of 11 December 2003, *Schnitzer* (C-215/01, EU:C:2003:662, paragraphs 27 and 28).

78 See Chapter III of the Services Directive.

79 See, with regard to discriminatory character, point 158 of this Opinion.

172. In any event, however, the measure cannot be justified on any of the grounds mentioned in point (b) of the third subparagraph of Article 16(1) or Article 16(3). It has already been shown that the rule at issue cannot be justified on grounds of protection of public policy. [80]

173. The EU legislature did not provide in Article 16 of the Services Directive, — unlike in other provisions of the directive [81] — for a justification for other overriding reasons in the public interest, which, according to recital 40 of the directive, include a high level of education.

174. It is true that case-law recognises a justification for overriding reasons in the public interest in the context of Article 56 TFEU. However, such a justification has not thus far been recognised in similar cases where there are discriminatory measures. [82] Consequently, there is no need to determine in the present case whether the possible justifications in the context of Article 16 of the Services Directive could be lawfully restricted by the EU legislature vis-à-vis the justifications recognised in primary law, [83] as the measure at issue likewise could not be considered to be justified under Article 56 TFEU.

175. It must therefore be stated that the requirement of the existence of genuine teaching activities in the State of origin does not satisfy the requirements of Article 16(1) and (3) of the Services Directive. By Paragraph 76(1)(b) of the Law on higher education, Hungary thus infringed Article 16 of the Services Directive.

176. The Services Directive contains more specific rules than Article 56 TFEU, which is relied on in the alternative, and there is thus no need to examine the latter provision in this case. [84]

(c) Infringement of the Charter

177. Finally, it must be examined whether by adopting Paragraph 76(1)(b) of the Law on higher education, Hungary breached the fundamental rights of the higher education institutions concerned, in particular those under Article 13 and Article 14(3) of the Charter. [85]

(1) Applicability of the Charter

178. Paragraph 76(1)(b) of the Law on higher education constitutes a deficient transposition of the Services Directive. [86] The Charter is therefore applicable under Article 51(1) thereof. [87]

179. The question whether a separate infringement of the Charter can be found if EU law is applicable merely by reason of a restriction of fundamental freedoms does not therefore arise in this case, contrary to the view taken by Hungary. [88]

80 See, *mutatis mutandis*, point 160 of this Opinion.

81 See, for example, Article 9(1) and (4), Article 10(2) and Article 11(1) of the Services Directive.

82 Judgments of 25 July 1991, *Collectieve Antennevoorziening Gouda* (C-288/89, EU:C:1991:323, paragraphs 11 to 13); of 19 July 2012, *Garkalns* (C-470/11, EU:C:2012:505, paragraph 37); and of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 43).

83 With regard to the parallel problem in respect of Article 14 of the Services Directive, see judgment of 16 June 2015, *Rina Services and Others* (C-593/13, EU:C:2015:399, paragraph 40). For the arguments, see Opinion of Advocate General Szpunar in *X and Visser* (C-360/15 and C-31/16, EU:C:2017:397, point 99 et seq.).

84 Judgment of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 118). See, by analogy, on the relationship between Article 15 of the Services Directive and Article 49 TFEU, judgment of 7 November 2018, *Commission* v *Hungary* (C-171/17, EU:C:2018:881, paragraph 87).

85 In this case, Article 14(3) of the Charter takes precedence, as a *lex specialis*, over Article 16 of the Charter, which is also relied upon; see above, points 130 and 132 of this Opinion.

86 See points 170 to 175 of this Opinion.

87 See, to that effect, judgment of 1 December 2016, *Daouidi* (C-395/15, EU:C:2016:917, paragraph 64 et seq.). See also judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 66).

88 See, on this point, Opinions of Advocate General Saugmandsgaard Øe in Joined Cases *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2017:410, points 121 to 142), and *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2018:971, points 64 to 112).

180. However, the finding of a separate breach of a fundamental right has no particular repercussions in this case, as the action for failure to fulfil obligations is already well founded on account of the infringements of the Services Directive and Article 49 TFEU. The separate examination of fundamental rights nevertheless reflects the particular significance and nature of the infringement more clearly. This holds especially if, as in this case, the alleged breach of fundamental rights goes beyond the detrimental economic effects which are already covered by a finding of infringements of the internal market rules.

(2) Interference

181. As has already been explained, a condition which, if not fulfilled, means that a university's teaching and research activities may not be commenced or must be ended and the foundation and operation of such an institution on a profit-making basis are prohibited falls within the scope of protection offered by both the second sentence of Article 13 and Article 14(3) of the Charter. [89]

(3) Justification

182. It must therefore be examined whether interference with those fundamental rights caused by Paragraph 76(1)(b) of the Law on higher education can be justified. In particular, interference would have to be proportionate. [90] According to the wording of Article 52(1) of the Charter, limitations of fundamental rights may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

183. Hungary asserts, first, that only where teaching activities exist in the State of origin can its authorities be certain that the activities are lawful and that all the conditions for teaching activities in the State of origin are fulfilled. Fraudulent practices can thereby be prevented. Second, the authorities can verify, on the basis of the education offered in the State of origin, whether the institution has a sustainable strategy and qualified teaching staff, thereby assuring the quality of teaching.

184. It is true that the successful operation of a higher education institution in the State of origin indicates that it meets all the legal conditions for operation there. That condition is therefore appropriate for eliminating illegal and fraudulent institutions at any early stage.

185. The legality and integrity of a higher education programme certainly cannot, however, be verified solely on the basis of existing teaching activities in the State of origin. If there are no such activities in the State of origin, a Member State must therefore also accept other appropriate proof, particularly given the paramount importance of the right to free establishment in the European Union, which, according to case-law, specifically includes the right of companies to carry on their activities principally or exclusively in a Member State other than the one in which they have their seat. [91] In order to avoid contradictory assessments, proof of activities in the State of origin cannot therefore be regarded as necessary.

186. As regards the aim of quality control, the Hungarian Government has not explained at all how the mere existence of higher education in the State of origin might assure the quality of education in the host State. It can hardly be presumed that the university employs the same teaching staff and teaches the same content in both States or that quality standards are the same in both States. The appropriateness of the measure is thus questionable.

89 See points 133 and 147 of this Opinion.

90 See points 134 and 148 of this Opinion.

91 See point 158 of this Opinion and judgment of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraph 97).

187. As regards the necessity of the requirement, it should be noted that it would be impossible to carry out quality control upon the initial foundation of domestic higher education institutions if existing provision was the only means to verify quality. Consequently, recourse must inevitably be had to other quality control measures which could also be applied to foreign higher education institutions.

188. Therefore, the link to the existence of teaching activities in the State of origin is, in itself, not appropriate and generally not necessary in any case for ensuring the legality and quality of higher education.

(4) Conclusion

189. By adopting Paragraph 76(1)(b) of the Law on higher education, Hungary thus also infringed the second sentence of Article 13 and Article 14(3) of the Charter.

(d) Infringement of Article XVII of the GATS in conjunction with Article 216(2) TFEU

190. In so far as the Commission also alleges an infringement of Article XVII of the GATS in respect of the requirement in Paragraph 76(1)(b) of the Law on higher education, it is sufficient to note that the rules of primary and secondary EU law prevail over international trade law in relations between Member States. [92]

191. However, Paragraph 76(1)(b) of the Law on higher education also applies to universities from third countries. For the abovementioned reasons, [93] that rule thus infringes the national treatment obligation under Article XVII of the GATS and cannot be regarded as a permissible exception in accordance with Article XIV of the GATS. That provision permits measures necessary to protect public morals or to maintain public order [94] or to prevent deceptive and fraudulent practices. As has been explained, the requirement of teaching activities in the State of origin does not fulfil those requirements. [95]

192. An infringement of Article XVII of the GATS in conjunction with Article 216(2) TFEU should thus also be taken to exist with regard to the requirement in Paragraph 76(1)(b) of the Law on higher education.

VI. Conclusion

193. In the light of all the foregoing considerations, I propose that the Court should rule as follows:

(1) By adopting Paragraph 76(1)(a) of Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény (Law CCIV of 2011 on national higher education), as amended, Hungary infringed Article XVII of the General Agreement on Trade in Services in conjunction with Article 216(2) TFEU and the second sentence of Article 13 and Article 14(3) of the Charter of Fundamental Rights of the European Union.

(2) By adopting Paragraph 76(1)(b) of Law CCIV of 2011, as amended, Hungary infringed Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Article 49 TFEU in conjunction with Article 54 TFEU,

92 See, to that effect, judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 161 et seq. and paragraph 165 et seq.).

93 See points 106 and 111 of this Opinion.

94 This is defined in the Agreement as a 'genuine and sufficiently serious threat is posed to one of the fundamental interests of society'.

95 See, *mutatis mutandis*, point 160 and points 183 to 188 of this Opinion.

Article XVII of the General Agreement on Trade in Services in conjunction with Article 216(2) TFEU and the second sentence of Article 13 and Article 14(3) of the Charter of Fundamental Rights.

(3) Hungary shall bear the costs.