

Does WTO Law Protect Academic Freedom? It Depends on How You Use It

Introduction

On October 6, 2020, the Court of Justice of the European Union (CJEU) handed down a landmark judgment in the history of European constitutionalism. In *Commission v. Hungary (CEU)*, it established that Hungary had violated the requirement of national treatment (prohibition of discrimination based on national origin) under the World Trade Organization's (WTO) multilateral agreement covering trade in services: the General Agreement on Trade in Services (GATS).¹ Interestingly, while presented as a trade dispute, the case had little to do with international trade. In reality, the European Commission (Commission) had launched the legal action—known as an “infringement procedure”—that found its way to the CJEU because Hungary failed to respect European Union law, specifically Article 13 (freedom of the arts and sciences), Article 14(3) (freedom to found educational establishments), and Article 16 (freedom to conduct a business) of the European Union Charter of Fundamental Rights (EU Charter). But because the EU Charter does not apply to member states when they act in domestic matters, at times—as it did here—the EU uses “legal finesse” to protect fundamental liberties.

The Court's ruling featured two striking novelties. First, WTO law was used to effectively protect fundamental liberties, given that the economic freedoms guaranteed by GATS and the academic freedom under threat by Hungary overlapped in this instance. Second, this was the first case in CJEU history where the Court applied WTO law as part of EU law, without caveat. In doing so, it established an unlimited European enforcement power

for the Commission (but solely for the Commission), while confirming longstanding case law ruling out actions for damages.

The CEU Saga and the EU's Asymmetric Bill of Rights

Central European University (CEU) is a postgraduate higher education institution registered in the United States, but which was located, at the relevant time, in Hungary. It was established as a postgraduate research university in 1991 by George Soros, the Hungarian-American financier and philanthropist, to promote the values of open societies.² The university had no operations in the U.S., but the programs it offered in Hungary were accredited in the state of New York (some of them were also accredited in Hungary). The CEU had been complying with the requirements of Hungarian higher education law for nearly three decades. However, in 2017, the Hungarian parliament amended the pertinent law to require foreign non-European universities to operate on the basis of an intergovernmental agreement and to have a campus in their country of registration. These requirements went into effect with remarkable pace, following escalating political skirmishes between the CEU and the Hungarian government. The University's license was not withdrawn, but the prospect of withdrawal hung over its head.³

The amending law was clearly contrary to academic freedom and raised serious concerns under the EU Charter. However, the Charter does not apply to member states acting in their domestic matters (much like the U.S. Bill of Rights, which, prior to the Fourteenth Amendment, applied to the federal government, but not to the states).⁴ It applies to EU institutions and member states acting as the EU's "agents,"⁵ but does not have genuine diagonal application.⁶ This means that, in principle, EU and national rules function in parallel: the EU Charter applies to the EU (and its "agents"), while member states are governed by their own national constitutions. As a corollary, EU member states, when they are not implementing EU law, are only subject to their own constitutional requirements (the European Convention on Human Rights is a separate international obligation).⁷

Protecting Fundamental Liberties: The EU's "Constitutional Finesse"

The EU has developed various techniques to overcome these incorporation limitations. Indeed, the CJEU's case law has the tendency to conceive of the scope of EU law widely and regard member states as acting as the EU's agents in an increasing number of cases.⁸ The Commission has also employed various legal maneuvers, often using the outer limits of EU rules and prohibitions.⁹ In these cases, the Commission used the

“supportive by-effects” of apparently unconnected EU norms.¹⁰ For instance, in the 2012 judgment in *Commission v. Hungary*, discrimination based on age was used to protect the independence of the judiciary.¹¹ Similarly, when Slovakia impaired the language rights of national minorities, the Commission objected to the law for endangering the EU internal market.¹² And in *Transparency of Associations*, the Court further extended this logic in a case that was, on its face, about freedom of association and ruled that the restrictions imposed by Hungary on foreign financing of civil organizations thwarted the free movement of capital.¹³

The restrictions imposed on the CEU inspired further finesse. Under the GATS and the EU’s Schedule of Commitments (documents that detail the trade concessions a WTO member has negotiated with its trading partners), U.S. entities have the right to market access and national treatment in the higher education industry. The amendment to the higher education law could have been judged under these requirements, since in this instance economic and academic freedom overlapped. Nonetheless, the application of the GATS raised an important issue: the CJEU had consistently ruled that WTO law had no direct application, at least not against the EU.

The Central Dilemma: Commercial Policy Interest Versus Academic Freedom

The attempt to use GATS to defend the CEU initially appeared to be in vain. The direct effect of WTO law has been consistently rejected by the CJEU in light of the fact that no such status is accorded to it by any of the major trading nations. Overruling this case law was out of the question: it would have had devastating economic consequences for the EU and seriously handicapped its bargaining position in international trade disputes.

As noted, the CJEU has had a somewhat unsteady relationship with the application of WTO law in the EU’s legal order. With some narrow exceptions, the CJEU has consistently rejected WTO law as a valid legal basis for invalidation of EU measures and actions for damages against the EU.¹⁴ The Court’s reasons have been very pragmatic: WTO law leaves ample room for political action¹⁵ and none of the EU’s major trading partners grant WTO law direct effect;¹⁶ hence, the EU’s unilateral opening of its legal space would result in a serious competitive disadvantage.¹⁷ The CJEU’s challenge, then, was to establish an EU competence without exposing the EU or its member states to WTO-law-based claims, in particular claims for damages.

The CJEU considered the matter to be a case of first impression.¹⁸ The Court had previously addressed the question as to whether, in the European legal sphere, the legality of the EU’s actions could be judged on the basis of WTO law,¹⁹ but it had not

before been confronted with a case where the Commission attempted to force a member state's compliance via an infringement procedure.²⁰

The CJEU proceeded from the basis that the WTO law's applicability in the EU's internal legal sphere is not a binary question. WTO law's application to the EU, as the master of European commercial policy, and the Commission's endeavor to make member states comply with that law, are two different things.²¹ While the first impairs the EU's bargaining position, the latter actually strengthens it. International commerce is an exclusive EU competence, and the EU can be held to account not merely for its own infractions, but also for those of its member states. Hence, the EU should have the power to compel them to comply with these international obligations. Furthermore, WTO law may be applicable without having direct effect. This is what happened in *CEU*: the Commission launched an infringement procedure against Hungary for non-compliance with the EU's obligations under the GATS.

Using the above distinction, the CJEU held that the Commission could validly rely on the provisions of the GATS in this case in order to "ensure that the Union does not incur any international liability in a situation in which there is a risk of a dispute being brought before the WTO"²² and found that Hungary had breached these provisions.²³

Conclusion

The CJEU cleverly overcame the challenge presented by the *CEU* case. The solution adopted by the court ensured that the EU could reconcile two, seemingly conflicting, considerations. While the court found that WTO law may be relied on by the Commission to compel a member state's compliance via an infringement procedure, that same law cannot be invoked against EU institutions and still lacks direct effect. It also cannot be invoked before member states' courts and actions for damages (against either the EU or its member states) are inadmissible. The application of WTO law is thus confined to infringement procedures, which aim at declaratory and injunctive relief (and possibly sanctions in case of non-compliance with the CJEU's ruling). The EU's internal enforcement power is justified by its external liability: international commerce is an exclusive EU competence and, hence, the EU can be held to account even for the infringements of member states. The external power should thus have its mirror-image in the internal legal sphere. Nonetheless, as a corollary of this rationale, standing is strictly limited to the Commission and claims for damages are admissible neither against the EU nor its member states. In this case, both the EU's commercial policy interests and academic freedom were vindicated.

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¹ Case C-66/18, *Commission v. Hungary*, ECLI:EU:C:2020:792 (Oct. 6, 2020). See Petra Bárd, *A Strong Judgment in a Moot Case: Lex CEU before the CJEU* (Nov. 12, 2020), <https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/>.

² See <https://www.ceu.edu/about/history>.

³ Ultimately, as a result of this uncertainty, the CEU made the decision to relocate the majority of its operations to Vienna in 2019.

⁴ With the exception of the unfeasible political mechanism set up by Article 7 TEU.

⁵ Article 51 of the Charter.

⁶ Csongor István Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à l'Européenne*, 21(5) GERMAN L.J. 838 (2020).

⁷ The Council of Europe, under the auspices of which the European Convention on Human Rights was adopted and operates, is not an EU institution; rather, it is a European regional human rights organization that was founded in the wake of World War II. Currently, it includes 47 member states, 27 of which are members of the European Union.

⁸ See, e.g., Case C-617/10, *Åklagaren v. Åkerberg Fransson*, ECLI:EU:C:2013:105 (Feb. 26, 2013).

⁹ Nagy, *supra* note 6, p. 844. See also Csongor István Nagy, *The Commission's Al Capone Tricks: Using GATS to protect academic freedom in the European Union*, VERFBLOG (Nov. 20, 2020), <https://verfassungsblog.de/the-commissions-al-capone-tricks/>.

¹⁰ *Id.* at 844.

¹¹ Case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687 (Nov. 6, 2012).

¹² Opinion on the Implementing Principles to the Slovak State Language Law Prepared by the European Commission's Legal Service (2010), <https://perma.cc/C5PJ-9G2G>. The internal market refers to the EU as a territory without internal borders and regulatory obstacles based on the free movement of goods, services, capital and persons.

¹³ Case C-78/18, *Commission v. Hungary*, ECLI:EU:C:2020:476 (June 18, 2020).

¹⁴ EU law is required to be interpreted, as far as possible, in a way that is in harmony with the EU's international obligations, including WTO law. Furthermore, if an EU law instrument is meant to implement a WTO law obligation, WTO law may be applicable.

¹⁵ Joined Cases 21-24/72, *International Fruit Company*, 1972 E.C.R. 1219, ¶ 21; Case C-149/96, *Portugal v. Council*, 1999 E.C.R. I-8395, ¶ 36.

¹⁶ As to the U.S., see 19 U.S.C. § 3512, as to Japan, see the Kyoto District Court's judgment of June 29, 1984, in *Endo v. Japan*, 530 Hanrei Taimuzu 265, affirmed by the Osaka High Court's judgment of November 25, 1986, 634 Hantei 186, and the Japanese Supreme Court judgment of February 6, 1990, 36 Shomu Geppo 2242.

¹⁷ *Portugal v. Council*, *supra* note 15, ¶¶ 43 & 46. This approach was confirmed, among others, by the CJEU's recent judgment in *FIAMM & Fedom*, where the CJEU rejected a claim for damages resulting from the EU's breach of WTO law as practically inadmissible. Joined Cases C-120-121/06 P, *FIAMM & Fedom*, 2008 E.C.R. I-06513.

¹⁸ *Commission v. Hungary*, *supra* note 1, ¶¶ 77-78.

¹⁹ *Id.*, ¶¶ 78, 80.

²⁰ The only ambiguous exception being *Commission v. Germany*, where the CJEU reviewed a German measure in the light of an agreement concluded within the framework of the GATT (Case C-61/94, [1996]

E.C.R. I-03989). The CJEU's judgment does not refer to this as precedential authority, though the opinion of AG Kokott, in paragraph 63, does contain such a reference.

²¹ Commission v. Hungary, *supra* note 1, ¶ 92.

²² *Id.*, ¶ 81.

²³ *Id.*, ¶ 93.