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Giacomo Marola

Relying on International and European Economic Law to sanction illiberal trends in Hungary: the ECJ judgments C-78/18 and C-66/18

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About the author:

Giacomo Marola is a LL.M. student at Europa Institut of Saarland University, where he is specializing on International and European Economic Law and fundamental rights protection. He holds a Master in Laws by the University of Pavia, as a student of Collegio Ghislieri, and a Master in Social Sciences by the University School for Advanced Studies IUSS Pavia.

Preface

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Editor

Lehrstuhl Prof. Dr. Thomas Giegerich Universität des Saarlandes
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66041 Saarbrücken

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1. Introduction

The victory of the 2010 parliamentary elections by Fidesz and its coalition partner KDNP has triggered drastic changes in the Hungarian constitutional order.[1] Besides constitutional reforms, several laws have been adopted over the last decade to strengthen the Government's influence on the media and to constrain civil society pluralism.[2] As a result, Hungary has been regarded as one of the prime examples of "rule of law backsliding" within the European Union (EU).[3] The rule of law crisis in Eastern Europe has triggered amongst decision-makers and scholars a growing debate on which political and legal tools should be deployed by the EU to defend the rule of law, democracy and human rights, as fundamental values on which the EU is founded pursuant to Article 2 of the Treaty on European Union (TEU).[4]

Against the background of the increasingly evident limited effectiveness of the Article 7 TEU procedure[5], in recent years the European Commission has shown a renewed interest in making use of the infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU) as a tool to defend the EU's fundamental values and to sanction illiberal trends in Eastern Europe.[6] Even though the Commission never explicitly based its claims on Article 2 TEU, most of the rule of law-related infringement proceedings initiated against Hungary over the last decade have been framed by reference to the EU Charter of Fundamental Rights, thus making the EU fundamental values indirectly enforceable via the Charter.[7]

In this context, the present paper discusses two judgments delivered by the European Court of Justice (ECJ) in 2020 on the basis of infringement proceedings initiated by the Commission against Hungary for the adoption of two controversial legislations dealing with, respectively, the transparency of civil society organisations[8] and the performance of educational activities by foreign academic institutions.[9] The main aim of this paper is to

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[1] *Anders, Priebus*, in: Lorenz/Anders (eds.), p. 235, 237
[2] *Ágh*, JCP 11(2) 2018, p. 30, 41.
[3] *Pech, Scheppele*, CYELS 19/2017, p. 3, 12.
[4] *Anders, Priebus*, in: Lorenz/Anders (eds.), p. 235, 237.
[5] While the process under Article 7(1) TEU has been activated against Hungary in September 2018, it seems unlikely that the sanction mechanisms under Article 7(2) and 7(3) TEU will be activated due to the requirement of unanimity within the European Council and the fact the Hungary and Poland are supporting each other; *Maurice*, Protecting checks and balances to save the Rule of Law, https://www.robert-schuman.eu/en/european-issues/0590-protecting-the-checks-and-balances-to-save-the-rule-of-law (last accessed on 03/06/2021).
[6] *Anders, Priebus*, in: Lorenz/Anders (eds.), p. 235, 236.
[7] Ibid., p. 235, 249.
[8] ECJ, Judgment of 18 June 2020, Case C-78/18*, Commission v Hungary (Transparency of associations)*, ECLI:EU:C:2020:476.
[9] ECJ, Judgment of 6 October 2020, Case C-66/18, *Commission v Hungary (Higher Education)*,

analyse these judgments and to critically evaluate the novelties inherent to them. Particular consideration will be given to their added-value in the interpretation of Article 51(1) of the Charter of Fundamental Rights, which famously limits the application of the Charter to Member States' measures "only when they are implementing Union law".[10] Against the background of this limited scope of Charter[11], the present paper argues that these two judgments shall be regarded as clear signals that the ECJ is ready to adopt an expansive reading of Article 51(1) of the Charter when serious threats to the EU fundamental values are at stake.

2. Challenging the Hungarian NGOs transparency law on the basis of the free movement of capital and the Charter: the ECJ judgment C-78/18

The first case which is analysed in this paper resulted from an infringement procedure initiated by the Commission against Hungary soon after the adoption by the latter, in June 2017, of a Russian-style legislation[12] on the transparency of civil society organisations receiving financial support from abroad. This legislation obliged civil society organisations receiving annually at least 7.2 million HUF (approximately € 20.800) from foreign sources to register with the national authorities as "organisations in receipt of support from abroad" and to indicate this label on their websites as well as on all their publications. For each support exceeding the threshold of 500.000 HUF (approximately € 1.500), additional information had to be provided to the authorities, including personal information of the donors. All that information was then published on a freely accessible online platform. Failure to comply with those obligations would have ultimately led to the dissolution of the organisation.

On application to the ECJ the Commission argued that Hungary, by adopting such legislation, had breached its obligations under Article 63 of the TFEU as well as Articles 7, 8 and 12 of the Charter of Fundamental Rights. In the next subparagraphs (2.1-2.2) the essential content of the judgment will be summarised by reflecting the analytical methodology followed by the ECJ. Then subparagraph 2.3 will be devoted to a critical evaluation of this judgment.

ECLI:EU:C:2020:792.

[10] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

[11] See, amongst the others, *Eeckhout,* CMLR 39(5) 2002, p. 945, 945-946*; Groussot, Pech, Petursson*, in: de Vries/Bernitz/Weatherill (eds.), p. 97, 99.

[12] Law No LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad. An unofficial translation can be found here: https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf. For a more detailed analysis of the law see here: https://www.helsinki.hu/wp-content/uploads/What-is-the-Problem-with-the-Law-on-Foreign-Funded-NGOs.pdf

2.1. Infringement of the free movement of capital

By recalling the concept of "movement of capital" as non-exhaustively defined in Annex I of the Council Directive 88/361/EEC, the ECJ first stressed that the transparency law, insofar as it was addressed to associations or foundations receiving "donations or other assets coming directly or indirectly from abroad", targeted holistically any possible form of cross-border funding for civil society organisations.[13]

Then the ECJ went on to assess whether the transparency law entailed a restriction of the free movement of capital. The Court found that the law amounted to an indirect discrimination based on nationality, since the differentiation in treatment was based on the criterion of residence or of the registered office of the natural or legal persons granting the financial support.[14] First, by exclusively targeting organisations receiving financial support from other Member States or third countries, the transparency law treated these organisations less favourably than those receiving support from Hungarian sources. In this regard, the ECJ further stressed that certain provisions of this law, such as those requiring the organisations to register and to systematically present themselves as "organisations in receipt of support from abroad", had the effect of "stigmatising" and of creating "a climate of distrust with regard to them".[15] Secondly, the law also targeted persons providing support from abroad insofar as, by imposing an obligation on the recipient organisations to disclose information related to their donors, was capable of deterring donors from providing support.[16]

As a last step the ECJ went on to consider whether such a discrimination was justified. In this regard, Hungary argued that the law at issue was justified by the interest of increasing the transparency of financing of civil society organisations, having regard to their influence on public life, as well as on grounds of public policy and public security, within the meaning of Article 65(1)(b) TFEU, consisting in combating money laundering, financing of terrorism and organised crime.

Regarding the first justification ground, the Court held that the objective of increasing the transparency of funding to civil society organisations may be considered an overriding reason in the public interest recognised by EU law. Nevertheless, by referring to the preamble of the law, the Court stressed that the Hungarian legislation was based on the presumption made in principle that any civil society organisation receiving support from abroad was intrinsically "liable to jeopardise the political and economic interests" of

[13] ECJ, *supra* note 8, para. 51.
[14] Ibid., para. 62-63.
[15] Ibid., para. 58.
[16] Ibid., para. 60-61.

Hungary.[17] By recalling the essential features of the law, the Court held that the objective of increasing transparency, although legitimate in principle, could not be invoked to justify a law whose obligations applied indiscriminately to any financial support from abroad and to all organisations receiving such a support, instead of targeting those which were likely to have significant influence on public life and debate.[18]

Regarding the second justification ground, the Court recalled its well-established case law according to which the ground of public policy and public security mentioned in Article 65(1)(b) TFEU can only be relied upon where there is a genuine, present and sufficiently serious threat to a fundamental interest of the society.[19] While Hungary submitted figures showing an increase of foreign funding to civil society organisations between 2010 and 2015, it didn't show how and why this increase could lead to a such a threat. The Court stressed again that the law was based on a presumption made in principle that foreign funding to civil society organisations was liable per se to affect the Hungarian society's fundamental interests.[20] Even by assuming that a restriction to the free movement of capital could be justified on the basis of a potential threat, such a potential threat could have only been invoked to justify measures that were proportionate to the nature and seriousness of the threat. By contrast, the fixed and relatively low amounts of the financial thresholds triggering the application of the transparency law were not regarded by the ECJ as being proportionate to the end of preventing the alleged threat.[21]

2.2. Infringement of the Charter of Fundamental Rights

By confirming the approach already followed in the earlier case *Commission v Hungary (Usufruct over agricultural land)*[22] the ECJ considered the Charter to be applicable to the present case and thus ruled on the separate infringements of Articles 7, 8 and 12 of the Charter.

Although there was no EU primary or secondary law specifically governing the subject matter covered by the transparency law, the Court confirmed its approach that a Member State's measure must be regarded as “implementing” EU law, within the meaning of Article 51(1) of the Charter, where that Member State “argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the TFEU is justified on the basis of

[17] Ibid., para. 84.
[18] Ibid., para. 82.
[19] Ibid., para. 91.
[20] Ibid., para. 93.
[21] Ibid., para. 94.
[22] ECJ, Judgment of 21 May 2019, Case C-235/17, *Commission v Hungary (Usufruct over agricultural land)*, ECLI:EU:C:2019:432.

that Treaty or by an overriding reason in the public interest recognised by EU law".[23] Since the Hungarian legislation restricted the free movement of capital and Hungary tried to justify the restriction on the ground of the public interest of transparency as well as on public policy and public security under Article 65(1)(b) TFEU, the Charter was deemed to be applicable.[24]

Regarding the right to freedom of association under Article 12 of the Charter, the Court referred to Article 52(3) of the Charter and largely relied on the case law of the European Court of Human Rights (ECtHR) concerning the corresponding Article 11 of the European Convention on Human Rights (ECHR).[25] In finding an interference with the right to association, the ECJ relied on two main arguments. First, having regard to their dissuasive effect and the penalties attached in case of non-compliance, the obligations of declaration and publicity imposed by the transparency law were such as to limit the capacity of the civil society organisations to receive financial support from abroad.[26] Secondly, the obligations to register and to present themselves under the label "organisations in receipt of financial support from abroad" were liable to deter foreign funding and thus to hinder the activities of those organisations. As further reiterated by the Court, those obligations were such as "to create a generalised climate of mistrust vis-à-vis the associations and foundations at issue, in Hungary, and to stigmatise them."[27]

The Court also found an interference with the right to respect for private life under Article 7 of the Charter insofar as the transparency law imposed an obligation on civil society organisations to declare and publish the personal data of their donors.[28] While the communication and dissemination of data relating to legal persons granting financial donations does not amount in itself to an interference with Article 7, it nonetheless amounts to an interference when the business name of those legal persons includes the name of natural persons.[29] Hungary argued that donors should be considered as "public figures" that, in accordance with the ECtHR's case law on Article 8 ECHR, could not claim the same protection of their private life as private persons. However, the ECJ rejected this argument by recalling that, in accordance with the ECtHR's case law, the concept of "public figures" must be strictly defined as mainly encompassing persons exercising political roles.[30] Therefore, the fact that natural or legal persons residing abroad grant financial support to civil society organisations established in Hungary, even when those organisations or their donors may be

[23] Ibid., para. 64-65; ECJ, *supra* note 8, para. 101.
[24] Ibid., para. 102.
[25] Ibid., para. 111-114.
[26] Ibid., para. 116.
[27] Ibid., para. 118.
[28] Ibid., para. 124.
[29] Ibid., para. 127.
[30] Ibid., para. 130.

regarded as participating in public life in Hungary, does not render them “public figures” pursuant to the ECtHR's case law.[31]

Lastly, the Court stressed that Hungary had failed to prove that the processing of the donors' personal data met the standards of fair processing laid down in Article 8(2) of the Charter.[32]

The ECJ did not carry out a full-fledged assessment on whether the interferences with Articles 7, 8 and 12 of the Charter fulfilled the limitation clause of Article 52(1) of the Charter. The Court simply pointed to its earlier finding that the transparency law could not be justified by any of the objectives of general interests recognised by the EU which Hungary relied upon and thus concluded that the law did not fulfil the requirement of Article 52(1) according to which any limitation on the Charter rights must “genuinely meet objectives of general interest recognised by the Union”.[33]

2.3. The NGOs transparency law case: using the *ERT* doctrine to protect the EU’s fundamental values

As already noted above, according to Article 51(1), the EU Charter of Fundamental Rights applies to Member States' measures “only when they are implementing Union law”. On one hand, Article 51(1) has codified a wording that traced back to the formula employed by the ECJ in the seminal case *Wachauf*[34], while rejecting the broader formulation referring to the “scope of Union law”[35] adopted by the ECJ in the case *ERT*.[36] One the other hand, the Explanations relating to the Charter[37] uses the latter formulation and refers to both *Wachauf* and *ERT*. By confirming its pre-Charter jurisprudence, in *Åkerberg Fransson*[38] the ECJ relied on the Explanations to the Charter and considered that the Charter’s rights must be complied with by the Member States where national legislation falls within “the scope of European Union law”[39]. While determining the type and degree of connection with EU law required for a

[31] Ibid., para. 131.
[32] Ibid., para. 133.
[33] Ibid., para. 141.
[34] ECJ, Judgment of 13 July 1989, Case C-5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, ECLI:EU:C:1989:321, para. 19-20.
[35] The drafting process of the Charter reveals the willingness by the Member States to limit the applicability of the Charter outside the cases that are not strictly related to EU law. See de Búrca, *ELRev* 26(2)/2001, p.126, 137; *Kook*, CMLR 42(2) 2015, p. 367, 373. The formula “scope of EU law” had been explicitly rejected by the Convention drafting the Charter; see *Snell*, Eur. Public Law 21(2) 2015, p. 285, 293.
[36] ECJ, Judgment of 18 June 1991, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvels and Nicolaos Avdellas and others*, ECLI: EU:C:1991:254, para. 42-43.
[37] Explanations relating to the Charter, OJ C 303, 14.12.2007. According to Article 6(1) TEU and Article 52(7) of the Charter, the Charter has to be interpreted “with due regard” to the Explanations.
[38] ECJ, Judgment of 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.
[39] Ibid., para. 21.

national measure to fall within the scope of EU law is still a controversial issue[40], the normative justification behind the *Wachauf* line of case law is largely accepted.[41] By contrast, the rationale behind *ERT* and its compatibility with Article 51(1) of the Charter have been the object of an academic and forensic debate until recently.[42]

According to the *ERT* line of case law, Member States are bound to comply with EU fundamental rights when they restrict a market freedom and, in doing so, they rely on written or unwritten grounds of justification.[43] Many arguments brought by the opponents of this line of case law relates to the fact that the Charter, according to Article 51(2) of the Charter and Article 6(1) TEU, cannot extend the EU's competences as defined under the Treaties.[44] It has been argued that in the *ERT* situations Member States are implementing national policies that fall within their sovereign powers and hence the Charter should not apply[45] or that it should apply with caution because of the ECJ's tendency to adopt a very broad interpretation of the free movement provisions.[46] On the other hand, the advocates of the *ERT* line of case law have pointed out that the extent to which Member States' may validly derogate from market freedoms is a matter of EU law[47] and that the fact the ECJ has broadly construed the notion of "restriction" to market freedoms, thereby expanding the scope of EU law by reflex, is not in itself a valid argument to deny the applicability of the Charter.[48] Since the national measure is subject to a EU fundamental rights review once it is established that it restricts the market freedoms, the Charter comes into play only after that the scope of EU law has been determined by reference to the scope of the market freedoms.[49] Any attempt by the ECJ to rely on an excessively wide definition of the scope of the market freedoms for the

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[40] See, amongst the others, *Biagioni*, in: Mancaleoni/Poillot (eds), p. 165, 180.
[41] See, amongst the others, *Snell*, Eur. Public Law 21(2) 2015, p. 285, 307.
[42] For an overview on the academic debate see *Lenaerts, Gutiérrez-Fons*, in: Amtenbrink at al. (eds.), p. 49, 54-59. In judicial context the *ERT* doctrine has been recently discussed by the Advocate General Øe in its Opinion on *Commission v Hungary (Usufruct over agricultural land)*, ECLI:EU:C:2018:971, para. 77-112.
[43] This is often referred to as "derogation situation". While the case *ERT* concerned written justification grounds, the same approach has been later extended to unwritten justification grounds since the case *Familiapress* (Case C-368/95); Ibid. (*Lenaerts, Gutiérrez-Fons*), p. 49, 53; *Snell*, Eur. Public Law 21(2) 2015, p. 285, 289.
[44] *van der Mei*, MJECL 22(3) 2015, p. 432, 437.
[45] See in particular *Jacobs*, Eur. Law Rev. 26/2001, p. 331, 336; *Huber*, Eur. Public Law 14(3) 2008, p. 323, 328.
[46] See, amongst the others, *Snell*, Eur. Public Law 21(2) 2015, p. 285, 307.
[47] *Lenaerts, Gutiérrez-Fons*, in: Amtenbrink et al. (eds.), p. 49, 57. On the same line see *Eeckhout*, CMLR 39(5) 2002, p. 945, 978; *Eeckhout* argues that revisiting the *ERT* doctrine would allow the Treaty provisions on market freedoms to be interpreted in a way which tolerates fundamental rights violations.
[48] *Dougan*, CMLR 52(5) 2015, p. 1201, 1216-1217; *van der Mei*, MJECL 22(3) 2015, p. 432, 437-438.
[49] On this point see in particular *Lenaerts, Gutiérrez-Fons*, in: Amtenbrink et al. (eds.), p. 49, 63-64; *van der Mei*, MJECL 22(3) 2015, p. 432, 437-438.

purpose of triggering an EU fundamental rights review, as in *Carpenter*[50], should be addressed by claiming for more clarifications as to the notion of "restriction" of the market freedoms, but not by calling into question the applicability of the Charter's rights.[51]

Many advocates of *ERT* line of case law have emphasized that the Charter's rights should only come into play once a restriction of the market freedoms have been found and not at the earlier stage when the national measure is considered as to fall within the scope *ratione materiae* of a given market freedom.[52] If the Court were to ascertain the compatibility of a national measure with the Charter on the sole basis that that measure falls within the scope of a market freedom, without hampering that freedom, this would hardly be reconcilable with Article 51(2) of the Charter and Article 6(1) TEU.[53] This may explain why the ECJ's approach has always been to first establish whether a national measure restricts a market freedom and then to apply the EU fundamental rights when examining the justification for such a restriction.[54]

By continuing on the path mapped out in *Åkerberg Fransson*, in the post-Lisbon case law the ECJ has importantly confirmed *ERT* in *Pfleger*[55] and *AGET Iraklis*.[56] *Pfleger* concerned an Austrian legislation imposing administrative or criminal penalties against persons who operated gaming machines in the absence of a prior authorisation. The referring court asked the ECJ whether the system of prior authorisation was compatible with the freedom to provide services enshrined in Article 56 TFEU as well as with Article 15 (freedom to choose an occupation), Article 16 (freedom to conduct a business) and Article 17 of the Charter (right to property). After having found that the system of prior authorisation provided by the Austrian legislation amounted to an unjustified restriction of the freedom to provide services, the

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[50] *Carpenter* (Case C-60/00) is often referred to as a judgment where the ECJ gave a too broad interpretation of the Treaty free movement provisions in order to review a national legislation in the light of the EU fundamental rights; see, *inter alia*, *Dougan*, CMLR 52(5) 2015, p. 1201, 1216; *Perišin*, Croat. Yearb. Eur. Law Policy 2(1) 2006, p. 69, 78-82; *von Bogdandy et al.*, CMLR 49(2) 2012, p. 489, 499.

[51] *Dougan*, CMLR 52(5) 2015, p. 1201, 1216-1217; *van der Mei*, MJECL 22(3) 2015, p. 432, 438.

[52] *Lenaerts, Gutiérrez-Fons*, in: Amtenbrink et al. (eds.), p. 49, 63-64; *van der Mei*, MJECL 22(3) 2015, p. 432, 437-439.

[53] Ibid.

[54] The only judgment where the ECJ reviewed a national legislation in the light of the EU fundamental rights, even though that legislation was found to be compatible with the Treaty free movement provisions, is *Karner* (Case C-71/02). The approach adopted in that case had been criticized in literature; see, amongst the others, *Perišin*, Croat. Yearb. Eur. Law Policy 2(1) 2006, p. 69, 82-83; *Snell*, Eur. Public Law 21(2) 2015, p. 285, 297. That approach had not been followed in any other case and in *Pelckmans* (Case C-483/12) the ECJ, after having found no restriction of market freedoms, declined its jurisdiction to review that legislation in the light of the Charter. Therefore, it seems that *Karner* had been overruled in *Pelckmans*; see *Snell*, p. 289, 290 and 297.

[55] ECJ, Judgment of 30 April 2014, Case C-390/12, *Pfleger and Others*, ECLI:EU:C:2014:281.

[56] ECJ, Judgment of 21 December 2016, Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972.

Court, while considering the Charter applicable in line with *ERT*[57], found that a separate assessment concerning the compatibility of that legislation with the Charter was not necessary given that an unjustified restriction of Article 56 TFEU "is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter."[58]

In *AGET Iraklis* the ECJ found a restriction to the freedom of establishment[59] by Greek legislation establishing a framework aimed at limiting the ability for undertakings to effect collective redundancies. After having considered the Charter applicable in line with *ERT*, the ECJ found the Greek legislation to entail a restriction of the freedom to conduct a business under Article 16 of the Charter.[60] The Court then turned to consider the justifications and found that the legislation went beyond what was necessary to achieve its intended goals and thus infringed the freedom of establishment.[61] The ECJ finally stressed that the Greek legislation "on identical grounds, also fails to comply with the principle of proportionality laid down in Article 52(1) of the Charter and, therefore, with Article 16 thereof."[62]

Besides confirming *ERT*, these two judgments reveal a significant overlap between the scope of the freedoms to provide services and to establishment with the scope of Articles 15 to 17 of the Charter.[63] It has indeed been suggested that the market freedoms and the freedom to conduct a business are "both very much rooted in the idea of an individual's freedom to organize his/her economic life" and that the market freedoms are "specific expression of the ability to carry out an economic activity across borders."[64] As illustrated by *Pfleger* and *AGET Iraklis*, a national measure that breaches the market freedoms is, for the same reasons, also very likely to breach the freedom to conduct a business.[65] Nevertheless, the case law shows that this is not necessarily the same in the reverse scenario[66], in particular as far as the free movement of goods is concerned.[67] For instance, in *Pelckmans*[68] the ECJ found that Belgian

[57] ECJ, *supra* note 55, para. 35-36.
[58] Ibid., para. 59.
[59] ECJ, *supra* note 56, para. 54-56.
[60] Ibid., para. 69.
[61] Ibid., para. 100-102.
[62] Ibid., para. 103.
[63] *Lenaerts, Gutiérrez-Fons*, in: Amtenbrink et al. (eds.), p. 49, 62; for case *Pfleger* see also *van der Mei*, MJECL 22(3) 2015, p. 432, 438-439.
[64] *Babayev*, CMLR 53(4) 2016, p. 979, 983. For the overlaps between the market freedoms and Articles 15-17 of the Charter see also *de Cecco*, Ger. Law J. 15(3) 2014, p. 383, 392-396; *Lenaerts, Gutiérrez-Fons*, in: Amtenbrink et al. (eds.), p. 49, 67; *Trstenjak, Beysen*, Eur. Law Rev. 38(3) 2013, p. 293, 310.
[65] Here "freedom to conduct a business" is used in a broad sense as referring to Articles 15 to 17 of the Charter.
[66] *Babayev*, CMLR, 53(4) 2016, p. 979, 984; *Lenaerts, Gutiérrez-Fons*, in: Amtenbrink et al. (eds.), p. 49, 67-68.
[67] While it is largely accepted that free movement of persons and of services are fundamental rights, as they are also protected as such by the Article 45 and 15 of the Charter, the same does not apply to the free movement of goods and of capitals; for this dichotomy and its impact on the scope of the free

legislation on shop opening hours did not interfere with Article 34 TFEU, even though it could be deemed to limit the exercise of the freedom to conduct a business under Article 16 of the Charter.[69] Since the free movement of goods was not breached, the ECJ held to have no jurisdiction to assess the compatibility of that legislation with the Charter.[70]

The rule of law crisis in Hungary and the related proceedings before the ECJ has recently renewed the importance of the *ERT* line of case law and of using the market freedoms as a tool to indirectly protect the EU fundamental values via the Charter of Fundamental Rights.[71] In the two judgments considered in the present paper the ECJ, when finding the Charter applicable to the Hungarian legislation, largely relied on the approach followed in the earlier *Commission v Hungary (Usufruct over agricultural land)*.[72]

That case concerned a law which retroactively deprived foreign landowners of their usufruct rights on the Hungarian territory unless they had close family ties with Hungarians. The ECJ first examined this legislation through a preliminary reference in the case *SEGRO*.[73] After having found that legislation to amount to an unjustified indirect discrimination contrary to the free movement of capital, the ECJ held that, similarly to the move made in *Pfleger*, since the legislation at issue was incompatible with the free movement of capital it was "not necessary" to assess the compatibility of that legislation with Articles 17 and 47 of the Charter.[74] Nevertheless, in the parallel infringement proceedings concerning the same legislation, *Commission v Hungary (Usufruct over agricultural land)*, the ECJ first found an unjustified restriction of the free movement of capital and then, contrary the Opinion of AG Øe[75], carried

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movement law see *de Cecco*, Ger. Law J. 15(3) 2014, p. 383, 384 and 397-398.

[68] ECJ, Judgment of 8 May 2014, Case C-483/12, *Pelckmans Turnhout NV v Walter Van Gastel Balen NV and Others*, ECLI:EU:C:2014:304.

[69] *Babayev*, CMLR 53(4) 2016, p. 979, 984.

[70] ECJ, *supra* note 68, para. 17-27. As already argued above (*supra* note 54), by *Pelckmans* the ECJ seems to have overruled the controversial *Karner* judgment.

[71] Making use of the market freedoms against Hungary as tools to indirectly protect the EU's fundamental values had been advocated in literature by *Dawson, Muir,* Ger. Law J. 14(10) 2013, p. 1959, 1964-1965.

[72] ECJ, *supra* note 22.

[73] ECJ, Judgment of 6 March 2018, Joined Cases C-52/16 and C-113/16, *'SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal*, ECLI:EU:C:2018:157.

[74] Ibid., para. 47. One difference is to be mentioned. By helding that an unjustified restriction to the freedom of service also amounts to an unjustified of Article 15-17 of the Charter (*supra* note 58), in *Pfleger* the ECJ had been more explicit in saying that the Austrian legislation breached both the market freedom and the freedom to conduct a business. Nevertheless, in *SEGRO*, by helding that an assessment based on Article 17 of the Charter was "not necessary", the ECJ has implicitly suggested, in line with *Pfleger*, that a breach of the free movement of capital also automatically entails a breach of the right to property.

[75] Opinion of Advocate General Øe in Case C-235/17, ECLI:EU:C:2018:971, para. 77-112. In his Opinion, AG Øe carried out a throughout review of the *ERT* doctrine and concluded that carrying out a stand-alone Charter-based assessment of a national legislation restricting the market freedoms is incompatible with the rationale behind the *ERT* doctrine.

out a separate stand-alone assessment concerning the compatibility of that legislation with Article 17 of the Charter, finding a violation thereof.[76]

In doing so, in *Commission v Hungary (Usufruct over agricultural land)* the ECJ went beyond *Pfleger*. While in *Pfleger* the ECJ has separated in formal terms the question whether the national legislation at issue was compatible with the freedom to provide services and the question whether it was compatible with Articles 15 to 17 of the Charter, *de facto* the ECJ has ruled out the need to carry out a separate assessment based on the Charter by considering that a national law that is incompatible with the Article 56 TFEU is also automatically incompatible with Articles 15 to 17 of the Charter. By contrast, *in Commission v Hungary (Usufruct over agricultural land)* the Court has carried out such separate assessment based on Article 17 of Charter. In doing so, the ECJ did not follow the AG's suggestion that such a separate assessment would be superflous in the light of the complete overlap between the right to property and the free movement of capital[77]. That such an overlap exists in practice is shown by the ECJ's judgment itself, given that the analysis carried out by the ECJ as regards the breach of the freedoms of capital and the right to property essentially coincide.[78] This means that, despite the existing overlap between the freedom of capital and the right to property, in *Commission v Hungary (Usufruct over agricultural land)* the ECJ nonetheless considered it necessary to carry out a Charter-based separate review of the Hungarian legislation.[79]

The same approach has been followed by the ECJ in *Commission v Hungary (Transparency of Associations)*. As we have seen above, the ECJ found an unjustified indirect discrimination contrary to the freedom of movement of capital and, by this route, applied the Charter and found a violation of Articles 7, 8 and 12 thereof. This judgment shows that the overlaps between the market freedoms and the Charter rights exist not only with respect to Article 15 to 17 of the Charter, but also beyond as to cover other Charter rights that may equally be regarded as expressions of private autonomy, such as the freedom of association and right to

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[76] *Groussot*, *Kirst, Leisure*, NJEL 2/2019, p. 69, 83; *Groussot, Lindholm*, Lund University Legal Research Paper 1/2019, p. 1, 24; *Hilpert*, NJEL 2/2019, p. 1, 16-17. In carrying out such a separate assessment, the ECJ upheld the Commission's argument that national legislations restricting the market freedoms must be separately examined in the light of the Charter as to strengthen the rule of law dimension of the infringement proceedings; see Opinion of AG Øe, *supra* note 75, para. 98-99.

[77] Opinion of Advocate General Øe, *supra* note 75, para. 114.

[78] The assessment carried out by the ECJ in order to establish an interference with the free movement of capital and the right to property as well as the impossibility of justifying that interference largely coincide; see ECJ, *supra* note 22, para. 58-62, 69-85, 123-128.

[79] *Groussot*, *Kirst, Leisure*, NJEL 2/2019, p. 69, 80-83; *Groussot, Lindholm*, Lund University Legal Research Paper 1/2019, p. 1, 24. This twist made by the ECJ in *Commission v Hungary (Usufruct over agricultural land)* had been equated by *Groussot et al.* with the move made by the ECJ in *Associação Sindical dos Juizes Portugueses* (Case C-64/16) and later developed in the infringement proceedings concerning the independence of the Polish judiciary (Case C-619/18; Case C-192/18).

privacy.[80] In the same vein of *Commission v Hungary (Usufruct over agricultural land)*, despite this overlap the ECJ has carried out a separate Charter-based review of the Hungarian legislation. While one might argue that striking down the Hungarian legislation on the sole basis of the market freedoms would have had the indirect result of protecting the affected fundamental rights, applying the Charter to "illiberal" Member States' policies undoubtedly increases the legitimacy of the Commission and the ECJ as relevant fundamental rights' guarantors in Europe and help to avoid miscategorising rule of law issues with ordinary EU Internal Market Law's compliance difficulties.[81]

By contrast with what was argued by AG Øe in his Opinion on SEGRO[82] and *Commission v Hungary (Usufruct over agricultural land)*[83], it is argued here that carrying out a separate assessment based on the Charter does not seem to alter the essential rationale behind the *ERT* line of case law nor to expand the EU's competences in breach of Article 51(2) of the Charter and Article 6(1) TEU. On the one hand, the rationale behind the *ERT* line of case law that the Treaty provisions on market freedoms must be interpreted in accordance with the fundamental rights[84] does not seem to be put into question by the mere fact that the Charter-based assessment has been formally separated from the assessment concerning the market freedoms. On the other hand, in both *Commission v Hungary (Usufruct over agricultural land)* and the transparency law case the ECJ found the Charter to be applicable only after having found a restriction to the market freedoms, in accordance with the Court's long-standing jurisprudence. Therefore, those two ECJ judgments do not alter the assumption that the Charter should apply only after that a restriction to the market freedom has been found.[85] Nor does the test adopted in those judgments as to the Charter's applicability seem to leave space for the Member States to successfully deploy tactics aimed at avoiding the Charter's application either by relying on justification grounds not recognised under EU law or by neglecting to provide any justification at all for the restrictions to the market freedoms.[86]

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[80] The case that will be examined in the next paragraph, *Commission v Hungary (Higher Education)*, shows that this overlap extends also to the right to found educational establishment enshrined in Article 14(3) and the right to academic freedom enshrined in the second sentence of Article 13 of the Charter.

[81] *Anders, Priebus*, in: Lorenz/Anders (eds.), p. 235, 241.

[82] Opinion of AG Øe in Joined Cases C-52/16 and C-113/16, ECLI:EU:C:2017:410, para. 137-138.

[83] *Supra* note 75.

[84] *Eeckhout,* CMLR 39(5), p. 945, 978. This reading of the *ERT* doctrine is endorsed by the AG Øe himself in his Opinion on Case C-235/17, *supra* note 75, para. 86.

[85] As such, it remains the scope of the market freedoms that determines that scope of EU law for the purpose of triggering the application of the Charter; see *supra* notes 52-54.

[86] The risk that Member States could develop these tactics is mentioned by *Groussot*, *Kirst, Leisure*, NJEL 2/2019, p. 69, 80. While this risk cannot be excluded, it seems unrealistic that these litigation tactics could ever be successful before the ECJ. On one hand, if a Member State neglects to justify a restriction to the market freedoms, this would amount to an unjustified restriction contrary to EU

3. Challenging the 2017 Hungarian reform on higher education on the basis of the GATS, EU internal market law and the Charter: the ECJ judgment C-66/18

The second case which is analysed in this paper concerns an infringement procedure brought by the Commission against some amendments adopted by the Hungarian legislature in April 2017[87] to the Law on national higher education. Following this reform, higher education institutions having their seats outside the European Economic Area (EEA) have been required, in order to be able to perform educational activities in Hungary, to prove the conclusion of an international treaty between Hungary and their state of seat. As a second requirement, the activity of all foreign higher education institutions, including those having their seat within the EEA, has been made conditional to the requirement for those institutions to offer education also in their state of seat.

According to many observers, the sole aim of this reform, which is often referred to as "lex CEU", was indeed to stop the activities of the Central European University (CEU) in Hungary, as a result of the "anti-Soros campaign" engaged in by the Hungarian Government over the last years.[88] The CEU, the main funders of which are the Open Society Foundations established by Hungarian-born US businessman George Soros, operated in Hungary since 1991 and, as a corollary of its mission to promote societal and cultural advancements in Eastern Europe, never undertook any teaching or research activities in the United States. When the reform was adopted in 2017, the CEU was the only foreign academic institution established in Hungary that was unable to fulfil the new requirements.[89]

In February 2018 the Commission initiated an infringement procedure against Hungary petitioning the ECJ to declare the 2017 reform to be in violation of the General Agreement on Trade in Services (GATS), the EU internal market law, as well as the Charter of Fundamental Rights. On 6th October 2020 the ECJ delivered its judgment[90] by which it largely confirmed

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internal market law and the Charter will be applicable and violated. On the other hand, in its case law the ECJ has accepted so many possible unwritten justification grounds for restrictions to the market freedoms that it is hardly feasible to speculate about possible justification grounds that will not be considered by the ECJ as being acceptable under EU law.

[87] Law No XXV of 2017 amending Law No CCIV of 2011 on national higher education, adopted on 4 April 2017.

[88] *Kirst*, Academic Freedom protected via the CJEU? - The Advocate's General Opinion in Commission v Hungary (C-66/18), https://europeanlawblog.eu/2020/04/29/academic-freedom-protected-via-the-cjeu-the-advocates-general-opinion-in-commission-v-hungary-c-66-18/ (last accessed on 03/06/21).

[89] Opinion of Advocate General Kokott in case C-66/18, ECLI:EU:C:2020:172, para. 4.

[90] ECJ, Judgment of 6 October 2020, Case C-66/18, *Commission v Hungary*, ECLI:EU:C:2020792.

the Opinion of the AG Kokott[91] and fully upheld the Commission's submissions. Admittedly, by this judgment the CEU gained a bittersweet victory[92] since the judgment was delivered only after that the CEU had already been forced to move its main campus from Budapest to Vienna.

In the next paragraphs (3.1-3.4) the essential content of the judgment will be summarised by reflecting the analytical methodology followed by the ECJ. Paragraph 3.5. will be devoted to a critical evaluation of the main novelties inherent in this ECJ judgment.

3.1. The ECJ's jurisdiction to assess infringements of the GATS

As a preliminary issue, the ECJ dealt with two lines of argumentation put forward by Hungary aimed at challenging the ECJ's jurisdiction to assess the alleged infringement of the GATS.

First, Hungary argued that, since the education sector falls outside the EU competence, any potential breach of the GATS in the area of educational services is a matter of Hungary's own international liability vis-à-vis third countries. In this respect the ECJ made a distinction between the internal dimension of the education sector, for which the EU has only supportive competence, and the external trade in private educational services, which falls under the EU common commercial policy. Since the contested Hungarian legislation belongs to the latter category, it is capable of affecting obligations falling within the EU exclusive competence under Article 3(1) lit. e TFEU.[93]

Secondly, Hungary argued that the existence of a dispute settlement system within the World Trade Organization (WTO) precluded the ECJ from exercising its jurisdiction under Article 258 TFEU over the GATS. Interestingly enough, this argument was totally reversed by the ECJ.[94] The Court concluded that the existence of a dispute settlement system within the WTO not only did not hinder the ECJ's jurisdiction under Article 258 TFEU, but rather required the EU to conduct internal proceedings against EU Member States in order to ensure compliance with its external legal obligations as a member of the WTO.[95] In this regard, the ECJ argued that the existence of the WTO dispute settlement system might lead the EU, as a member of the WTO besides to the Member States, to be liable under international law for an act of one Member State that violated WTO law to the extent that

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[91] Opinion of Advocate General Kokott in case C-66/18, ECLI:EU:C:2020:172.

[92] *Bornemann*, Academic freedom in illiberal times – A bittersweet victory for the Central European University, https://europeanlawblog.eu/2020/10/21/academic-freedom-in-illiberal-times-a-bittersweet-victory-for-the-central-european-university/ (last accessed on 03/06/2021).

[93] ECJ, *supra* note 90, para. 74.

[94] *Traudt*, Update zum EuGH-Urteil C-66/18, https://jean-monnet-saar.eu/?page_id=2929 (last accessed 03/06/21).

[95] ECJ, *supra* note 90, para. 86.

such a violation fell in an area of EU competence[96] or in case the EU failed to ensure compliance by its own Member States with their WTO obligations.[97]

In order to conclude that the existence of the WTO dispute settlement system had no bearing on its jurisdiction under Article 258 TFEU, the ECJ referred to some norms of general international law that, as such, are binding upon the EU.[98] By referring to Articles 3 and 32 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), the ECJ inferred that neither the EU nor the Member States may rely on an ECJ judgment in order to refuse compliance with a ruling of the WTO dispute settlement body (WTO DSB).[99] By referring to the principle *pacta sunt servanda* enshrined in Article 26 of the Vienna Convention on the Law of Treaties (VCLT), the ECJ stressed that it was itself bound by the WTO DSB's interpretation of the various GATS provisions. But, should the WTO DSB not yet have interpreted the relevant GATS provisions, it would remain for the ECJ to interpret them in accordance with the customary rules of interpretation of international treaties.[100]

3.2. The first limb of the 2017 reform: the requirement of a prior international treaty

After having ruled in favour of its own jurisdiction, the ECJ focused on the first of the two requirements introduced by the 2017 reform. By this amendment, academic institutions having their seats outside the EEA have been required, in order to be able to perform educational activities in Hungary, to prove the conclusion of an international treaty between Hungary and their state of seat.

In order to determine whether Hungary, by introducing such a requirement, had breached the EU's obligations under the principle of "national treatment" enshrined in Article XVII of the GATS, the ECJ proceeded in three steps.

First of all, the ECJ investigated whether Hungary could successfully invoke some derogations from this principle.[101] Indeed, while Article XVII(1) of the GATS entails an obligation for each WTO member to accord to service suppliers of any other WTO member a treatment no less favourable than that it accords to its own like service suppliers, this obligation is subject to the qualifications set out for each relevant market sector in the "schedule of commitments". After having analysed Hungary's schedule, the Court concluded

[96] Ibid., para. 84.
[97] Ibid., para. 85. The ECJ referred to Article XVI(4) of the WTO Agreement and Article I(3)(a) of the GATS.
[98] Ibid., para. 87.
[99] Ibid., para. 91.
[100] Ibid., para. 92.
[101] Ibid., para. 103-114.

that Hungary could not invoke any qualification to its commitments under Article XVII in respect of trade in private educational services.[102]

As a second step, the Court went on to assess whether the contested requirement entailed a different and “less favourable” treatment to service suppliers of other WTO members within the meaning of Article XVII (3) of the GATS. Since the contested requirement was specifically targeted to non-EEA suppliers of educational services, it entailed a disparity in treatment between suppliers of educational services on the basis of their place of establishment.[103] Then the ECJ stressed that the requirement modified the conditions of competition at the disadvantage of non-EEA service providers since the conclusion of an international treaty was dependent on the discretion of the Hungarian Government.[104]

As a last step, the Court went on to assess whether this disparity in treatment was justified under Article XIV of the GATS. In this respect, Hungary tried to defend itself by arguing that the contested requirement was necessary to maintain public order and to prevent deceptive practices.

Regarding the first justification, the ECJ stressed that Hungary failed to provide sufficiently detailed evidence as to how and why the exercise of teaching activities on the Hungarian territory by an institution having its seat outside the EEA could constitute, in the absence of a treaty, a genuine and sufficiently serious threat to a fundamental interest of Hungarian society.[105]

Regarding the second justification, Hungary argued that the conclusion of a prior international treaty would have prevented deceptive practices by increasing the foreign education institutions' reliability. In rejecting this justification, the ECJ relied on two arguments. First, the Court stressed that the fulfilment of the requirement of a prior international treaty was dependent solely on the Hungarian Government's political will and thus breached Article XIV of the GATS, according to which the exceptions listed therein could not “be applied in a manner which would constitute a mean of arbitrary or unjustifiable discrimination between countries”.[106] Secondly, the Court stressed that, insofar as the requirement applied to foreign education institutions that were already present in Hungary (such as the CEU), that requirement was not proportionate, since the objective of preventing fraud could have been more effectively met by using internal means to monitor and eventually sanction deceptive practices.[107]

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[102] Ibid., para. 114.
[103] Ibid., para. 118.
[104] Ibid., para. 120-121.
[105] Ibid., para. 131.
[106] Ibid., para. 136.
[107] Ibid., para. 137.

3.3. The second limb of the reform: the requirement that the foreign institution provides education in the state where it has its seat

The second limb of the 2017 reform concerned the requirement that only foreign universities offering education in the state of the seat would have been entitled to offer education services in Hungary. This requirement was applicable to all foreign academic institutions, including those having their seat in EEA Member States. In order to enable the ECJ to review this limb of the reform in its entirety, the Commission challenged it on the basis of Article XVII of the GATS in respect of the restriction imposed on universities having their seats outside the EEA (such as the CEU), as well as under EU internal market law in respect of universities having their seat within the EEA.

The Court first focused on the compatibility of the reform with Article XVII of the GATS. Similarly to the findings concerning the first limb of the reform, the Court found that the contested requirement modified the conditions of competition in favour of Hungarian providers, within the meaning of Article XVII(3).[108] Likewise in respect of the justifications under Article XIV of the GATS, the Court stressed that Hungary failed to provide sufficiently detailed evidence as to how the exercise of teaching activities in Hungary by foreign institutions that did not perform those activities in the state of the seat could constitute a threat to public order as well as how such a requirement could contribute to the objective of preventing deceptive practices.[109]

Then the Court turned to assess the compatibility of the contested requirement with EU internal market law. The Court considered first whether the requirement amounted to a violation of the freedom of establishment under Article 49 TFEU.

By referring to its ruling in *Neri*, the Court held that the provision of remunerated university courses is an economic activity covered by Article 49 TFEU provided that this activity is carried out 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.[110]

The Court further reiterated that the freedom of establishment covers the situation in which a company registered in one Member State carries out most or even all its business activities through a branch set up in another Member State.[111] Accordingly, the Court found that a national provision requiring a university to provide education activities within the home

[108] Ibid., para. 149.
[109] Ibid., para. 154-155.
[110] Ibid., para. 160.
[111] Ibid., para. 162.

Member State, as a precondition to exercise the same activities from an establishment in another Member State, renders less attractive the exercise of the freedom of establishment.[112] Therefore, the contested requirement of the Hungarian reform was found to restrict the freedom of establishment.[113]

In order to justify this restriction, Hungary relied on public order, prevention of deceptive practices and the objective of ensuring high standards of university education. Regarding the first two justification grounds, the Court reiterated that Hungary had not established how the exercise of education activities by foreign universities on its territory could lead to a risk for public order as well as how the contested requirement could contribute to the prevention of deceptive practices.[114] Regarding the objective of ensuring high standards of university education, the Court stressed that the contested requirement was inconsistent with the attainment of that objective. First, the requirement did not include any detail as to the standards concerning the quality of the education offered by university institutions in their home countries. Second, the quality of the education offered in the home country did not automatically affect the level of the education provided in Hungary.[115]

Finally, the Court briefly assessed the compatibility of the contested requirement with the freedom to provide services. By reproducing its findings concerning the freedom of establishment, the Court found that the Services Directive (2006/123/EC) was applicable to the provision of remunerated education or training courses[116] and that the second limb of the reform entailed a restriction of the freedom to provide services.[117] In that context too, the Court rejected again the poor justification arguments invoked by Hungary.[118]

3.4. Infringement of the Charter of Fundamental Rights

In the last part of the judgment the Court went on to consider whether Hungary, by adopting the controversial reform, breached Articles 13, 14(3) and 16 of the Charter.

As a preliminary issue, the Court considered that Hungary, by adopting the 2017 reform, was "implementing Union law" within the meaning of Article 51(1) of the Charter. To the extent that the reform affected university institutions having their seats outside the EEA, Hungary was performing its obligations under the GATS, which, as an international agreement entered by

[112] Ibid., para. 169.
[113] Ibid., para. 170.
[114] Ibid., para. 185-186.
[115] Ibid., para. 188.
[116] Ibid., para. 195.
[117] Ibid., para. 200.
[118] Ibid., para. 213.

the EU, formed an integral part of EU law.[119] Whereas, to the extent that the reform affected university institutions having their seat within the EEA, the Court reconfirmed the approach already followed in the transparency law case, according to which a Member State's action must be regarded as "implementing Union law" where that Member State "argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the TFEU is justified by an overriding reason in the public interest recognised by EU law."[120]

The Hungarian reform enabled the ECJ to pronounce itself for the first time on the right to academic freedom enshrined in the second sentence of Article 13 of the Charter.[121] In order to determine the scope of this right, the ECJ first made a reference to the ECtHR's interpretation in *Erdoğan and Others v. Turkey*[122] on the protection of academic freedom by the ECHR.[123] According to the ECtHR's case law, certain aspects of academic freedom, such the freedom to disseminate information, to conduct research and to distribute knowledge, are associated with the right to freedom of expression enshrined in Article 10 ECHR. Nevertheless, the ECJ then stressed that, for the scope of EU law, academic freedom had to be understood more broadly than the ECtHR's case law.[124]

By referring to recommendations by the Parliamentary Assembly of the Council of Europe[125] and of the General Conference of UNESCO[126], the ECJ held that academic freedom also incorporated an institutional and organisational dimension, as an essential precondition for researching and teaching freely from State interferences. Having established this framework, the Court rapidly concluded that the Hungarian reform was capable of depriving foreign academic institutions of their institutional autonomy and thus of limiting academic freedom as protected under Article 13 of the Charter.[127] By referring to the Explanations relating to the Charter, the ECJ decided to examine together the alleged violations of Articles 14(3) and 16, safeguarding respectively the freedom to found educational establishments and the freedom to conduct a business. Likewise, the Court found that the Hungarian reform was prone "to render uncertain or to exclude the very possibility of founding a higher academic institution,

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[119] Ibid., para. 213.
[120] Ibid., para. 214.
[121] *Bornemann*, Academic freedom in illiberal times – A bittersweet victory for the Central European University, https://europeanlawblog.eu/2020/10/21/academic-freedom-in-illiberal-times-a-bittersweet-victory-for-the-central-european-university/ (last accessed on 03/06/2021).
[122] ECtHR, *Erdoğan Mustafa and Others v. Turkey*, Applications nos. 346/04 and 39779/04.
[123] ECJ, *supra* note 90, para. 224.
[124] Ibid., para. 226.
[125] Council of Europe (2006) Recommendation 1762: Academic Freedom and University Autonomy, 30th June 2006.
[126] UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, 11 November 1997.
[127] ECJ, *supra* note 90, para. 228.

or of continuing to operate an existing higher education institution, in Hungary."[128]

By following the same approach followed in the transparency law case, the ECJ did not carry out a full-fledged assessment on whether the interferences with the Charter's rights fulfil the limitation clause of Article 52(1) of the Charter. The Court simply pointed to its earlier finding that the Hungarian reform could not be justified by any of the objectives of general interests recognised by the EU which Hungary relied upon.[129]

3.5. The "CEU" case: what's new under the sun?

The ECJ judgment on the "CEU" case has been considered as a "landmark judgment" in the history of the EU.[130] There are at least two relevant novelties inherent in this judgment.

First, the ECJ for the first time has decided in an infringement procedure initiated by the Commission against a Member State for the failure to comply with WTO law.[131] The approach adopted by the Court in the "CEU" judgment contrasts with the approach adopted in the former case law where the ECJ largely dealt with the issue of the direct applicability of WTO law within the EU legal order.[132] In this case law the ECJ generally refused, with narrow exceptions[133], to review the legality pursuant to WTO law of EU secondary legislation in favour of private plaintiffs within the context of both preliminary reference proceedings under Article 267 TFEU and actions for annulment under Article 263 TFEU.[134] By contrast, in this judgment the ECJ has fully accepted WTO law as a standard against which national legislation may be reviewed within the EU. While accepting that WTO law can be a standard for reviewing Member States' legislation under Article 258 TFEU, the ECJ judgment on the "CEU" case did not deal with the issue of the direct applicability of WTO law. Therefore, this judgment has opened up the possibility for a top-down enforcement of WTO law within the EU legal order without altering the essential lack of bottom-up enforcement in accordance to the long-standing ECJ case law.[135] Although this distinction has triggered criticisms of

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[128] Ibid., para. 233.
[129] Ibid., para. 241.
[130] *Nagy*, ASIL Insights 25(1) 2021, p. 1, 1.
[131] Ibid., p.1, 4.
[132] *Fontanelli*, ESIL Reflections 10(2) 2021, p. 1, 5-6; for an overview of this case law see *Errico,* CILJ*,* 44(1) 2011, p. 179, 182-190.
[133] ECJ, Judgment of 22 June 1989, Case C-70/87, *Fediol*, ECLI:EU:C:1989:254; ECJ, Judgment of 7 May 1991, Case C-69/89, *Nakajima*, ECLI: EU:C:1991:186.
[134] ECJ, Judgment of 12 December 1972, Joined Cases C-21/72 to 24/72, *International Fruit Company and Others*, ECLI:EU:C:1972:115; Judgment of 23 November 1999, Case C-149/96, *Portugal v Council*, ECLI:EU:C:1999:574; Judgment of 9 January 2003, C-76/00 P, *Petrotub and Republica*, ECLI: EU:C:2003:4).
[135] *Fontanelli*, ESIL Reflections 10(2) 2021, p. 1, 5-7;*Traudt*, Der EuGH als regionaler Ersatz für den Appellate Body der WTO?, https://jean-monnet-saar.eu/?page_id=2490 (last accessed 03/06/21).

"double standards" by some commentators[136], it has also been argued that the dogmatic basis militating in favour of having WTO law as a standard for reviewing Member States' legislation does not equally apply to the reviewing of EU legislation.[137] In any event, it cannot be excluded that the approach followed by the ECJ judgment in the "CEU" case, where WTO law has been fully integrated into EU law for the purpose of reviewing the compatibility of a national legislation with the Charter, could in the future open the door for a strategic use of the Charter by private plaintiffs aimed at challenging the compatibility of EU measures with WTO law.[138]

The second novelty, which has so far been relatively underestimated in the literature, is that for the first time the ECJ has deemed the EU Charter of Fundamental Rights to be applicable to a Member State's legislation via an international agreement entered into by the EU, namely the GATS. The doctrine developed by the ECJ, which may be labelled as the "CEU" doctrine, seems to entail that Member States' actions falling within the scope of an international agreement entered into by the EU shall be considered as "implementing Union law" pursuant to Article 51(1) of the Charter.

In the next three subparagraphs (3.5.1-3.5.3) some aspects of the "CEU" doctrine will be analysed. Firstly, the rationale behind this doctrine will be explored (3.5.1) with the view to reconcile it with the pre-existing ECJ's interpretation of Article 51(1). Secondly, the factors influencing the precise contours of this doctrine will be identified (3.5.2) in order to determine whether and to what extent the doctrine could in the future be extended to international agreements entered into by the EU other than the GATS. Thirdly (3.5.3), it will be considered whether the "CEU" doctrine could realistically give rise to tensions between the EU's obligation to comply with the WTO DSB's rulings and the need for ensuring the protection of fundamental rights within the EU.

3.5.1. Specifying the rationale behind the "CEU" doctrine

In explaining the rationale behind the "CEU" doctrine the ECJ simply referred to the

[136] *Fontanelli*, ESIL Reflections 10(2) 2021, p. 1, 6; *Johannsen,* Policy Papers on Transnational Economic Law No. 55/2020, p.1, 7; *Nagy*, ASIL Insights 25(1) 2021, p. 1, 3-4.

[137] This position has been advocated by the AG Kokott in her Opinion (para. 60-68). For a comment and further elaboration of the arguments brought by the AG Kokott see *Traudt,* Der EuGH als regionaler Ersatz für den Appellate Body der WTO?, https://jean-monnet-saar.eu/?page_id=2490 (last accessed 03/06/21).

[138] This is suggested by *Fontanelli*, ESIL Reflections 10(2) 2021, p. 1, 11-12. Since any EU measure, including those that breach WTO law, must comply with the Charter, the Charter could be relied upon by individuals and Member States to challenge the validity of EU measures that are incompatible with WTO law. In this sense, the ECJ judgment on the CEU case might open the door for a strategic use of the Charter aimed at circumventing the lack of bottom-up enforcement of WTO law in the EU legal order.

Haegeman formula according to which international agreements entered by the EU form an "integral part of EU law".[139] In the judgment on the "CEU" case the ECJ held that the GATS had to be regarded as forming an "integral part of EU law" since "the agreement establishing the WTO, of which the GATS is part, was signed by the Union and then approved by it (…) by Decision 94/800".[140] It follows for the ECJ that, when the Member States are "performing their obligations" under the GATS, they must be considered to be "implementing Union law" within the meaning of Article 51(1) of the Charter.[141]

By referring to the *Haegeman* formula, the ECJ adopted a strict EU law perspective to justify the "CEU" doctrine. Since international agreements concluded by the EU are a source of EU law[142], a Member State measure falling within the scope of these agreements shall be considered as "implementing Union law" within the meaning of Article 51(1) of the Charter.

In adopting this justification the ECJ did not try to insert the "CEU" doctrine within any of the two main lines of case law pre-existing the entry into force of the Charter of Fundamental Rights, namely the *Wachauf*[143] and the *ERT*[144] lines of cases, concerning the scope of Member States' obligations to comply with fundamental rights as general principles of EU law. Given the important role that these lines of cases have played in both the ECJ jurisprudence on Article 51(1) of the Charter and the scholars' attempts to analyse this jurisprudence[145], this lack of reference in the ECJ judgment is rather surprising.

In her Opinion the AG Kokott adopted a slighty different approach to justify the applicability of the Charter via the GATS. Her argumentation relates to the wider approach adopted by the AG in her Opinion, as also reflected in the ECJ judgment, that tends to equate the EU with a federal state from an international law perspective.[146]

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[139] ECJ, Judgment of 30 April 1974, Case C-181/73, *R. & V. Haegeman v Belgian State*, EU:C:1974:41, para. 5-6.

[140] ECJ, *supra* note 90, para. 84-86.

[141] Ibid., para. 213.

[142] *Mohay*, Pravni vjesnik 33(3-4) 2017, p. 151, 151; *Rosas*, Fordham Int'l L.J. 34(5) 2011, p. 1304, 1309-1310.

[143] ECJ, *supra* note 34.

[144] ECJ, *supra* note 36.

[145] These two lines of case law are mentioned in the Explanations relating to the Charter and referred to by the ECJ in many landmark judgments dealing with Article 51(1); see, for instance, ECJ, Judgment of 26 February 2013, Case C-617/10, *Åkerberg Fransson,* ECLI:EU:C:2013:105, para. 19. Most of the scholars who try to sistematize the ECJ case law on Article 51(1) of Charter use these two lines of case law as a starting point; see, amongst the others, *Dougan*, CMLR 52(5) 2015, p. 1201, 1204-1205; *Groussot, Pech, Petursson*, in: de Vries/Bernitz/Weatherill (eds.), p. 97, 98.

[146] For the ECJ's tendency to equate the EU with a federal state in Case C-66/18 see *Traudt*, Update zum EuGH-Urteil C-66/18, https://jean-monnet-saar.eu/?page_id=2929 (last accessed 03/06/21). At paragraphs 84-86 of the judgment the ECJ assumes that Member States' actions in breach of the GATS may render the EU liable towards third WTO members, similarly to the international liability that may arise upon a federal state as a result of the conduct of the constituent states. The same approach is reflected in the AG Kokott's Opinion (para. 48-55).

In her Opinion the AG drew an interesting parallel between *Kupferberg* and the *Wachauf* line of case law.[147] In *Kupferberg* the ECJ had stressed that, in the internal implementation of an international agreement concluded by the EU the Member States fulfil an obligation in relation to the EU, which had assumed external responsibility for due performance of that agreement.[148] By reading *Kupferberg* in conjunction with *Wachauf*, the AG essentially stressed that, when Member States are acting within the scope of international agreements entered into by the EU, they shall be regarded as external "representatives" of the EU vis-à-vis third countries, being as such obliged to comply with the EU Charter of Fundamental Rights.[149]

The rationales given by the ECJ and the AG to justify the "CEU" doctrine should be seen as being complementary, rather than as alternative. It can be argued that the rationale behind the "CEU" doctrine is twofold. From a strict EU law perspective, international agreements entered into by the EU are sources of EU law and, therefore, any Member State action falling within the scope of those agreements shall be regarded as "implementing Union law" pursuant to Article 51(1) of the Charter. From a perspective more oriented towards international law, since the EU has assumed international responsibility for due performance of agreements concluded by it, Member States acting within the scope of those agreements shall be regarded as external "representatives" of the EU, being therefore bound to comply with the Charter in accordance with the *Wachauf* line of case law.

3.5.2. Specifying the contours of the "CEU" doctrine

According to the construction made by the ECJ in the "CEU" judgment, the Member States that are "performing their obligations" under an international agreement forming an "integral part of EU law" are to be regarded as "implementing Union law" within the meaning of Article 51(1) of Charter.[150] As such, the precise definition of the contours of the "CEU" doctrine requires further investigation of two main factors.

The first factor relates to the type of interaction required by a given Member State's legislation and the relevant international agreement entered by the EU. In particular, it

[147] At para. 128 of her Opinion, by footnote No. 58, the AG made a reference to para. 53 of the Opinion, where the *Kupferberg* principle is summed up. In the footnote No. 59 of her Opinion, the AG made a reference to para. 82 of the Opinion of AG Øe in *Commission v Hungary (Usufruct over agricultural land)* (C-235/17), where the *Wachauf* line of case law is summed up.

[148] ECJ, Judgments of 26 October 1982, Case C-104/81, *Kupferberg*, EU:C:1982:362, para. 11 and 13.

[149] The *Wachauf* line of case law is based on the idea that Member States, when are implementing EU law, act as "agents" or "representatives" of the EU and are, therefore, bound by the Charter in the same way as the EU institutions. This is often referred to as "agency" situation.

[150] ECJ, *supra* note 90, para. 71 read in conjuction with para. 213.

remains to be clarified whether a violation of the relevant international agreement is to be regarded as a necessary precondition for triggering the application of the Charter of Fundamental Rights or, alternatively, whether a mere finding that the Member State's legislation falls within the scope of that international agreement would suffice in this respect. This latter reading of the "CEU" doctrine, being more oriented to make the Charter applicable than to scrutinise the triggering international agreement, would enable the ECJ to interpret the relevant international agreement only to the extent necessary to determine whether the Member State's legislation falls within the scope of that agreement, without requiring the ECJ to carry out a full-fledged substantive assessment on whether the agreement has been violated by the Member State.

Even though in the judgment the ECJ carried out such a fully-fledged assessment of the GATS upon the Commission's request, there are still good arguments in favour of reading the "CEU" doctrine as not requiring such an assessment under WTO law. First, according to the wording of the ECJ judgment, for the Charter to be applicable it is sufficient that the Member States are "performing their obligations" under the GATS.[151] This expression used by the Court suggests that the decisive factor for the Charter to be applicable in the "CEU" case has been the ECJ's finding that the Hungarian reform fell within the scope of the GATS, rather than the finding of a violation of the GATS. Second, the same notion of "implementing Union law", pursuant to Article 51(1) of the Charter, does not require a prior finding that Member States have breached EU law, but only a prior finding that Member States have acted within the scope of EU law.

Besides being more line with the wording of the ECJ's judgment and the traditional understanding of Article 51(1) of the Charter, such a reading will reduce to the minimum the risk for "CEU" doctrine to give rise to tensions between the EU's obligation to comply with the jurisprudence of the WTO DSB and the need of ensuring the respect of fundamental rights within the EU. As will be considered in more detail in the next subparagraph, by limiting its review to the mere applicability of the relevant WTO law instrument, the ECJ could still be able to apply the Charter without delving into an open conflict with a hypothetical prior ruling by the WTO DSB finding no violation of WTO law by the same Member State's legislation.

The second factor that plays a role in shaping the contours of the "CEU" doctrine relates to the nature of the international agreement entered into by the EU within the scope of which a Member State's legislation has to fall in order to trigger the applicability of the Charter. In this regard, the ECJ judgment seems only to require that the Member State's legislation has to fall within the scope of an international agreement forming an "integral part of EU law"

[151] ECJ, *supra* note 90, para. 213.

pursuant to the *Haegeman* formula.

The ECJ's reference to this formula in the "CEU" case raises the question about the extent to which an international agreement entered by the EU has to be incorporated into the EU legal order for the purpose of triggering the applicability of the Charter. The *Haegeman* formula has been referred to by the ECJ in the case law concerning both EU-only agreements and mixed agreements[152], since both the types of agreements are signed by the EU and approved by Council decisions pursuant to Article 218 TFEU.[153] Within the category of mixed agreements a distinction has to be drawn between the parts of mixed agreements falling within the areas of EU exclusive competence listed in Article 3 TFEU and the parts of mixed agreements falling outside the areas of EU exclusive competence. Whilst the former clearly fulfil the *Haegeman* formula and are fully subject to the ECJ jurisdiction[154], this is not necessarily the case for mixed agreements falling outside the EU exclusive competence. Even though the ECJ case law has largely referred to the *Haegeman* formula in respect of those agreements, the ECJ has then self-restrained its jurisdiction to the EU-only parts of the agreements that are considered by the Court itself to fall within the competence of the EU.[155]

Against this background, the GATS assumes a peculiar position within the EU legal order. After the entry into force of the Maastricht Treaty in 1993, the Marrakesh Agreement establishing the WTO, which includes the GATS (Annex 1B), was concluded by the European Community (EC) and the EC Member States in the form of a mixed agreement.[156] The conclusion of the WTO Agreement as a mixed agreement was largely due to the fact that the ECJ, in its Opinion 1/94[157], famously ruled that trade in services (covered by the GATS) and the trade aspects of intellectual property (covered by the TRIPS) fell outside the common commercial policy and thus outside the exclusive competence of the EU. Having given rise to concerns and difficulties over the following years, the distinction between exclusive (GATT) and shared competence (GATS and TRIPS) had been addressed by the subsequent

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[152] EU-only agreements are international agreements concluded only by the EU. Mixed agreements are agreements that are concluded by both the EU and the EU Member States, as separate entities under international law. Mixity usually comes into play when the relevant agreement contains provisions that fall outside the EU exclusive competence; *Neframi*, in: Cannizzaro/Palchetti/Wessel (eds.), p.325, 329; *Rosas*, Fordham Int'l L.J. 38(4) 2015, p. 1073, 1074; *Rosas*, in: Govaere/Lannon/Van Elsuwege/Adam (eds.), p. 17, 20.

[153] The ECJ case law suggests that the mere fact that the EU has entered an international agreement, either alone or together with the Member States, is sufficient to conclude that this international agreement is "integral part of EU law" for the sake of the *Haegeman* formula; see *Neframi*, in: Cannizzaro/Palchetti/Wessel (eds.), p. 325, 326.

[154] *Neframi*, in: Cannizzaro/Palchetti/Wessel (eds.), p. 325, 331.

[155] *Koutrakos*, in: Hillion/Koutrakos (eds.), p. 116, 117; *Mohay*, Pravni vjesnik 33(3-4) 2017, p. 151, 154; Ibid. (*Neframi*), p. 325, 326-327.

[156] *Steinberger*, EJIL 17(4) 2006, p. 837, 838.

[157] ECJ, Opinion of 15 November 1994, Opinion 1/94, WTO Agreement, ECLI:EU:C:1994:384.

amendments of the EU Treaties. As a result, with the entry into force of the Lisbon Treaty in 2009 the trade in service and the commercial aspects of intellectual property were brought into the realm of the common commercial policy and thus of the exclusive competence of the EU, as it results from the now Article 207(1) TFEU.[158]

The peculiar nature of the GATS and the other WTO instruments, as agreements falling within the very limited areas of EU exclusive competence, raises doubts as to whether the "CEU" doctrine could in future cases be extended to agreements falling outside the areas of EU exclusive competence. Regarding those latter, the mere fact than an international agreement has been entered into by the EU on the basis of the procedure set out in Article 218 TFEU, as the ECJ judgment on the "CEU" case might suggest at a first glance, would clearly not be sufficient in itself to trigger the applicability of the Charter pursuant to the "CEU" doctrine. An essential precondition in this respect is that the ECJ would need to have jurisdiction to interpret the relevant international agreement to the extent necessary to determine whether a given Member State's legislation falls within the scope of that agreement. In other words, also international agreements concluded by the EU outside the policy areas of EU exclusive competence could in principle be able to trigger the applicability of the Charter pursuant to the "CEU" doctrine, but only to the extent that the relevant parts of the agreements would be considered by the ECJ as being within the shared competences of the EU and thus subject to the Court's jurisdiction.

The ECJ's judgment on the "CEU" case, by referring only to the *Haegeman* formula and irrespective of the exclusive nature of the EU competence involved in the case, leaves sufficient space for future possible extensions of the "CEU" doctrine to the parts of mixed agreements entered into by the EU in the areas of shared competence to the extent that they are considered by the ECJ as forming part of EU law and being subject to its jurisdiction.

3.5.3. Relational framework between the ECJ and the WTO DSB: does the "CEU" doctrine entail a risk of conflicting decisions?

The "CEU" doctrine entails that when Member States are "performing their obligations" under an international agreement entered into by the EU, they must be regarded as "implementing Union law" within the meaning of Article 51(1) of the Charter of Fundamental Rights. As suggested above, a finding by the ECJ as to the applicability of the relevant international agreement is the necessary pre-condition for assessing the compatibility of one Member State's legislation with the Charter. In other words, for the ECJ to be able to assess whether

[158] *Rosas*, Fordham Int'l L.J. 38(4) 2015, p. 1073, 1081.

a Member State's legislation complies with the Charter, the ECJ will first need to find that legislation as falling within the scope of an international agreement concluded by the EU.

Since the operation of the "CEU" doctrine presupposes an assessment by the ECJ as to the applicability of the relevant international agreement, the question arises whether making the Charter applicable via international agreements entered into by the EU may become the spark triggering conflicting jurisdictions and decisions between the ECJ and the external dispute settlement or monitoring bodies which may have competence to interpret the relevant international agreements. In particular, within the WTO there is a dispute settlement system unique in international law that consists of elements of ad hoc arbitration proceedings and a mandatory permanent tribunal in the second instance.[159] The reports issued by the first instance's panels and by the Appellate Body in the second instance are legally binding for the parties of the dispute.[160] As such, in a situation where the EU is sued before the WTO DSB as a defendant for one Member State's legislation allegedly violating WTO law and the DSB finds a violation thereof in its final report, the EU will be bound to comply with that WTO DSB's final report.

The relevant issue that needs to be considered is whether the EU's obligation to comply with the WTO DSB's rulings could come into conflict with the EU's interest to preserve the applicability of the Charter for ensuring the protection of fundamental rights in the EU. In order to determine whether the "CEU" doctrine could realistically give rise to tensions between the EU's obligation to comply with the DSB's rulings and the need of ensuring protection of fundamental rights within the EU, it is necessary to analyse three different hypothetical scenarios: the first scenario where there is a prior WTO DSB's ruling and subsequent (diverging) judgment by the ECJ; the opposite second scenario where there is a prior judgment by the ECJ and a subsequent (diverging) ruling by the WTO DSB; and finally the third scenario where there are parallel proceedings pending before the ECJ and the WTO DSB. When considering each of these scenarios a further distinction will be made in respect of the content of the WTO DSB's rulings and of the ECJ's judgments between "non-violation", "violation" and "non-applicability" of the WTO law.

The analysis of the three scenarios has to be carried out by taking into account the way in which the ECJ structured its relationship with the WTO DSB in the judgment on the "CEU" case. There the ECJ depicted itself as a sort of supreme court of a federal state which is subordinated to the WTO DSB.[161] By recalling Articles 3 and 32 ARSIWA and Article 26

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[159] *Cottier,* CMLR 35(2) (1998), p. 325, 335.

[160] Ibid., p. 340.

[161] *Traudt*, Update zum EuGH-Urteil C-66/18, https://jean-monnet-saar.eu/?page_id=2929 (last accessed 03/06/21); for the AG Kokott's Opinion see also *Traudt*, Der EuGH als regionaler Ersatz für

VCLT, the Court stressed that neither the EU nor the Member States may rely on a ECJ's judgment in order to refuse to comply with WTO DSB's rulings as well as that it must itself be bound by the WTO DSB's interpretation of the various GATS provisions.[162]

The first hypothetical scenario concerns the situation where there is a prior ruling by the WTO DSB and a subsequent diverging judgment by the ECJ. If that WTO DSB ruling found no violation of WTO law by an EU Member State's legislation, the ECJ would still be able to find that legislation as falling within the scope of WTO law and thus to assess its compatibility with the Charter of Fundamental Rights. Since a finding by the WTO DSB that WTO law is not substantively violated presupposes a finding as to the applicability of the WTO law, the ECJ will still be free to find that the WTO law is applicable and thus to carry out an independent substantive assessment as to whether or not the relevant Member State's legislation violates the Charter of Fundamental Rights. Equally, if the prior WTO DSB's found a violation of WTO law by an EU Member State's legislation, the ECJ could uphold that ruling, find the WTO law to be applicable and thus assess the compatibility of the national legislation with the Charter.[163]

The risk of conflicting decision by the ECJ and the WTO DSB remains only in the rather theoretical situation where there would be a prior ruling by the WTO DSB declaring WTO law to be inapplicable to an EU Member State's legislation. In such a scenario, the ECJ would essentially be prevented from finding the Charter applicable and thus from assessing the compatibility of that national legislation with the Charter on the basis of the "CEU" doctrine. Should the ECJ decide in favour of the applicability of WTO law, the ECJ would find itself in conflict with the previous WTO DSB ruling. At the same time, however, it is questionable that a conflicting judgment by the ECJ finding the WTO law to be applicable for EU-internal purposes will in itself render the EU liable for failure to comply with the WTO DSB's ruling. Although the EU is bound to comply with the WTO DSB rulings, a DSB's ruling finding the WTO law to be inapplicable leaves substantively unaffected the legal relationship between

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den Appellate Body der WTO?, https://jean-monnet-saar.eu/?page_id=2490 (last accessed 03/06/21).

[162] ECJ, *supra* note 90, para. 91-92.

[163] Only if the ECJ decides to carry out a full-fledged substantive assessment of WTO law and to find no violation thereof, thereby distancing itself from DSB ruling, the ECJ would run the risk of exposing the EU to international liability for allowing that Member State to act in a manner that has been judged by the WTO DSB as being incompatible with WTO law. The EU's international liability could arise since that Member State's choice to maintain its legislation will result in a violation of the WTO law caused by an EU Member State that is attributable to the EU. Indeed, at paragraph 84-86 of the judgment on the "CEU" case, the ECJ assumes that the Member States' actions in breach of WTO law may be attributed to the EU and render the EU liable under international law towards third WTO Members. The same approach is reflected in the AG's Opinion (para. 48-55). For an overview of the possible legal bases for attributing the "lex CEU" to the EU from an international law's liability perspective see *Traudt*, Update zum EuGH-Urteil C-66/18, https://jean-monnet-saar.eu/?page_id=2929 (last accessed 03/06/21).

the EU and its Member States, on one hand, and third WTO Members on the other hand. In the same way, a finding by the ECJ that is limited to the applicability of the WTO law solely for the purpose of triggering the application of the Charter would have only a pure EU's domestic value without affecting the EU's substantive WTO obligations and without impinging on any legitimate expectation by third WTO Members.[164]

In any event, the risk that the ECJ will distance itself from the jurisprudence of the WTO DSB in such a theoretical situation is reduced by the fact that in the judgment on the "CEU" case the ECJ held that it must itself be bound by the jurisprudence of the WTO DSB.[165] Since in the "CEU" case there was no prior ruling by the WTO DSB, this ECJ's statement may be seen a signal that in future cases where there would be a prior WTO DSB's ruling the ECJ will follow it. For the ECJ to be able to distance itself from this prior DSB's ruling in order to preserve to applicability of the Charter, the ECJ will need to essentially reverse the construction made in the "CEU" case where it has depicted itself as a regional court subordinated to the DSB.

The second scenario concerns the situation where there is a prior judgment by the ECJ and a subsequent diverging ruling by the WTO DSB. Indeed, regardless of the prior assessment carried out by the ECJ as to the compatibility of an EU Member State's legislation with WTO law, third WTO Members that are affected by this legislation might be interested in starting subsequent proceedings before the WTO DSB against the EU for obtaining a DSB's report assessing the compatibility of that legislation with the WTO law. If a third WTO Member decides to initiate proceedings before the WTO DSB, the relevant question would be to determine the effect of the prior ECJ judgment on the subsequent assessment of the WTO DSB as well as the effect of the subsequent assessment of the WTO DSB on the future jurisprudence of the ECJ.

Regarding the effect of the prior ECJ judgment on the WTO DSB's assessment, both the AG Kokott[166] and the ECJ in the CEU case stressed that infringement proceedings based on WTO law are purely internal instruments that have no bearing with any future possible assessment under WTO law carried out by the DSB. The ECJ referred to Articles 3 and 32 ARSIWA to show that its assessment does not bind third WTO Members, nor the WTO DSB and that neither the EU nor the EU Member States could rely on the ECJ's assessment in order to refuse to comply with the WTO DSB's rulings.[167] As such, a prior ECJ judgment

[164] The fact that one EU's Member State legislation is judged by the DSB as falling outside the scope of WTO law does not seem to alter in any way the legal relationship between the EU and third WTO Members.
[165] ECJ, *supra* note 90, para. 92.
[166] Opinion of Advocate General Kokott in case C-66/18, *supra* note 91, para. 58.
[167] ECJ, *supra* note 90, para. 88-91.

finding that one member state's legislation falls within the scope of WTO law and/or that it complies with or violates WTO law does not affect in any way the subsequent assessment by the DSB.

Regarding the effect of the subsequent diverging WTO DSB ruling on the future ECJ jurisprudence, in the judgment on the "CEU" case the ECJ did not explicitly hold that it will be ready to adapt its future jurisprudence to that of the WTO DSB. However, the ECJ's statement that it must itself be bound by the WTO DSB's interpretation of WTO law[168] suggests that the Court will likely adapt its future jurisprudence to that of the WTO DSB. Should there be a prior ECJ judgment finding no violation of WTO law and a subsequent ruling by the WTO DSB finding a violation, the ECJ will in all likelihood adapt its own jurisprudence to that of the DSB in order to ensure that the EU will not be exposed to international liability stemming from Member States' actions that are incompatible with the WTO law as interpreted by the DSB.[169] By contrast, should there be a prior ECJ judgment finding WTO law to have been breached or to be applicable and a subsequent diverging ruling by the DSB, the ECJ could probably avoid to adapt its future jurisprudence to that of DSB.[170]

The third scenario concerns the situation where parallel proceedings are pending before the WTO DSB and the ECJ. The most appropriate way to avoid conflicting decisions being delivered in parallel proceedings would be, as suggested by the AG Kokott in her Opinion[171], to stay the infringement proceedings pending before the ECJ until the conclusion of the proceedings pending before the WTO DSB. The fact that in the judgment on the "CEU" case the ECJ did not adopt the AG's suggestion may indicate that the ECJ is willing to reserve to itself some margin of autonomy in interpreting the WTO law, rather than getting involved in a judicial dialogue with the WTO DSB.[172]

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[168] ECJ, *supra* note 165.

[169] As noted above (note 163), the ECJ will need to adapt its jurisprudence to that of the DSB in order to ensure that the EU Member States won't behave inconsistently with the interpretation of WTO law given later on by the DSB. If the Member States decide to follow the previous ECJ's jurisprudence without conforming to the subsequent DSB's jurisprudence, the Member States' actions conflicting with the DSB's interpretation of WTO law will render the EU itself liable under international law.

[170] As noted above (note 164), a DSB ruling finding the WTO law to be inapplicable does not seem to alter the legal relationship between the EU and third WTO Members. The same seems to hold true for a DSB's ruling finding WTO law to have been complied with. The fact that an ECJ judgment prevents a Member State from maintaining a law that had been judged by the DSB as being compatible with WTO law does not seem to alter the substantive WTO obligations of the EU and its Member States vis-à-vis third WTO members. Indeed, by forcing one EU Member State to remove a national legislation that has been judged by the DSB as being compatible with WTO law, the ECJ does not affect the ability for that Member State to comply with WTO law as interpreted by the DSB.

[171] Opinion of Advocate General Kokott in case C-66/18, *supra* note 91, para. 59.

[172] *Traudt*, Update zum EuGH-Urteil C-66/18, https://jean-monnet-saar.eu/?page_id=2929 (last accessed 03/06/21).

At the same time, the fact that the ECJ has claimed to be bound by the jurisprudence of the WTO DSB may offer some guidance also in the scenario where there are parallel proceedings pending before the DSB and the ECJ. If the WTO DSB was to conclude proceedings earlier than the ECJ, the latter would have to adjust its decision to that of the WTO DSB. Similarly to what was said in the first scenario, if the WTO DSB were to decide "violation" or "non-violation" of the WTO law, the ECJ could still consider WTO law to be applicable and thus to assess the compatibility of the national legislation with the Charter. Also in this scenario, the risk of conflicting decisions being delivered by the WTO DSB and the ECJ remains only if the WTO DSB decided that WTO law was not applicable.

Similarly to what has been considered in the second scenario, if the ECJ was to conclude the proceedings before the WTO DSB, the WTO DSB will not in any way be bound by the ECJ judgment. Should ECJ conclude that WTO law was not breached and the WTO DSB reach a diverging conclusion, the ECJ could be required to adjust its subsequent case law to that of the WTO DSB. The need for the ECJ to adapt its future jurisprudence to that of the DSB does not seem to arise in the case where the ECJ found WTO law to be applicable or to have been breached and then the DSB reached a diverging finding.[173]

This analysis of the different possible scenarios of interaction between the ECJ and the WTO DSB reveals that the risk of conflicting decisions by the ECJ and the WTO DSB exists only in the situation where there is a prior DSB ruling finding WTO law to be inapplicable. Since a finding by the ECJ that one Member State's legislation falls within the scope of WTO law is necessary to enable the ECJ to assess the compatibility of that legislation with the Charter pursuant to the "CEU" doctrine, a prior DSB ruling finding WTO law to be inapplicable will essentially prevent the ECJ from applying the Charter of Fundamental Rights under the "CEU" doctrine. The only way for the ECJ to apply the Charter will be to distance itself from the interpretation given by the DSB and to find WTO law to be applicable. Since distancing itself from the interpretation of the DSB will entail a reversal of the construction made by the ECJ in the "CEU" case where the Court depicted itself as a regional court subordinated to the WTO DSB, the likelihood that the ECJ will distance itself from the DSB in this residual scenario seems to be particularly remote.

Outside this situation, the "CEU" doctrine is largely incapable of triggering conflicting decisions of the ECJ and the WTO DSB as to the interpretation of WTO law. On the one hand, a prior ruling by the DSB finding WTO law to have been complied with or violated by one EU Member State's legislation does not prevent the ECJ from finding the WTO law to be

[173] As noted above (notes 164 and 170), a DSB's ruling finding the WTO law to be inapplicable or not to have been violated does not seem to alter the legal relationship between the EU and third WTO Members.

applicable and assessing the compatibility of that legislation with the Charter of Fundamental Rights. On the other hand, should the ECJ's assessment be followed by a diverging assessment by the DSB, in most conceivable cases the ECJ will need to adapt its future jurisprudence to that of the DSB. In the scenario where there are parallel proceedings pending before the ECJ and the DSB the best solution to avoid conflicting decisions will be to stay the infringement proceedings before the ECJ until the conclusion of the DSB proceedings. Although in the judgment on the "CEU" case the ECJ did not adopt the AG's suggestion to stay the proceedings in such a scenario, the ECJ's statement that it must itself be bound by the DSB's interpretation of the WTO law suggests that the ECJ will likely adapt its future case law to that of the DSB should the failure to stay proceedings result in a conflicting decision being delivered by the ECJ.

3.6. Concluding remarks on the "CEU" case

The ECJ judgment on the "CEU" case, besides representing a victory for academic freedom and more widely for the EU fundamental values under Article 2 TEU, opens up a new door by which the Charter may come into play. For the first time, the ECJ held that the Charter may be applicable to Member State's actions falling within the scope of international agreements entered into by the EU. In the last paragraph this novelty has been carefully scrutinised, and the following conclusions have been reached.

First, it has been suggested that the rationale behind making the Charter applicable via international agreements is twofold. From an EU law perspective, international agreements concluded by the EU are a source of EU law, and, from an international law perspective, Member States acting within their scope should be regarded as external "representatives" of the EU and thus subject to the Charter.

Regarding the types of international agreements that may trigger the application of the Charter, they could theoretically be not only agreements falling within the EU's exclusive competence, but also mixed agreements entered by the EU in the areas of shared competence, even though only to the extent that their provisions are judged by the ECJ as being subject to its own jurisdiction.

It has been suggested that the "CEU" doctrine only requires a finding by the ECJ as to the applicability of the relevant international agreement, without a full-fledged substantive assessment as to whether or not that agreement has been breached being required. In other words, for the ECJ to be able to assess the compatibility of an EU Member State's legislation with the Charter, the ECJ will simply need to find that legislation as falling within the scope of the WTO law and can leave aside the issue as to whether or not that legislation violates the

WTO law.

Besides being more in line with the ECJ's judgment on the CEU case and the traditional understanding of Article 51(1) of the Charter, such a reading of the "CEU" doctrine will confine the risk of conflicting decisions being delivered by the ECJ and the WTO DSB to the situation when there is a prior DSB ruling that found the WTO law to be inapplicable to the same Member State's legislation. Apart from this situation, the "CEU" doctrine is largely incapable of triggering conflicting decisions between the ECJ and the WTO DSB as to the interpretation of WTO law. On the one hand, a prior ruling by the DSB finding no violation of WTO law by a Member State's legislation does not prevent the ECJ from finding the WTO law to be applicable and assessing the compatibility of that legislation with the Charter of Fundamental Rights. On the other hand, should the ECJ's assessment be followed by a diverging assessment of the DSB, in most conceivable cases the ECJ will need to adapt its future jurisprudence to that of the DSB. Although in the judgment on the "CEU" case the ECJ did not refer to the AG's suggestion to stay the proceedings before the ECJ in the scenario where there are parallel proceedings pending before the DSB and the ECJ, the ECJ's statement that it must itself be bound by the DSB's interpretation of the WTO law suggests that the ECJ will likely adapt its future case law to that of the DSB.

4. Common trend in both judgments: expansive interpretation of Article 51(1) of the Charter

The analysis carried out in this paper has revealed both commonalities and differences amongst these two ECJ judgments. The main common feature is that in both cases the ECJ has made the Charter applicable via the EU market freedoms, thereby confirming the expansive reading of the *ERT* line of case law already relied upon by the Court in the earlier case *Commission v Hungary (Usufruct over agricultural land)*. In both the transparency law case and the "CEU" case, the ECJ, even in the absence of any EU primary or secondary law provisions on the respective matters, considered that Hungary's reliance on justification grounds recognised under EU law when restricting the market freedoms was a sufficient connection with EU law, for the sake of Article 51(1) of the Charter, to enable the Court to carry out a separate assessment based on the Charter of Fundamental Rights.

At the same time, in the "CEU" case the ECJ went further by deciding fundamental rights issues via the WTO law. While the NGOs transparency law was challenged solely on the basis of the market freedoms, the "lex CEU" was challenged by the Commission also on the basis of the GATS to the extent that it applied to universities having their seats in third countries. In this regard, the Commission did not limit itself to bring an infringement

procedure based on the GATS, but it also argued that the GATS, as an international agreement concluded by the EU, is a source of EU law which may trigger the application of the Charter. By upholding the Commission's argument, the ECJ accepted that an international agreement entered into by the EU, being a source of EU law, may trigger the application of the Charter to Member States' measures that fall within the scope of that agreement. This approach, which has been labelled as “CEU” doctrine throughout the paper, inevitably renders the ECJ judgment on the “CEU” case more innovative from the perspective of the Charter's scope of application under Article 51(1) than that on the transparency law case.

Against the background of the increasingly evident limited effectiveness of the Article 7 TEU procedure, these two judgments undoubtedly reveal the potential of relying on EU internal market law and international trade law for the purpose of compelling the EU Member States to respect the EU’s fundamental values. In spite of the well-known limited scope of application of Charter to Member States’ measures, the overall picture given by these two judgments is that of a Court which is actively exploring the possible connections with the EU law to enable it to enforce the Charter’s provisions against Hungary’s illiberal policies.

5. Conclusion

Overall, the two ECJ judgments that have been examined in this paper should be regarded as clear signals that the ECJ is ready and willing to adopt an expansive approach in determining the Member States' actions that fall within the scope of the Charter under Article 51(1) when serious threats to the EU’s fundamental values are at stake. In these times of rule of law crisis where the limited effectiveness of the Article 7 TEU procedure is becoming increasingly obvious, these two judgments delivered against Hungary are a confirmation that the ECJ is placing itself as an active player in protecting and enforcing the EU’s fundamental values against some illiberal Member States’ policies. The twist realized by the ECJ in these judgments shows the potential of relying on EU internal market law and international trade law for the purpose of triggering the application of the Charter of Fundamental Rights to sanction illiberal trends in Hungary.

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