Court of Justice of the European Union
PRESS RELEASE No 125/20
Luxembourg, 6 October 2020

Press and Information

Judgment in Case C-66/18
Commission v Hungary

The conditions introduced by Hungary to enable foreign higher education institutions to carry out their activities in its territory are incompatible with EU law

In its judgment in ***Commission* v *Hungary (Higher education)*** (C-66/18), delivered on 6 October 2020, the Grand Chamber of **the Court of Justice upheld the action for failure to fulfil obligations brought against Hungary by the European Commission.** The Court held, first, that, **by making the exercise, in Hungary, of teaching activities leading to a qualification by higher education institutions situated outside the European Economic Area (EEA) subject to the existence of an international treaty between Hungary and the third country in which the institution concerned has its seat, Hungary has failed to comply with the commitments** in relation to national treatment **given under the General Agreement on Trade in Services (GATS),** concluded within the framework of the World Trade Organisation (WTO).[1] **That requirement is also contrary to the provisions of the Charter of Fundamental Rights of the European Union ('the Charter') relating to academic freedom, the freedom to found higher education institutions and the freedom to conduct a business.[2]**

Second, the Court held that, **by making the exercise, in Hungary, of the activities of foreign higher education institutions, including institutions having their seat in another Member State of the EEA, subject to the condition that they offer higher education in the country in which they have their seat, Hungary has failed to comply with its national treatment commitments under the GATS and with its obligations in respect of the freedom of establishment,[3] the free movement of services[4] and the abovementioned provisions of the Charter.**

On 4 April 2017 Hungary adopted, as a matter of urgency, a law amending the Law on higher education,[5] which was presented as being intended to safeguard the quality of higher education teaching activities, and the main object of which was to reform the licensing regime applicable to foreign higher education institutions. Regardless of whether or not they were previously approved, such institutions are now subject to new requirements, including those examined by the Court.

The Commission brought an action for failure to fulfil obligations before the Court against Hungary, claiming that the 2017 Law on higher education was incompatible both with the commitments undertaken by Hungary within the framework of the GATS and with the freedom of establishment, the free movement of services and the provisions of the Charter relating to academic freedom, the freedom to found higher education institutions and the freedom to conduct a business.

First of all, the Court rejected the grounds of inadmissibility put forward by Hungary. First, as regards the short time limits imposed by the Commission during the pre-litigation procedure, the

[1] Article XVII of the GATS.
[2] Articles 13, 14(3) and 16 of the Charter.
[3] Article 49 TFEU.
[4] Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36, 'the Services Directive').
[5] Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény módosításáról szóló 2017. évi XXV. törvény (Law No XXV of 2017, amending Law No CCIV of 2011 on national higher education) ('the 2017 Law on higher education').

Court, confirming its case-law on this point,[6] examined the actual conduct of that procedure and concluded that Hungary had not established that its rights of defence had been infringed as alleged. Furthermore, it observed that the contested time limits had been set taking into consideration the imminent entry into force of the provisions at issue, which was originally set for 1 January 2018. Second, the Court considered that the Hungarian Government could not reasonably rely on the illegitimacy of the political intentions ascribed to the Commission, namely to protect the particular interests of the Central European University, since the question as to whether it is appropriate to initiate an infringement procedure is entirely within the Commission's discretion, which, as such, is not subject to judicial review by the Court.

The Court went on to declare that it had jurisdiction to hear and determine complaints alleging infringements of WTO law. In that regard, having recalled that any international agreement entered into by the EU is an integral part of EU law, the Court confirmed that to be the case as regards the Agreement establishing the WTO, of which the GATS is part. Next, with respect to the relationship between the exclusive competence of the EU in the area of common commercial policy and the broad competence of the Member States in the area of education, the Court made clear that commitments entered into under the GATS, including those relating to the liberalisation of trade in private educational services, fall within the common commercial policy. Moreover, in addressing the Hungarian Government's arguments as to the exclusivity of the interpretative powers conferred, in particular, on the bodies constituting the WTO's dispute settlement system, the Court emphasised that not only did the existence of the WTO's own dispute settlement system not preclude the Court from accepting, in the context of infringement proceedings, jurisdiction to hear and determine complaints alleging infringements of WTO law – in this instance, the GATS – but the exercise of that jurisdiction was in fact entirely consistent with the obligation of each member of the WTO, including the EU, to ensure observance of its obligations under the law of that organisation. The Court pointed out that the EU may find itself incurring international liability as a result of any failure by a Member State to comply with its obligations under the GATS.

Similarly, the Court set out the specific implications, for the exercise of its own jurisdiction, of the provisions of international conventions that are binding on the EU, and of the rules and principles of general customary international law, the binding nature of which for the EU was noted at the outset. Thus, in the light of the codified principles of general international law in relation to a State's liability for an internationally wrongful act, the Court observed that the assessment of the conduct of a Member State which the Court must make in infringement proceedings, including in the light of WTO law, is not binding on other members of the WTO, nor can it affect any later assessment that the WTO's Dispute Settlement Body (DSB) might be called upon to make. Thus, according to the Court, neither the EU nor the Member State concerned could rely on a judgment delivered by the Court at the end of infringement proceedings in order to avoid their obligation to comply with the legal consequences which WTO law attaches to rulings of the DSB.

Having thus accepted jurisdiction, the Court proceeded to examine the Commission's complaints. First, as regards the assessment, in the light of Article XVII of the GATS on national treatment, of the requirement that there be a prior international treaty, the Court found at the outset that, **in the field of higher education services, Hungary is fully committed to according the national treatment provided for in that article,** notwithstanding a reservation in respect of the market access commitment (Article XVI), to the effect that the establishment of education institutions in Hungary is subject to prior authorisation. According to WTO law, such a prior authorisation reservation aimed at limiting the market access commitment undertaken can apply to national treatment only in so far as it relates to a measure that is inconsistent both with the market access obligation and with that relating to national treatment. In the present case, the general nature of the prior authorisation reservation by which Hungary sought to limit its market access commitment is not discriminatory, so that Hungary cannot rely on it with respect to the national treatment obligation.

[6] See, in particular, judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)* (C-78/18, paragraph 30 and the case-law cited) (see also PR No 73/20).

Next, the Court stated that **the conclusion of an international treaty,** as required by the 2017 Law on higher education, imposes on the foreign providers concerned an additional condition for the supply of higher education services in Hungary, the fulfilment of that condition being in the discretion of the Hungarian authorities, which **is sufficient to establish a modification of the conditions of competition to the detriment of the institutions concerned and in favour of Hungarian institutions.** Last, the Court considered that the explanations given by the Hungarian Government in relation to the objectives of the requirement at issue were not sufficient to justify it, in the light of Article XIV of the GATS. As regards Hungary's reliance on the protection of public order, Hungary had not established, in a specific and detailed manner, that there was a genuine and sufficiently serious threat affecting a fundamental interest of Hungarian society. In addition, in so far as the requirement at issue seeks to prevent deceptive practices, the Court ruled that it constituted a means of arbitrary discrimination because of the decisive nature of the political will of the Hungarian authorities as regards that requirement being met. That justification on Hungary's part also, therefore, could not be accepted.

Furthermore and in any event, the Court ruled that the requirement at issue was disproportionate, observing that it applied indiscriminately, including to institutions already present on the Hungarian market.

Second, the Court examined **the requirement that education activities be offered in the State of origin.** So far as concerns, first of all, the commitment undertaken by Hungary under Article XVII of the GATS, the Court, having shown the competitive disadvantage resulting from the requirement at issue for the institutions concerned, noted again the insufficiency of the explanations provided by the Hungarian Government in relation to the objectives that might justify its necessity. For reasons similar to those adopted in the analysis of the first complaint, the Court therefore concluded that, **in so far as that requirement applies to higher education institutions established in a third country member of the WTO, it infringed that provision.** Furthermore, **in so far as the requirement applies to education institutions which have their seat in another Member State of the EU,** the Court found **there to be an unjustified restriction both of the freedom of establishment** guaranteed by Article 49 TFEU **and of the free movement of services** covered by Article 16 of the Services Directive. Last, in so far as the requirement at issue is presented as being intended to ensure the high quality of higher education, the Court observed that the activities required, the quality of which remains to be established, do not in any way prejudge the quality of the education offered in Hungary, and such an objective is not, therefore, sufficient to justify the requirement at issue.

Third, the Court examined whether the requirements at issue, introduced by the 2017 Law on higher education, were consistent with Articles 13, 14(3) and 16 of the Charter. The Court stated, first of all, that Hungary was bound by the Charter as regards the disputed provisions, since performance of its obligations under an international agreement that is an integral part of EU law, such as the GATS, on the one hand, and the restrictions placed by those provisions on the fundamental freedoms, which it sought in vain to justify, on the other, are part of the implementation of EU law within the meaning of Article 51(1) of the Charter.

Examining one after another the scope of the guarantees provided by these provisions of the Charter, the Court emphasised, in relation to the exercise of the activities of higher education institutions, that academic freedom did not only have an individual dimension in so far as it is associated with freedom of expression and, specifically in the field of research, the freedoms of communication, of research and of dissemination of results thus obtained, but also an institutional and organisational dimension reflected in the autonomy of those institutions. The Court held that the measures at issue were capable of endangering the academic activities of the foreign higher education institutions concerned within the territory of Hungary and, therefore, of depriving the universities concerned of the autonomous infrastructure necessary for conducting their scientific research and for carrying out their educational activities; consequently **those measures were such as to limit the academic freedom** protected in Article 13 of the Charter. Furthermore, **the founding of those institutions** is covered by Articles 14(3) and 16 of the Charter and, for reasons similar to those just outlined, **the measures at issue constitute an interference with the rights enshrined in those provisions.** Since the various interferences could not be justified under

Article 52(1) of the Charter, the Court held that Hungary has failed to comply with the provisions of the Charter cited above.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355