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## GATS the way / I like it: WTO Law, Review of EU Legality and Fundamental Rights

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### Introduction

The recent judgment of the Court of Justice of the EU (the Court) in *Commission v. Hungary*<sup>1</sup> has many interesting parts, but this Reflection addresses two of them in particular: the use of WTO law as the standard of review for EU legality, and the application of the Charter of Fundamental Rights of the EU (the Charter).

I focus on three aspects: two double standards designed to shield the EU, and a Trojan horse that could be used to attack it on the sly. First, the Court supports the full integration of WTO law into EU law *only* when it can use it against the Member States (MS). Second, the Court accepts that an international tribunal enforces the norms of another legal order *only* when that tribunal is the Court itself. Third, the first approach might open new avenues of strategic use of the Charter, by individuals and MS, against EU measures or domestic implementing acts.

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<sup>1</sup> Case C-66/18, *Commission v. Hungary*, Judgment of 6 October 2020, ECLI:EU:C:2020:792 (CEU decision).

## Background – the Hungarian measure

In 2017, Hungary amended its law on higher education, forbidding overnight the Central European University (CEU) from operating its US-incorporated university in Budapest (the CEU act). The new measure is not formally *ad personam*: it requires, for foreign suppliers to operate in Hungary, the conclusion of bilateral agreements between Hungary and their home states, and that they also provide educational services in their home state. The CEU lies where the two requirements overlap, and not by accident.<sup>2</sup> The Venice Commission criticised this interference since it does not take account of the rights protected in the European Convention of Human Rights (ECHR), in particular the freedom of expression.<sup>3</sup>

The European Commission filed an infringement action against Hungary. On 6 October 2020, following the Opinion of the Advocate General (AG),<sup>4</sup> the Court declared that Hungary had breached EU law. The measure appeared long-planned and veined by nationalist and authoritarian undertones,<sup>5</sup> but the link with EU law was not entirely clear.

Non-EU corporations do not enjoy the four freedoms of the Treaty on the Functioning of the European Union (TFEU) (spare a thought for Barclays in 2021). Sure, the CEU act restricts the right to education and the freedom to conduct a business listed in the Charter of Fundamental Rights. But what judges across the EU blissfully forget<sup>6</sup> is that the Charter only applies when other EU norms also apply (i.e. the measure reviewed must fall within the scope of *other* EU law). In this case, what non-Charter EU norm applies?

According to the Commission, the AG and the Court, the applicable EU law is the General Agreement on Trade in Services (GATS), a treaty of the World Trade Organization (WTO). In the press release on the infringement action,<sup>7</sup> the GATS seemed to be an afterthought, coming after the Charter in the list of breached provisions. Then, it stole the spotlight.

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<sup>2</sup> For instance, see Guardian, 'George Soros: Orbán turns to familiar scapegoat as Hungary rows with EU' (5 December 2020).

<sup>3</sup> Venice Commission, Hungary - Preliminary Opinion on Act XXV of 4 April 2017 on the amendment of Act CCIV of 2011 on Tertiary Education, CDL-PI(2017)005-e, 11 August 2017.

<sup>4</sup> Case C-66/18, *Commission v. Hungary*, Opinion of Advocate General Kokott, 5 March 2020, ECLI:EU:C:2020:172 (*CEU* Opinion).

<sup>5</sup> The Atlantic, Franklin Fore, 'Viktor Orbán's War on Intellect' (June 2019).

<sup>6</sup> For instance, see Cases C-723/18, *EV v. Inspectoratul General*, ECLI:EU:C:2019:398; C-789/18 and C-790/18, *AQ and ZQ v. Corte dei Conti*, ECLI:EU:C:2019:417; C-185/19, *KE v LF*, ECLI:EU:C:2019:779; C-818/19 and C-878/19, „*Marvik-Pastrogor*“ *EOOD v Darzhavata*, ECLI:EU:C:2020:314; C-234/19, *EOS Matrix d.o.o. v Entazis d.o.o.*, ECLI:EU:C:2019:986; C-376/19, „*MAK TURS*“ *AD v Direktor*, ECLI:EU:C:2020:99.

<sup>7</sup> Press Release, *Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law* (7 December 2017).

I focus only on the ‘bilateral treaty’ requirement for non-EU operators, for which the GATS link is indispensable for the infringement case. I do not address the elements of the CEU act that could stifle the freedom of movement of EU suppliers. By requiring them to also provide educational services in their home States, the Hungarian measure breaches the Services Directive and Articles 49 and 54 of the TFEU. In addition, I will not comment here on the assessment of the CEU act under Art. XIV GATS or the Charter. I focus on the usability of WTO law, which is a matter of jurisdiction/ admissibility, not merits.

### **What’s the GATS and why Hungary breached it**

The GATS<sup>8</sup> promotes trade liberalisation, creating mutual obligations on trade in services. Furthermore, each WTO member’s ‘Schedules of concessions’ clarify commitments to accept foreign services and suppliers, depending on the sector, supply mode, and the conditions imposed. A breach of the Schedules and/or the GATS entitles WTO members, whose suppliers and services are harmed, to start litigation.

Hungary’s Schedule liberalised ‘higher education services’,<sup>9</sup> including those supplied through ‘commercial presence’ (when foreign operators open shop locally). Besides requiring a license to operate, Hungary cannot treat foreign establishments worse than domestic ones. However, the CEU act imposes restrictions that are ‘unnecessary’ to protect public order and morals or ensure compliance with domestic law – hence, not saved by Article XIV GATS.

The breach of the GATS engages the EU’s responsibility since the EU is a WTO member and answers for MS acts. The US could request consultations with the EU, after which a WTO arbitral panel could hear its claim and eventually order the EU to restore compliance with the GATS. The WTO Dispute Settlement Understanding<sup>10</sup> governs this process. Article 23 requires WTO members seeking to redress WTO law violations to “have recourse to [the] procedures of this Understanding”: that is, proceedings before the panels and Appellate Body, whose decisions are ratified by the Dispute Settlement Body (DSB). WTO Members cannot bring WTO law claims to other *fora*.

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<sup>8</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) .

<sup>9</sup> See Schedule at <http://i-tip.wto.org/services/Search.aspx>.

<sup>10</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

## Two objections and two convenient responses

The use of GATS in *CEU* accords in principle with the Court's precedents on the use of international law in infringement proceedings. In *Étang de Berre*, the Court held that "in ensuring compliance with commitments arising from an agreement concluded by [the EU], MS fulfil ... an obligation in relation to the [EU]".<sup>11</sup> It found that France, by permitting the pollution of a lagoon near Marseille, had breached EU law, via a protocol<sup>12</sup> to the Barcelona Convention<sup>13</sup> against pollution in the Mediterranean Sea. The pollution predominantly affected French territory, so was not "likely to prejudice directly the interests of one or more of the other Parties" (Art. 12.1), let alone non-EU ones. EU-internal policing, therefore, made sense for a breach that might otherwise remain unaddressed. As regards international trade law, in 1994 the Commission used the law of the GATT (the predecessor to the WTO) against Germany, for importing into the Community sub-price milk in breach of the International Agreement on Dairy.<sup>14</sup> As in *Étang de Berre*, the breach had an infra-Community effect; if Germany's practice were justified, "the essential interests of Community producers would inevitably be impaired"<sup>15</sup>: allowing sub-price milk into the Community mostly harmed Community producers.

This precedent (C-61/94, *Commission v. Germany*) is not a perfect fit for the *CEU* case. The 'bilateral treaty' aspect of the CEU act has no infra-EU tail (EU operators might even *benefit* from restrictions on US competitors). Moreover, the WTO dispute settlement system did not exist when the Commission brought the infringement action.

Hungary raised two jurisdictional objections. First, education being a reserved competence, Hungary owes GATS compliance to the WTO, not to the EU: let the US complain. Second, a Court's decision on Hungary's GATS obligation would encroach on WTO bodies' exclusive jurisdiction. The first objection implies that WTO law cannot be used as standard in infringement proceedings, the second that only WTO bodies – not the Commission – can enforce WTO-law compliance. The Court's decision to discard both objections raises issues of coherence.

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<sup>11</sup> Case C-239/03, *Commission v. France*, Judgment of 7 October 2004, ECLI:EU:C:2004:598, para. 26.

<sup>12</sup> Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities, entered into force on 11 May 2006, see [https://wedocs.unep.org/bitstream/handle/20.500.11822/7096/ProtocolLBS\\_Consolidated\\_eng.pdf](https://wedocs.unep.org/bitstream/handle/20.500.11822/7096/ProtocolLBS_Consolidated_eng.pdf).

<sup>13</sup> Convention for the Protection of the Mediterranean Sea against Pollution, entered into force on 12 February 1978, see [https://wedocs.unep.org/bitstream/handle/20.500.11822/14027/77ig9\\_inf3\\_bc\\_eng.pdf](https://wedocs.unep.org/bitstream/handle/20.500.11822/14027/77ig9_inf3_bc_eng.pdf).

<sup>14</sup> International Dairy Agreement, now discontinued, see [https://www.wto.org/english/docs\\_e/legal\\_e/ida-94\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/ida-94_01_e.htm).

<sup>15</sup> Case C-61/94, *Commission v. Germany*, Judgment of 10 September 1996, ECLI:EU:C:1996:313, para. 25.

## 1. Double standard #1: WTO law as enforceable EU law

For the Court, international agreements entered into by the Union – like the GATS – are part of EU law.<sup>16</sup> Trade agreements, since Lisbon, fall under the EU's common commercial policy<sup>17</sup> and therefore its exclusive competence. The GATS, in this respect, differs from other trade agreements that cover both EU and MS competences.<sup>18</sup> For instance, before Nice and Lisbon, the TRIPS (Agreement on the Trade-Related Aspects Intellectual Property Rights) covered both, so it had to be ascertained whether the specific MS acts fell within an area covered by EU law.<sup>19</sup> Likewise, the Court held in Opinion 1/94<sup>20</sup> that the GATS was a mixed agreement – to be concluded jointly by Community and MS – because it straddled the competences of both. Instead, GATS -compliance in 2020 is unquestionably a matter of EU law and can be raised in infringement proceedings.

A summary of the Court's stance on WTO law qua EU law helps to understand this approach. The Court has always refused to grant WTO law direct effect<sup>21</sup> or review the WTO-legality of EU measures,<sup>22</sup> with limited exceptions interpreted restrictively.<sup>23</sup> In *Rusal Armenal*, the AG and the Court held that certain provisions of the Anti-Dumping Regulation did not intend to implement the WTO Anti-Dumping Agreement,<sup>24</sup> thus the Commission's mistaken application of the former could not be challenged under the latter in EU courts. The AG in *Rusal Armenal* is the same as in the CEU case. Therefore, individuals cannot invoke WTO law to set aside or annul EU measures, or seek compensation from the EU for the damage caused. The EU is rarely accountable internally for its WTO law breaches even when they harm innocent bystanders.

For instance, when the EU ignored the WTO Bananas decision,<sup>25</sup> the US imposed lawful retaliatory tariffs on certain EU goods unrelated to the WTO dispute. Manufacturers claimed damages. In *FIAMM & Fedon*, the Court found that in accordance with its 'settled case-law' WTO agreements "are not in

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<sup>16</sup> CEU decision (n 4), para. 69.

<sup>17</sup> *Ibid.*, para. 73.

<sup>18</sup> P Conconi, C Herghelegiu, and L Puccio, 'EU Trade Agreements: To Mix or not to Mix, That is the Question' (2020) EUI Working Paper, at <http://respect.eui.eu/wp-content/uploads/sites/6/2020/05/Mixity.pdf>.

<sup>19</sup> Joined Cases C-300/98 and C-392/98, *Dior*, Judgment of 14 December 2000, ECLI:EU:C:2000:688, para. 33, 48.

<sup>20</sup> Opinion 1/94 of 15 November 1994, ECLI:EU:C:1994:384.

<sup>21</sup> Case C-377/02, *Van Parys*, Judgment of 1 March 2005, ECLI:EU:C:2005:121.

<sup>22</sup> Case C-21/14 P, *Rusal Armenal ZAO*, Judgment of 16 July 2015, ECLI:EU:C:2015:494.

<sup>23</sup> Case 70/87, *Fediol*, Judgment of 22 June 1989, ECLI:EU:C:1989:254.

<sup>24</sup> *Rusal Armenal* (n 22), para. 52 of the AG Opinion; para. 53 of the judgment.

<sup>25</sup> WTO, *European Communities - Regime for the importation, sale and distribution of bananas*, Appellate Body Report, WT/DS27/AB/R, 9 September 1997.

principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions”.<sup>26</sup>

Likewise, MS cannot seek the annulment of EU measures for a breach of WTO law.<sup>27</sup>

[A]s a rule, the lawfulness of a Community instrument [cannot] be assessed in the light of instruments of international law which, like the WTO agreement and the [other WTO] agreements ... are not in principle, having regard to their nature and structure, among the rules in the light of which the Court is to review the lawfulness of measures adopted by the Community institutions” (Netherlands v. Parliament and Council<sup>28</sup> [52]).

What remains to explain of the non-usability of WTO law by individuals and MS are its ‘nature and structure’. The formula means opportunism: specific and limited WTO law breaches come in handy to build pressure on trading partners, and are best left outside the reach of remedies actionable by victims or MS:

to accept that the Community courts have the direct responsibility for ensuring that Community law complies with the WTO rules would effectively deprive the Community’s legislative or executive organs of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners.<sup>29</sup>

This pragmatic doctrine has stood for decades, its true colours easy to spot:

[t]he Court [went] so far as to suggest that an international wrong (the WTO finding of inconsistency of the EC bananas import regime) is not wrong as a matter of EC law; all in the name of not depriving an EC institution of a negotiating option.<sup>30</sup>

Back to October 2020. WTO law is not actionable by individuals and MS as the standard of review of EU-legality of EU secondary law. Yet, the Court used it against Hungary precisely in that way, finding the domestic measure to be precluded by WTO law qua EU law. In doing so, it consolidated a double standard: is WTO law a benchmark of EU law compliance or not? It depends on who is asking. Why should infringement actions count on an enlarged range of EU law standards, some of which are unavailable in liability and annulment actions?

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<sup>26</sup> Joined cases C-120/06 P and C-121/06 P, *FIAMM and Fedon v. Council and Commission*, Judgment of 9 September 2008, ECLI:EU:C:2008:476, para. 111.

<sup>27</sup> Case C-268/94, *Portugal v. Council*, Judgment of 3 December 1996, ECLI:EU:C:1996:461.

<sup>28</sup> Case C-377/98, *Netherlands v. Parliament and Council*, Judgment of 9 October 2001, ECLI:EU:C:2001:523.

<sup>29</sup> *FIAMM & Fedon* (n 26), para. 119.

<sup>30</sup> Petros C Mavroidis, ‘It’s alright ma, I’m only bleeding’ (2008) STALS Working Paper, at [http://www.stals.santannapisa.it/sites/default/files/stals\\_MavroidisII.pdf](http://www.stals.santannapisa.it/sites/default/files/stals_MavroidisII.pdf).

In *Commission v. Germany*, AG Tesouro wondered as much, but the Court ignored his suggestion that both MS action and EU measures should be reviewable for GATT-legality.<sup>31</sup>

In CEU, the Court nodded to its non-usability precedents, but distinguished between them. The Court mentioned the Commission's pharisaic distinction between compliance with WTO law and compliance with a decision by the DSB,<sup>32</sup> which it had itself dismissed in 2008.<sup>33</sup> Then, it simply noted that when a State's responsibility for breach of WTO law is at stake, the precedents on the responsibility of the EU would simply not matter: one for the rich, one for the poor.

The EU's policing of MS actions for international law breaches is a desirable rule-of-law operation. However, only the Commission can perform it, not the MS or individuals. The CEU ruling reiterated this distinction, reasoning that the EU is not a MS, an explanation that begs many questions. For short, this is known as the 'Barnard Castle distinction': a distinction whereby a ruler explains why the prohibition set for everyone does not apply to itself.

WTO law is EU law, binding EU bodies and MS acting as EU agents; therefore, the Commission can enforce it against MS. Instead, rights of individuals and MS derived from WTO law are not enforceable against the EU. This is double standard #1, and nobody explained it better than the AG in the CEU Opinion:

... relying on the particular importance of negotiations within the framework of the WTO, the Court has rejected the direct applicability of WTO law in settled case-law. This merely means, however, that Member States, in an action for annulment, or the parties in a reference for preliminary ruling on the validity of an EU act, may not rely on the incompatibility of an EU act with the WTO Agreement.<sup>34</sup>

That 'merely' lifted much weight, suggesting that the preclusion for MS and individuals is merely an exception. The general rule, instead, benefits the Commission alone. Compliance with the law and the consequences of illegality are candidly presented as functions of power and convenience. The EU's responsibility for WTO law breaches remains only for the WTO to assess, while MS responsibility for WTO law breaches can be determined by the Commission and the Court.

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<sup>31</sup> Case C-61/94, AG Opinion, para. 23-24.

<sup>32</sup> CEU decision (n 4), para. 80.

<sup>33</sup> *FIAMM & Fedon* (n 26), para. 128.

<sup>34</sup> CEU Opinion (n 4), para. 60, italics added.

## 2. Double standard #2: do as I say, not as I do.

Hungary's second objection invoked the WTO exclusive jurisdiction as a bar to the Court exercising its own. The Court agreed that the matter "had not been decided by the Court in its case law on the relations between EU law and WTO law".<sup>35</sup>

On this point, the AG did not see an obstacle in the WTO bodies' exclusive jurisdiction (Art. 23 DSU), since the effects of the Court's decision would stay inside the EU:

... a judgment delivered by the Court in infringement proceedings does not in any way call into question the exclusive competence of the WTO dispute settlement bodies ... in proceedings between two Members, as infringement proceedings are a purely internal regulatory instrument. The judgment is thus binding only as between the European Union and the Member State and does not prevent the WTO bodies from finding an infringement of the WTO Agreement upon application by a third country, even if the Court has previously rejected such an infringement.<sup>36</sup>

The Court agreed, showing a penchant for pragmatism:

[the assessment on infringement] is not binding on the other members of the WTO, [and] does not affect any assessment that might be made by the DSB.<sup>37</sup>

Days before the CEU judgment, an investment tribunal applying the Croatia-Germany bilateral investment treaty sounded similarly laid-back. The tribunal wondered whether, in handling EU law to decide a case, it would step on the CJEU's toes. Not so:

The CJEU operates on the level of the EU legal order, and its judgments are binding within the bounds of that order. In contrast, international arbitration tribunals constituted under investment treaties operate on the level of the international legal order.<sup>38</sup>

These mirroring statements, just days apart, seemingly show international tribunals getting along well, shrugging off judicial detours into each other's laws. Instead, the tribunal was dismissing a jurisdictional objection – supported by the Commission as amicus – that after a recent CJEU case (*Achmea*), tribunals should just close shop lest they cast eyes on EU law.

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<sup>35</sup> CEU decision (n 4), para. 77.

<sup>36</sup> CEU Opinion (n 4), para. 58.

<sup>37</sup> CEU decision (n 4), para. 89, see also para. 86.

<sup>38</sup> *Raiffeisen v. Croatia*, ICSID Case No. ARB/17/34, Decision on Respondent's Jurisdictional Objections of 30 September 2020, para. 220.



Indeed, invoking its own rule of exclusive jurisdiction on inter-State EU law disputes (Article 344 TFEU), the Court has decided that i) the EU cannot accede to the European Convention on Human Rights as proposed by the Commission, the MS and the Council of Europe,<sup>39</sup> and ii) arbitration clauses in infra-EU bilateral investment treaties are invalid.<sup>40</sup> In both cases, the Court considered unacceptable the risk that the European Court of Human Rights (ECtHR) or the investment tribunals could, directly or not, interpret EU law in a specific dispute. The *Achmea* decision was so severe that in May 2020 MS were pressured into terminating hundreds of investment treaties,<sup>41</sup> the enforcement of which – as in the case mentioned above – is anathema for the Commission and the Court.

In this light, para. 92 of the CEU judgment is involuntarily humorous. Announcing its intention to apply WTO law, the Court would consider the decisions of panels and the Appellate Body; if a relevant WTO practice is missing, the Court would interpret WTO law using “the customary rules of interpretation of international law that are binding on the Union.” I cannot go into a detailed account of the inaccuracies in WTO law interpretation in CEU, which reveal that the Court underestimated the difficulty of a WTO judge’s job. For instance, there is no discussion of the likeness of services and service suppliers, which is indispensable to find a breach of national treatment. Compare the one-line presumption of likeness in the CEU decision<sup>42</sup> with the Appellate Body’s admonition in *Argentina-Financial Services*.<sup>43</sup> Common sense and a printout of the Vienna Convention will not turn you into a WTO judge.

More striking than this mistake, perhaps immaterial to the outcome, is the Court’s nonchalance in enforcing a non-EU source safeguarded by an exclusive jurisdiction guarantee (Art. 23 DSU). For comparison, the mere hypothesis that the ECtHR could look upon un-interpreted EU law led both to the ‘prior involvement’ concoction in the Accession Protocol (whereby the ECtHR should have suspended proceedings and asked a preliminary question to the Court) and its surprising rejection in *Opinion 2/13*. Indeed, the Court held that even determining whether an EU law provision had been already interpreted “would be tantamount to conferring on [the ECtHR] jurisdiction to interpret the case-law of the Court of Justice”.<sup>44</sup>

In CEU, the Court seemed unbothered by similar concerns. It is worth pointing out that the Court’s appropriation of WTO jurisdiction would not fit in the narrow exception that the Court has formulated to

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<sup>39</sup> *Opinion 2/13* of 18 December 2014, ECLI:EU:C:2014:2454, para. 201-204.

<sup>40</sup> Case C-284/16, *Slovak Republic v. Achmea*, Judgment of 6 March 2018, ECLI:EU:C:2018:158, para. 17.

<sup>41</sup> Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 29 May 2020, OJ L 169.

<sup>42</sup> CEU decision (n 4), para. 148.

<sup>43</sup> WTO, *Argentina – Measures Relating to Trade in Goods and Services*, Appellate Body Report of 14 April 2016, WT/DS453/AB/R, para. 6.39.

<sup>44</sup> *Opinion 2/13* (n 39), para. 239.

tolerate external interpretations of EU law. Namely, when the Court green-lighted the arbitration system in the Canada-EU trade agreement (CETA) it was adamant that CETA tribunals should only treat EU measures as fact, not as law. CETA tribunals could look at EU measures, to apply CETA law and assess the EU's responsibility under it. In Opinion 1/17, the Court said that prior involvement was unnecessary, as "the Tribunal will have to confine itself to an examination of EU law as a matter of fact and will not be able to engage in interpretation of points of law... [Therefore,] the CETA Tribunal will have to apply and interpret international law, ... and not EU law".<sup>45</sup>

Instead, the Court in CEU not only professed itself capable of applying WTO law but also of exercising the supposedly exclusive jurisdiction of the WTO DSB. The Court's application of WTO law, indeed, is not incidental fact-finding en route to the determination of compliance with (other) EU law sources: the Court exercises jurisdiction precisely over the alleged breach of WTO law, to determine the responsibility of a WTO member.

### **They took the Trojan horse into the city**

In CEU, the Charter's application depends on the equivalence between GATS and EU law, which confirms that the CEU act implements EU law under Article 51(1) CFR.<sup>46</sup> In these proceedings, the conclusion that the Charter is breached adds nothing to the outcome: the Hungarian measure was already precluded for a breach of some other EU law (the GATS). This is a scenario of precluded measure plus Charter breach ('double preclusion'<sup>47</sup>), where the Charter breach is redundant for the determination of EU illegality.

However, the Court's habit of adding upon a breach of (other) EU law a concurrent Charter breach could undermine the double standard on WTO law qua EU law (actionable against MS, never against the EU). The use of WTO law as standard of EU legality might be the Trojan horse that nobody thought was dangerous before it was too late because it carries within another standard: the Charter. Whatever you think of the reasons why WTO law cannot be enforced against EU bodies, the Charter does not respond to them. The Charter is a valid standard of review for EU (and national implementing) measures breaching WTO law. Moreover, its articles on economic rights might align with WTO law violations in specific cases.

To recap:

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<sup>45</sup> Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 76-77.

<sup>46</sup> CEU decision (n 4), para. 213.

<sup>47</sup> F Fontanelli, 'Implementation of EU Law through Domestic Measures after Fransson: the Court of Justice Buys Time and "Non-preclusion" Troubles Loom Large' (2014) 5 European Law Review 682-700.

- WTO law is part of EU law (✓) but cannot be invoked as standard of review of EU measures by individuals or MS, because of the 'Barnard Castle distinction' (✗). Accordingly, individuals or MS cannot seek to annul EU measures breaching WTO law, or obtain compensation for the EU breaches;
- However, EU measures and domestic measures implementing them must observe the Charter, even when they breach WTO law. If the GATS cannot serve as standard of review (✗), the Charter can (✓). Furthermore, a breach of WTO law can entail a colourable breach of Articles 16 and 17 CFR.
- It follows inescapably that EU measures and domestic measures that breach WTO law must respect the Charter, but might not do so in some scenarios. The Charter serves as a yardstick of EU legality for EU secondary measures (and national implementing measures) irrespective of whether the challenge comes from the Commission, a MS, an individual or a domestic judge.
- Therefore, individuals and MS can seek annulment of, challenge the validity of, or seek compensation for WTO-illegal EU measures (and MS implementing measures) for breach of the Charter, in EU courts or domestic proceedings (✓✓). The success of these actions depends on whether the Charter is actually breached. Not a foregone conclusion, but WTO illegality is a good starting point.

An easy example: had it predicted the CEU decision, the CEU itself could have challenged the EU validity of the CEU act in Hungarian courts, and the Hungarian judge should have set it aside, not because it breached WTO law, but because it implemented EU law (because of the WTO connection<sup>48</sup>) and breached Article 16 CFR. If the domestic judge had hesitated, the CEU could (or should) have asked the Court to determine the Charter-compliance of the CEU act. The GATS lacks direct effect but marks the EU law's application, triggering the Charter. Here is one path around the 'Barnard Castle distinction'.

Here is another. Assume a breach by the EU of WTO law harming a MS or a private entity. AG Kokott made an example: Italian parmesan hit by retaliatory tariffs following the EU's unwillingness to remove WTO-illegal subsidies to Airbus.<sup>49</sup> The 'Barnard Castle distinction' forecloses the annulment action of Italy or of the directly concerned persons<sup>50</sup> for breach of the GATS, but not for breach of the Charter.

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<sup>48</sup> CEU decision (n 4), para. 213.

<sup>49</sup> F Fontanelli, *The United States and the European Union trading blows* (2019), at <https://spice-spotlight.scot/2019/11/07/guest-blog-the-united-states-and-the-european-union-trading-blows/>

<sup>50</sup> Under Article 263(2) and (4) TFEU.

Alternatively, a cheese manufacturer like Lactalis could bring a non-contractual liability case against the EU, invoking the Charter.

## **Conclusions**

In CEU, the Court enforced WTO law upon Hungary, confirming that, instead, EU bodies are internally unaccountable for WTO law breaches. Moreover, it cavalierly decided to exercise its jurisdiction on WTO law breaches, invoking the same reason (the separation of EU and other orders) that it rejects when it protects its monopoly on EU law and the latter's autonomy. For a judgment that is partly performative and intended to punish a foe of the 'rule of law', the ruling sits uneasily with some basic principles of accountability and coherence. Both doctrines end up shielding the EU and its institutions like two defensive walls.

The judgment, however, unintendedly showed one way to use the Court's doctrines to turn up the accountability heat on the EU. Since WTO obligations mark the scope of EU law, the accountability of EU bodies (and that of MS acting as EU agents) vis-à-vis MS and individuals can be obtained through the Charter. Using the Trojan horse of WTO law (and subject to an actual breach of the Charter), individuals and MS can get inside the walls built by the Court.

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