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# INTRODUCTORY NOTE TO CASE C-66/18 COMM'N V. HUNGARY (C.J.E.U.)

BY TAMÁS KENDE AND GÁBOR PUSKÁS*

[October 6, 2020]

## Introduction

The Court of Justice of the European Union (CJEU) delivered a judgment on October 6, 2020 in case C-66/18 following long deliberations. The case concerned an amendment to the Hungarian law on national higher education (HEA) in 2017, requiring both new and established foreign universities in Hungary (the host state) to prove that they had a physical campus in their home state and, if their host and home states failed to conclude an international treaty on the university's operation in Hungary within a period of six months, they were forced to close and leave the Hungarian market. Of the 24 established foreign university programs in Hungary in 2017, one was particularly affected by the new requirement: an American university operating in Hungary, whose founder was at odds with the Hungarian Government, was forced to stop admitting students.

## Background

The Hungarian Government submitted a draft law to the Hungarian Parliament on March 28, 2017, to amend the HEA. This draft has become Act 25 of 2017 amending the HEA on April 4, 2017. According to the official explanation, the amendment was adopted in response to a 2016 examination of foreign universities by the Hungarian Education Authority, which discovered discrepancies and serious irregularities in their functioning, as well as wider policy imperatives and national security concerns. Under the new Article 76(1) of the HEA, a foreign university may admit students and issue diplomas in Hungary only if four cumulative conditions are met. Out of these four conditions, two were already part of the HEA; however, the following two were added: (1) an international treaty is concluded between Hungary and the home country government of the foreign university; and (2) the foreign university genuinely offers higher education services in its home country and qualifies there as a recognized university. The law created an exception to the new international treaty requirement for universities with a seat in the European Economic Area. The HEA was applicable to incoming universities and to incumbents with a six-month transition period to comply with the new requirements.

When Hungary ratified the Marrakesh agreement, it did not make any exceptions in its Schedule of Commitments annexed to the General Agreement on Trade in Services (GATS) to its national treatment commitment for established higher education service providers.[1] As a result, the EU Commission sent Hungary a letter of formal notice on April 27, 2017. The letter claimed that the law was incompatible with the freedom to provide services and the freedom of establishment, as well as the right of academic freedom, the right to education, and the freedom to conduct business as provided by the Charter of Fundamental Rights of the EU (the Charter)[2] as well as the Union's legal obligations under international trade law.

After inconclusive discussions with Hungary and two reasoned opinions on the matter, the Commission launched an infringement action at the CJEU on February 1, 2018, on legal grounds essentially identical to those listed in the formal notice.

In its defense, Hungary claimed that it had public policy and public security reasons for introducing the amendment to the HEA. It also contended that its GATS obligations could not be raised in front of the Court and that Articles 49 and 56 of the Treaty on the Functioning of the EU (TFEU) and the Services Directive were not applicable.[3]

## The Court's Decision

In its judgment, the Court held on admissibility that WTO obligations may be brought up in front of the CJEU in infringement proceedings and Articles 49 and 56 of the TFEU and the Services Directive were applicable to private higher education service providers.

The Court held that while—in line with prior jurisprudence—non-state claimants cannot rely on WTO law against a member state, EU institutions like the Commission can, as WTO obligations form part of EU law[4] and member states

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failing to comply with it infringe their obligations under EU law. As no third-party WTO member seems to have initiated dispute settlement proceedings, the Court seems to have been satisfied by the Commission's arguments that there was a risk of international liability.[5]

Regarding the substance of the infringement case, on the "international treaty requirement," the Court was of the view that GATS members had the possibility of placing limitations on various undertakings relating to specific sectors and modes of supply. The terms, limitations, and conditions relating to "limitations on market access," and the conditions and qualifications relating to "limitations on national treatment," are set out in two separate columns in the GATS, but Hungary entered no limitation in the national treatment section. Article XX (2) of the GATS permits limitations in the market access column to be applicable to national treatment as well, but only if the particular limitation is discriminatory. The Court found that the market access limitation made by Hungary was worded in a way that was applicable across all higher education institutions, and was not discriminatory, so the limitation in the market access column could not be interpreted as a limitation affecting Hungary's national treatment obligation.

The Court found that Hungary did not put forward substantive and detailed arguments as to how the operation of a third country higher education supplier would constitute, without the required international treaty, a genuine and sufficiently serious threat affecting a fundamental interest of the Hungarian society, or how the requirement would prevent such operators from engaging in deceptive and fraudulent activities. The Court also found—agreeing with the Advocate General's opinion—that this requirement conditioned access to and remaining in the Hungarian higher education market upon a sovereign decision of the Hungarian government.

Unlike the international treaty requirement, which applied only to non-EU providers, the "genuine teaching activities" in the state of origin requirement introduced by Hungary forces every foreign school—including EU and EEA schools—to have a physical presence in their state of origin to continue their operation in Hungary. This meant that a possible violation of the freedom of establishment principle had to be examined by the Court as well. With reference to established case law, the Court found that Articles 49 and 56 TFEU and the Services Directive were applicable in the present case.

The "genuine teaching activities in the state of origin" requirement was approached by the Court from two different angles. First, in relation to third-country operators, the requirement was examined under Articles XVII and XIV of the GATS. Second, in relation to EU operators, the Court examined whether the requirement complied with Article 49 TFEU and Article 16 of the Services Directive. The focus here will be on the Court's decision regarding the latter.

The Court noted that the provision of higher education courses for remuneration constitutes an economic activity for the purposes of Article 49 and the Services Directive when provided by a national of one member state in another member state.[6] In addition, the freedom of establishment extends to a higher education institution that has its seat in a member state other than Hungary and that offers education or training for remuneration in Hungary. Finally, the Court referenced a prior judgment,[7] where it held that any measure "which prohibits, impedes or renders less attractive the exercise of the freedom of establishment must be regarded as a restriction on that freedom"; thus, the requirement of pursuing genuine teaching activities not just in Hungary, but also in the state of origin, is not in compliance with Article 49 TFEU unless it is justified by special circumstances.

With regard to the Charter's applicability, the Court held first that, in line with its practice,[8] the GATS forms part of EU law. Second, it stated that when Hungary applies the national treatment obligation under Article XVII(1) of the GATS, it is implementing EU law within the meaning of Article 51(1) of the Charter, and therefore the Charter is applicable to Hungary's implementation of the GATS. In addition, when a member state argues, as Hungary did, that a particular measure that actually restricts a fundamental freedom enshrined in the TFEU is justified by an overriding reason in the public interest recognized by EU law, such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter.[9] The Court accepted Advocate General (AG) Kokott's broad interpretation of the concept of "academic freedom" under Article 13 of the Charter,[10] and found that the HEA is capable of restricting these freedoms protected by the Charter.[11]

The Hungarian Government decided in April 2021 to partially comply with the decision of the CJEU by proposing an amendment of the HEA to the Hungarian Parliament by removing the "genuine teaching activities in the state of origin" requirement, but not the international treaty requirement, from the law.[12]

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## Analysis

The Commission and the Court were faced with an increasingly familiar dilemma.[13] In response, the CJEU took at least three innovative steps in this case.

Despite settled case law holding that WTO law lacked direct effect and, therefore could not be relied on against member states,[14] the Court (and the AG) relied on another precedent decision[15] to come up with a creative solution on the applicability of WTO norms: they maintained the non-justiciability of WTO norms for non-state actors, but opened the gates for infringement actions by the Commission when there is an alleged infringement of a WTO obligation by a member state and a related risk of the EU incurring liability under international law through WTO dispute settlement.[16]

Admittedly, the Charter's applicability to member states is secondary and limited as provided for in Article 51(1) of the Charter. Yet the Court—based on an innovative exercise in logics—held that the Charter was applicable because, in performing their obligations under the GATS (a part of EU law), member states are implementing EU law.

Still, there was a problem because the CJEU established that Hungary did not implement Article XVII of the GATS because it acted in breach thereof. In that respect, the judgment went further, establishing that the mere fact that a member state uses a GATS exception to justify a national measure's restriction on the EU[17] triggers the application of the Charter. The Court established that a measure contrary to EU law "must be regarded as implementing EU law." Therefore, such a measure must comply with the fundamental rights enshrined in the Charter."[18]

The Court accepted AG Kokott's broad interpretation of the concept of "academic freedom" under Article 13 of the Charter[19] and found that the amendment of the HEA—by giving the state the right to block or to stop university programs with absolute discretion—is capable of restricting this freedom.[20] The Court found therefore that matters relating to the organization of universities, such as their right of establishment and operation, are covered by the principle of academic freedom incorporated in the Charter.

The judgment will have a significant impact on many fronts. It declared that all breaches of WTO obligations are justiciable by the Commission through the infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU) without the Commission actually pointing out an actual rather than a potential act of international responsibility. This could be interpreted extensively, and in the case of WTO obligations other member states (under Article 259 of the TFEU) could also sue. By analogy, other international obligations—similar to WTO obligations—could give rise to infringement proceedings. These are agreements falling under Article 3 of the TFEU on the exclusive competencies of the EU. Primarily international trade=related agreements (free trade agreements, complex agreements such as the one concluded with Canada and Japan) come to mind, but—given the scope of Article 3—a breach of an international agreement on the conservation of marine biological resources under the common fisheries policy could also give rise to an infringement action by the Commission.

In addition, the judgment likely will have extended scope of application for the Charter, as it will be applicable even if the member state claims it does not have to apply an international treaty that is part of EU law. Even such an argument could be deemed a reason to apply the Charter.

## ENDNOTES

1 Though it did make an exception for new market entrants.

2 Charter of Fundamental Rights of the European Union 2012 O.J. (C 326) 391. In addition, on April 27, 2017, the Parliamentary Assembly of the Council of Europe requested the opinion of the Venice Commission on the HEA amendment. The Venice Commission accepted that the new regulatory framework introduced by the HEA might legitimately be applied to new market entrant foreign universities, but that the law raised serious rule of law concerns. It stated, however, that "introducing more stringent rules without very strong reasons, coupled with strict deadlines and severe legal consequences, to foreign universities which are already established in Hungary and have been lawfully operating there for many years, appears highly problematic from the standpoint of rule of law and fundamental rights principles and guarantees." *See* Council of Europe, *Hungary—Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education*, endorsed by the Venice Commission at its 112th Plenary Session (Venice, 6–7 October 2017), CDL-AD(2017)022-e, ¶ 77.

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3 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

4 Case C-66/1'8, Comm'n v. Hungary, ECLI:EU:C:2020:792, ¶¶ 69–71 (Oct. 6, 2020).

5 *Id.* ¶¶ 82, 84: "to ensure that the Union does not incur any international liability in a situation in which there is a risk of a dispute being brought before the WTO."

6 Case C-153/02, Neri, ECLI:EU:C:2003:614, ¶ 39 (Nov. 13, 2003).

7 Case C-38/10, Comm'n v. Portugal, ECLI:EU:C:2012:521, ¶ 26 (Sept. 6, 2012).

8 *See*, in particular, Case 181/73, Haegeman, EU:C:1974:41, ¶¶ 5–6 (Apr. 30 1974); Case C-366/10, Air Transport Ass'n of America, ECLI:EU:C:2011:864, ¶ 73 (Dec. 21, 2011); and Opinion 1/17, EU–Canada C.E.T. Agreement, ECLI:EU:C:2019:341, ¶ 117 (Apr. 30, 2019).

9 Case 78/18, Comm'n v. Hungary (Transparency of Associations), ECLI:EU:C:2020:476, ¶ 101 (June 18, 2020).

10 The Court also referred to Recommendation 1762 (2006), adopted by the Parliamentary Assembly of the Council of Europe on June 30, 2006, and entitled *Academic freedom and university autonomy*, according to which academic freedom "also incorporates an institutional and organisational dimension, a link to an organisational structure being an essential prerequisite for teaching and research activities."

11 Because they can "render uncertain or exclude the very possibility of founding a higher education institution, or of continuing to operate an existing higher education institution, in Hungary" (¶ 233).

12 The amendment (T/15909) was presented by Deputy Prime Minister, Dr. Zsolt Semjén, and is available at https://www.parlament.hu/irom41/15909/15909.pdf.

13 Comm'n v. Hungary, *supra* note 9 and Case C-286/12, Comm'n v. Hungary, ECLI:EU:C:2012:687 (Nov. 6, 2012) on the compulsory retirement of judges, prosecutors and notaries.

14 *See* originally in Joined Cases C-21–24/72, International Fruit Company, 1972 E.C.R. 1219, and later restated in Case C-149/96, Portugal v. Council 1999 E.C.R. I–8395.

15 The AG stated in her opinion in paragraph 63: "The Court has already answered that question in the affirmative in *Commission* v *Germany*, where it reviewed a national measure in the light of an agreement concluded within the framework of the General Agreement on Tariffs and Trade (GATT)." (citing Case C-61/94, Comm'n v. Germany, ECLI:EU:C:1996:313, ¶ 16 (Sept. 10, 1996)). In paragraph 64 she added: "I consider that the Court was essentially correct in its view in that decision that the considerations on the basis of which a review of EU acts in the light of the WTO Agreement is precluded cannot be applied to infringements of WTO law by Member States. The possibility of bringing infringement proceedings against a Member State does not run counter to the aims and particular character of dispute settlement in the WTO."

16 Neri, *supra* note 6.

17 Such as the WTO-law, articles of the TFEU or the Services Directive.

18 Comm'n v Hungary, supra note 9, ¶ 101.

19 See discussion in *supra* note 10.

20 See *supra* note 11.

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# CASE C-66/18 COMM'N v. HUNGARY (C.J.E.U.)*

[October 6, 2020]

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2020 (**)

(Failure of a Member State to fulfil obligations – Admissibility – Jurisdiction of the Court – General Agreement on Trade in Services – Article XVI – Market access – Schedule of specific commitments – Requirement of authorisation – Article XX(2) – Article XVII – National treatment – Service provider having its seat in a third country – National legislation of a Member State imposing conditions for the supply of higher education services within its territory – Requirement relating to the conclusion of an international treaty with the State in which the provider has its seat – Requirement relating to the provision of education in the State in which the provider has its seat – Modification of conditions of competition to the benefit of national providers – Justification – Public order – Prevention of deceptive practices – Article 49 TFEU – Freedom of establishment – Directive 2006/123/EC – Services in the internal market – Article 16 – Article 56 TFEU – Freedom to provide services – Existence of a restriction – Justification – Overriding reason in the public interest – Public order – Prevention of deceptive practices – High quality of the education – Charter of Fundamental Rights of the European Union – Article 13 – Academic freedom – Article 14(3) – Freedom to found educational establishments – Article 16 – Freedom to conduct a business – Article 52(1))

In Case C-66/18,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 1 February 2018,

**European Commission,** represented by V. Di Bucci, L. Malferrari, B. De Meester and K. Talabér-Ritz, acting as Agents,

applicant,

v

**Hungary,** represented by M.Z. Fehér and G. Koós, acting as Agents,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, M. Safjan and S. Rodin, Presidents of Chambers, E. Juhász, J. Malenovský (Rapporteur), L. Bay Larsen, T. von Danwitz, C. Toader and C. Lycourgos, Judges,

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**Language of the case: Hungarian.

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Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2019,

after hearing the Opinion of the Advocate General at the sitting on 5 March 2020, gives the following

**Judgment**

1 By its application, the European Commission requests that the Court:

- declare that, by requiring foreign higher education institutions situated outside the European Economic Area (EEA) to conclude an international agreement as a prerequisite for providing education services, pursuant to Article 76(1)(a) of Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény (Law No CCIV of 2011 on national higher education) (*Magyar Közlöny* 2011/165), as amended by 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), adopted by the Hungarian Parliament on 4 April 2017 (*Magyar Közlöny* 2017/53) ('the Law on higher education'), Hungary has failed to fulfil its obligations under Article XVII of the General Agreement on Trade in Services ('the GATS'), in Annex 1B to the Agreement establishing the World Trade Organisation (WTO), signed in Marrakesh and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1) ('the Agreement establishing the WTO');
- declare that, by requiring foreign higher education institutions to offer higher education in their country of origin, pursuant to Article 76(1)(b) of the Law on higher education, Hungary has failed to fulfil its obligations under 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), and, in any event, under Articles 49 and 56 TFEU and Article XVII of the GATS;
- declare that, by imposing the abovementioned measures, pursuant to Article 76(1)(a) and (b) of the Law on higher education ('the measures at issue'), Hungary has failed to fulfil its obligations under Article 13, Article 14(3) and Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter'); and
- order Hungary to pay the costs.

## I. Legal context

### A. WTO LAW

#### *1. The Agreement establishing the WTO*

2 Article XVI(4) of the Agreement establishing the WTO provides:

> 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.'

#### *2. The GATS*

3 Article I(1) to (3) of the GATS states:

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

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

. . .

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

. . .

3. For the purposes of this Agreement:

(a) "measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

. . .'

4 Article XIV of the GATS provides:

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

(a) necessary to protect public morals or to maintain public order;

. . .

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

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

. . .'

5 Articles XVI to XVIII of the GATS fall within Part III of that agreement, entitled 'Specific commitments'.

6 Article XVI of the GATS, entitled 'Market access', provides:

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

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

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

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

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

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

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

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

7 Article XVII of the GATS, entitled 'National treatment', provides:

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

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

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

8 According to Article XX(1) and (2) of the GATS:

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

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

(b) conditions and qualifications on national treatment;

. . .

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

### *3. Understanding on the settlement of disputes*

9 The Understanding on rules and procedures governing the settlement of disputes, in Annex 2 to the Agreement establishing the WTO ('the Understanding on the settlement of disputes'), provides, in Article 1(1), that the rules and procedures it contains are to apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Annex 1 to the Agreement establishing the WTO, which include the GATS.

10 Article 3(2) of that understanding states:

'The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of

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those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements.'

11 According to Article 11 of that understanding:

'The function of panels is to assist the [Dispute Settlement Body] in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the [Dispute Settlement Body] in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.'

12 Article 17 of that understanding, entitled 'Appellate Review', provides in particular:

'6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

. . .

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

. . .'

13 According to Article 19(1) of the Understanding on the settlement of disputes:

'Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.'

14 Article 21 of that understanding, entitled 'Surveillance of Implementation of Recommendations and Rulings', provides:

'1. Prompt compliance with recommendations or rulings of the [Dispute Settlement Body] is essential in order to ensure effective resolution of disputes to the benefit of all Members.

. . .

3. At a [Dispute Settlement Body] meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the [Dispute Settlement Body] of its intentions in respect of implementation of the recommendations and rulings of the [Dispute Settlement Body]. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. . . .

. . .

6. The [Dispute Settlement Body] shall keep under surveillance the implementation of adopted recommendations or rulings. . . .

. . .'

15 Article 22(1) of that understanding states:

'Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. . . .'

16 According to Article 23(1) of that understanding:

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'When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.'

## B. EUROPEAN UNION LAW

17 Recital 41 of Directive 2006/123 states:

'The concept of "public policy", as interpreted by the Court of Justice [of the European Union], covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare. . . .'

18 As provided in Article 2(1) of Directive 2006/123, the directive is to apply to services supplied by providers established in a Member State.

19 Article 4(1) of Directive 2006/123 defines 'service' as 'any self-employed economic activity, normally provided for remuneration, as referred to in Article [57 TFEU]'.

20 Article 16 of that directive, entitled 'Freedom to provide services', states, in paragraphs (1) and (3):

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

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

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

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

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

. . .

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

## C. HUNGARIAN LAW

21 Under Article 76(1)(a) of the Law on higher education, a foreign higher education institution may carry on teaching activities leading to a qualification in the territory of Hungary only if 'the binding application of an international treaty on fundamental support for the activities in Hungary, concluded between the Government of Hungary and the government of the State in which the foreign higher education institution has its seat – in the case of a federal State in which the central government is not responsible for recognition of the binding effect of an international treaty, on the basis of a prior agreement with the central government – has been recognised by the parties' ('the requirement of a prior international treaty').

22 Under Article 77(2) of the Law on higher education, Article 76(1)(a) of that law is not to apply to foreign higher education institutions established in another Member State of the EEA.

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23 Article 76(1)(b) of the Law on higher education provides that a foreign higher education institution carrying on activities in Hungary must not only be a State-recognised higher education institution in the country in which it has its seat, but must also 'genuinely offer higher education' in the country concerned ('the requirement that the institution concerned provide education in the State where it has its seat').

24 In accordance with Article 77(3) of the Law on higher education, the provisions of Article 76(1)(b) of that law are to apply also to higher education institutions having their seat in a Member State of the EEA.

25 Article 115(7) of the Law on higher education set 1 January 2018 as the date by which foreign higher education institutions were required to satisfy the conditions laid down in Article 76(1) of that law, with the exception of federal States, in which case a prior agreement was required to be concluded with the central government within the six-month period following the publication of Law No XXV of 2017, that is before 11 October 2017. Under that provision, moreover, foreign higher education institutions not satisfying the conditions laid down by that law would forfeit their licence and, with effect from 1 January 2018, no new first-year students could be admitted to a course of study provided in Hungary by a foreign higher education institution, while courses already in progress in Hungary on 1 January 2018 may be completed in the academic year 2020/2021 at the latest, under the same conditions as before, according to a scheme of progressive abandonment.

## II. Pre-litigation procedure

26 The Commission, having considered that, by adopting Law No XXV of 2017, Hungary had failed to fulfil its obligations under Articles 9, 10 and 13, Article 14(3) and Article 16 of Directive 2006/123, and, in the alternative, Articles 49 and 56 TFEU, Article XVII of the GATS, and Article 13, Article 14(3) and Article 16 of the Charter, sent a letter of formal notice to Hungary on 27 April 2017, setting a period of one month for the submission of observations. Hungary replied by a letter dated 25 May 2017 in which it disputed the infringements alleged against it.

27 On 14 July 2017, the Commission issued a reasoned opinion in which it concluded, in particular, that:

- by requiring foreign higher education institutions situated outside the EEA to conclude an international agreement as a prerequisite for providing education services, pursuant to Article 76(1)(a) of the Law on higher education, Hungary had failed to fulfil its obligations under Article XVII of the GATS;
- by requiring foreign higher education institutions to offer higher education in their country of origin, pursuant to Article 76(1)(b) of the Law on higher education, Hungary had failed to fulfil its obligations under Article 16 of Directive 2006/123 and, in any event, under Articles 49 and 56 TFEU; and
- by imposing the measures at issue, Hungary had failed to fulfil its obligations under Article 13, Article 14(3) and Article 16 of the Charter.

28 The Commission set Hungary a period of one month within which to take the necessary measures in order to comply with the reasoned opinion or to submit observations to the Commission.

29 By a letter dated 17 July 2017, Hungary requested an extension of that time limit, which the Commission refused.

30 Hungary replied to the reasoned opinion by a letter dated 14 August 2017, in which it contended that the alleged infringements did not exist.

31 By a letter dated 11 September 2017, Hungary sent further observations to the Commission seeking, in particular, to draw a comparison between its own situation and that of other Member States and to provide additional information concerning a number of Member States.

32 On 26 September 2017, a meeting of experts was held between the Commission's representatives and those of Hungary.

33 On 5 October 2017, the Commission sent a supplementary reasoned opinion to Hungary, in which it maintained that, by requiring foreign higher education institutions to offer higher education in their country of origin,

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pursuant to Article 76(1)(b) of the Law on higher education, Hungary had also failed to fulfil its obligations under Article XVII of the GATS.

34 By a letter dated 6 October 2017, Hungary provided the Commission with additional information, explaining that the United States of America was the only federal State not a member of the EEA with which a prior agreement, as provided for in Article 76(1)(a) of the Law on higher education, needed to be concluded. According to the information provided subsequently by the Hungarian authorities, such a prior agreement was concluded within the time limit originally laid down in Article 115(7) of that law, the deadline being 11 October 2017.

35 Hungary replied to the supplementary reasoned opinion by a letter dated 18 October 2017 in which it informed the Commission that the Hungarian Parliament had, on 17 October 2017, adopted a draft law amending the Law on higher education, the effect of which, inter alia, was to postpone until 1 January 2019 the deadline laid down in Article 115(7) of that law for compliance with the conditions referred to in Article 76(1).

36 Hungary stated, moreover, in that letter that the law promulgating the agreement on cooperation in matters of higher education between the Government of Hungary and the State of Maryland (United States), concerning the activities undertaken by McDaniel College in Hungary, had been published in the *Magyar Közlöny* (Official Journal of Hungary).

37 Last, by a letter dated 13 November 2017, Hungary sent further supplementary information to the Commission, stating that the international agreement necessary for the continued operation in Hungary of the University of Medicine of Heilongjiang Daxue (China) had been signed on 30 October 2017.

38 It is in those circumstances that the Commission initiated the present infringement proceedings, on 1 February 2018, in respect of the measures at issue.

39 By decision of 25 July 2018, the President of the Court of Justice gave the case priority over others, pursuant to Article 53(3) of the Rules of Procedure of the Court of Justice.

## III. The action

### A. ADMISSIBILITY

#### *1. Arguments of the parties*

40 In its statement in defence, Hungary contends that the action must be dismissed as inadmissible on account of the Commission's conduct during the pre-litigation procedure and the resulting illegalities. Hungary states first of all that the Commission required it, without providing any justification, to submit its observations on the letter of formal notice, and subsequently on the reasoned opinion, within one month, instead of the period of two months that is usually applied in pre-litigation procedures, and that it did so even though Hungary was required to deal with two other infringement procedures initiated in parallel and in which similar time limits were imposed. Next, Hungary submits that the Commission refused its requests for that time limit to be extended, without providing an appropriate statement of reasons.

41 According to Hungary, such conduct shows that the Commission did not seek to give it an adequate hearing, contrary to the principle of sincere cooperation and the right to good administration. That conduct also constitutes an infringement of Hungary's right to avail itself of its right to defend itself.

42 In its rejoinder, Hungary also states that the Commission seeks to justify its conduct by invoking the fact that the Hungarian authorities were not prepared to repeal the disputed provisions of the Law on higher education. It maintains, however, that that circumstance cannot be relied upon to justify a reduction in the time limits applicable to the pre-litigation procedure if the objectives of that procedure are not to be disregarded.

43 Furthermore, Hungary contends that, by giving a clear indication that it had initiated the present infringement procedure solely in the interest of the Central European University (CEU) and for purely political considerations, the Commission seriously undermined the right to good administration, provided for in Article 41(1) of the Charter.

44 The Commission disputes the merits of those arguments.

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*2. Findings of the Court*

45 As regards, in the first place, the arguments relating to the allegedly excessively short time limits for reply which the Commission imposed on Hungary, it must be borne in mind that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under EU law or to avail itself of its right to defend itself against the complaints made by the Commission (judgment of 26 October 2006, *Commission* v *Italy*, C-371/04, EU:C:2006:668, paragraph 9). The proper conduct of that procedure constitutes an essential guarantee required by the FEU Treaty, not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject matter (judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 91 and the case-law cited).

46 Those objectives require the Commission to grant the Member States concerned a reasonable period to reply to letters of formal notice and to comply with reasoned opinions, or, where appropriate, to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case (see, to that effect, judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 92 and the case-law cited).

47 The Court has thus held that a short period may be justified in particular circumstances, especially where there is an urgent need to remedy an infringement or where the Member State concerned is fully aware of the Commission's views long before the procedure starts (judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 92).

48 In the present case, on 4 April 2017 the Hungarian Parliament adopted Law No XXV, under which higher education institutions not satisfying the conditions now set out in Article 76(1) of the Law on higher education would have their authorisation to carry out their activities withdrawn and would no longer be entitled to admit new first-year students from 1 January 2018, while courses already in progress must be completed at the latest during the 2020/2021 academic year.

49 On 27 April 2017, the Commission sent a letter of formal notice to Hungary and set a period of one month for Hungary to submit observations. On 14 July 2017, the Commission issued a reasoned opinion in which it set Hungary a period of one month within which to take the necessary measures to comply with the reasoned opinion or to submit observations.

50 In the light of the circumstances referred to above, from which it is apparent that the reason for the time limit imposed on Hungary was the urgency, according to the Commission, of the need to remedy the infringement alleged against Hungary, a period of one month does not appear to be unreasonable.

51 Moreover, contrary to the Hungarian Government's contention, that assessment is not called into question by the fact that the Commission did not initiate the present infringement proceedings until 1 February 2018. The Commission had previously been informed, by a letter of 18 October 2017, that the date from which higher education institutions not satisfying the requirements of Article 76(1) of the Law on higher education would cease to be entitled to admit new first-year students had been postponed until 1 January 2019.

52 In any event, as is apparent from the case-law of the Court, the fact that the Commission makes the pre-litigation procedure subject to short time limits is not in itself capable of leading to the inadmissibility of the subsequent action for failure to fulfil obligations. Such a finding of inadmissibility is only to be made where the Commission's conduct prevented the Member State concerned from availing itself of its right to defend itself against complaints made by the Commission and thus infringed the rights of the defence, which it is for that Member State to prove (see, to that effect, judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 30 and the case-law cited).

53 Such proof has not, however, been produced by Hungary in the present case.

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54 On the contrary, examination of the conduct of the pre-litigation procedure, as recalled in paragraphs 26 to 37 of the present judgment, shows, first of all, that Hungary did submit detailed observations in relation to the letter of formal notice, and subsequently the reasoned opinion, within the period of one month allowed by the Commission. Hungary went on to submit further observations in that regard in three letters dated 11 September, 6 October and 13 November 2017, all of which were accepted by the Commission. Last, analysis of the documents exchanged in the pre-litigation procedure and of the application initiating proceedings shows that the Commission duly took into consideration all the comments made by Hungary at the various stages of that procedure, including those submitted after the deadlines imposed had expired.

55 In those circumstances, it is irrelevant that similar time limits were imposed on Hungary, during the same period, in two other infringement procedures.

56 As regards, in the second place, Hungary's assertion that the Commission allegedly initiated the present infringement procedure with the sole aim of protecting the interests of the CEU and that it did so for purely political purposes, it must be recalled that the objective of the procedure provided for in Article 258 TFEU is an objective finding that a Member State has failed to fulfil its obligations under EU law (see, to that effect, judgment of 27 March 2019, *Commission* v *Germany*, C-620/16, EU:C:2019:256, paragraph 40 and the case-law cited). According to settled case-law, in the context of such proceedings, the Commission enjoys a discretion as to whether or not to commence such proceedings, which is not for review by the Court (see, to that effect, judgment of 16 July 2020, *Commission* v *Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 49 and the case-law cited).

57 It follows from the foregoing considerations that the present action for failure to fulfil obligations is admissible.

## B. THE JURISDICTION OF THE COURT

### *1. Arguments of the parties*

58 Hungary submits that the Court does not have jurisdiction to hear and determine the present action for failure to fulfil obligations with respect to the Commission's complaints concerning infringements of the GATS.

59 In the first place, Hungary claims that, in accordance with Article 6(e) TFEU, the area of higher education does not fall within the competence of the European Union and that it is therefore, in that area, the Member States concerned which answer individually for any failure to comply with their obligations under the GATS.

60 In the second place, in accordance with the general rules of international law, it is exclusively for the panels and the Appellate Body of the WTO ('the Appellate Body') established by the Dispute Settlement Body ('the DSB') to assess whether the Law on higher education is compatible with the commitments undertaken by Hungary under the GATS.

61 In Hungary's submission, it is apparent from the case-law of the Court (judgment of 10 September 1996, *Commission* v *Germany*, C-61/94, EU:C:1996:313, paragraphs 15 and 16) that the Commission is competent to examine the implementation of a WTO agreement which has become an integral part of EU law in the context of relations between Member States and the EU institutions, but not in the context of relations between a Member State and a third country.

62 Furthermore, should the Court grant the Commission's application in so far as it is based on an infringement of the GATS, it would, by its autonomous interpretation of the articles of the GATS and Hungary's schedule of specific commitments, be interfering with the exclusive competence of WTO members and of the bodies constituting the WTO's dispute settlement system to interpret WTO agreements, contrary to Article 216(2) TFEU, and would thereby risk undermining the uniform interpretation of the GATS.

63 Once a Member State's failure to fulfil its obligations under the GATS has been established by the Court, third countries would no longer have any reason to initiate a procedure within the framework of the WTO's dispute settlement system.

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64 The Commission's reply is, in the first place, that, in accordance with Article 207(4) TFEU, trade in education services falls within the exclusive competence of the Union in so far as it is included within the scope of the common commercial policy. Consequently, by ensuring that commitments arising from the GATS are complied with, the Member States are fulfilling an obligation vis-à-vis the Union, which has assumed responsibility for the proper implementation of that agreement.

65 In the second place, in the Commission's submission, in accordance with Article 216(2) TFEU, international agreements concluded by the Union are binding on the Member States. Consequently, as is apparent from the case-law of the Court (judgment of 10 September 1996, *Commission* v *Germany*, C-61/94, EU:C:1996:313, paragraph 15), non-compliance with those agreements by the Member States falls within EU law and constitutes a failure to fulfil obligations that is capable of being the subject matter of an action under Article 258 TFEU.

66 In the present case, since the GATS is an international agreement concluded by the Union, it is for the Commission to ensure that the Member States comply with the international obligations that arise for the Union under that agreement, which, in particular, enables the Union to avoid incurring international liability in a situation in which there is a risk of a dispute being brought before the WTO.

67 The Commission submits that the existence of the WTO's dispute settlement system is of no relevance in that regard. The Union, as a member of the WTO, is required to ensure that its obligations under the WTO agreements are complied with in the territory of the Union. Moreover, third countries are bound neither by the settlement within the Union of disputes concerning international obligations that are binding on the Union and its Member States, nor by the Court's interpretation of those international obligations.

### *2. Findings of the Court*

68 As a preliminary point, it must be borne in mind that, in accordance with Article 258 TFEU, an action for failure to fulfil obligations can have as its subject only the finding of a failure to comply with obligations under EU law (see, to that effect, judgment of 19 March 2002, *Commission* v *Ireland*, C-13/00, EU:C:2002:184, paragraph 13).

69 The Court has repeatedly held that an international agreement entered into by the Union is, from its entry into force, an integral part of EU law (see, in particular, judgments of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, paragraphs 5 and 6; of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 73; and Opinion 1/17 *(EU-Canada CET Agreement)* of 30 April 2019, EU:C:2019:341, paragraph 117).

70 In the present case, the Agreement establishing the WTO, of which the GATS is part, was signed by the Union and then approved by it, on 22 December 1994, by Decision 94/800. It entered into force on 1 January 1995.

71 It follows that the GATS is part of EU law.

72 As regards, in the first place, the objection raised by Hungary and mentioned in paragraph 59 of the present judgment, it should be noted that, in accordance with Article 3(1)(e) TFEU, the Union is to have exclusive competence in the area of common commercial policy.

73 The Court has held that the commitments entered into under the GATS fall within the common commercial policy (see, to that effect, Opinion 2/15 *(Free Trade Agreement with Singapore)* of 16 May 2017, EU:C:2017:376, paragraphs 36 and 54).

74 It follows that, while it is apparent from Article 6(e) TFEU that the Member States are to have broad competence in the area of education, the Union having competence in that area only 'to carry out actions to support, coordinate or supplement the actions of the Member States', the commitments entered into under the GATS, including those relating to the liberalisation of trade in private educational services, fall within the exclusive competence of the Union.

75 Accordingly, Hungary is wrong to maintain that it is, in the area of trade in educational services, the Member States concerned which answer individually for any failure to comply with their obligations under the GATS.

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76 As regards, in the second place, the objection raised by Hungary and set out in paragraphs 60 to 63 of the present judgment, it must be pointed out that Hungary does not dispute, in general terms, the Court's jurisdiction to hear and determine, under Article 258 TFEU, an action seeking a declaration that a Member State has failed to fulfil its obligations under an international agreement that is binding on the Union. However, Hungary maintains that it is the particular context resulting from the existence of the WTO's dispute settlement system, which applies inter alia to the obligations of WTO members arising from the GATS, that precludes the Court from exercising that jurisdiction.

77 It must be observed that that issue has not been settled by the Court in the case-law concerning the relationship of EU law with WTO law.

78 Until now, the Court has ruled either in the context of the assessment of the validity of an act of EU secondary law on grounds of the incompatibility of EU law with WTO law (see, in particular, judgment of 1 March 2005, *Van Parys*, C-377/02, EU:C:2005:121, paragraphs 1 and 39 and the case-law cited), or in the context of the possible non-contractual liability of the Union and the exercise of the right to compensation for damage suffered (see, in particular, judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraphs 1 and 107).

79 In particular, in the cases that gave rise to the judgments cited in the preceding paragraph of the present judgment, the Court had been presented with WTO rulings that were unfavourable to the Union and had had to adjudicate on various aspects of the implementation of those rulings, in particular as to whether the persons concerned could rely on WTO law.

80 In the present case, first, the Commission claims that certain legislative provisions adopted by a Member State are incompatible with the GATS, with the result that that Member State has failed to comply with EU law of which that international agreement is an integral part. Second, in the absence of a DSB ruling declaring conduct of the Union or of a Member State to be incompatible with WTO law, the question of the possible implementation of such a ruling does not arise.

81 That being the case, as is apparent from paragraph 66 of the present judgment, the Commission submits that the objective of the present infringement proceedings is to ensure that the Union does not incur any international liability in a situation in which there is a risk of a dispute being brought before the WTO.

82 In that respect, Article 3(2) of the Understanding on the settlement of disputes states that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system, serving to preserve the rights and obligations of WTO members and to clarify the provisions of the covered agreements in accordance with customary rules of interpretation of public international law.

83 More specifically, under Article 11 of the Understanding on the settlement of disputes, a panel is empowered to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. Under Article 17(13) of that understanding, the Appellate Body may uphold, modify or reverse the legal findings and conclusions of that panel, its jurisdiction being limited, in accordance with Article 17(6) of that understanding, to issues of law covered in the panel report and legal interpretations made by the panel. Members of the WTO are in principle required to comply immediately with the recommendations and rulings of the DSB, as is apparent from Article 21(1) and (3) of the Understanding on the settlement of disputes.

84 It follows from those considerations that, in certain circumstances, the review undertaken as part of the WTO's dispute settlement system may result in a legal finding that measures taken by a WTO member are not in conformity with the law of that organisation and can, ultimately, give rise to international liability on the part of the Union, a member of the WTO, because of a wrongful act.

85 It must also be recalled that, under Article XVI(4) of the Agreement establishing the WTO, each member of the WTO is obliged, within the framework of its internal legal order, to ensure compliance with its obligations under WTO law within the various parts of its territory. A similar obligation is, moreover, laid down in Article I(3)(a) of the GATS.

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86 In those circumstances, not only does the particular context resulting from the existence of the WTO's dispute settlement system have no bearing on the jurisdiction conferred on the Court under Article 258 TFEU, but the exercise of that jurisdiction is entirely consistent with the obligation of each WTO member to ensure observance of its obligations under the law of that organisation.

87 It should also be recalled that, in accordance with settled case-law, the Union is bound, when exercising its powers, to observe international law in its entirety, including not only the provisions of international conventions that are binding on it, but also the rules and principles of general customary international law (see, to that effect, judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118, paragraph 47 and the case-law cited).

88 First of all, as is apparent from Article 3 of the articles on the responsibility of States for internationally wrongful acts – drawn up by the International Law Commission of the United Nations Organisation and of which that organisation's General Assembly took note in its Resolution 56/83 of 12 December 2001 – which codify customary international law and are applicable to the Union, the characterisation of an act of a State as being 'internationally wrongful' is governed solely by international law. Consequently, that characterisation cannot be affected by any characterisation of the same act that might be made under EU law.

89 In that regard, while the Commission correctly notes that the assessment of the alleged conduct of the Member State concerned which it is for the Court to make under Article 258 TFEU is not binding on the other members of the WTO, it should be observed that that assessment also does not affect any assessment that might be made by the DSB.

90 Next, it is clear from Article 32 of the articles on the responsibility of States for internationally wrongful acts that the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under international law.

91 It follows, in particular, that neither the Union nor the Member State concerned can rely on the assessment, with regard to WTO law, of the conduct of that Member State by the Court, in the context of infringement proceedings under Article 258 TFEU, in order to refuse to comply with the legal consequences provided for by WTO law should the DSB find that conduct not to be in conformity with WTO law.

92 Last, without prejudice to the limits placed on the possibility of reliance upon WTO law in order to review the legality of acts of the EU institutions before the Courts of the European Union, recalled in the case-law cited in paragraph 78 of the present judgment, it must be noted that the general international law principle of respect for contractual commitments (*pacta sunt servanda*), laid down in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series,* Vol. 1155, p. 331), means that the Court must, for the purposes of interpreting and applying the GATS, take account of the DSB's interpretation of the various provisions of that agreement. In addition, should the DSB not yet have interpreted the provisions concerned, it is for the Court to interpret those provisions in accordance with the customary rules of interpretation of international law that are binding on the Union, while observing the principle, set out in Article 26, that that international agreement should be implemented in good faith.

93 It follows from the foregoing considerations that the arguments relied on by Hungary as to the lack of jurisdiction of the Court to hear and determine the present action for failure to fulfil obligations with respect to the complaint of infringement of the GATS must be rejected in their entirety.

## C. SUBSTANCE

### *1. The requirement of a prior international treaty*

94 In order to rule on the first complaint, it is necessary, first of all, to clarify the scope of Hungary's commitments in respect of higher education services in the light of the rule on national treatment set out in Article XVII of the GATS; next, to examine the question whether the requirement of a prior international treaty modifies the conditions of competition to the benefit of national providers of such services or of the services which they supply, contrary to that provision; and, last, if so, to examine the arguments by which Hungary seeks to justify that modification on the basis of one of the exceptions provided for in Article XIV of the GATS.

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(a) The effects to be ascribed to Hungary's commitment in respect of higher education services, in the light of the rule on national treatment set out in Article XVII of the GATS

*(1) Arguments of the parties*

95 The Commission maintains, in the first place, that the inscription of privately financed higher education services in Hungary's schedule of specific commitments and, as regards the establishment of a commercial presence, referred to in Article I(2)(c) of the GATS ('mode of supply 3'), the entry of the word 'none' in the column relating to 'limitations on national treatment' referred to in Article XVII of that agreement mean that there is no qualification in respect of that commitment and, therefore, that Hungary has undertaken a full commitment in that respect.

96 In the second place, the Commission submits that the condition mentioned by Hungary in the column relating to 'limitations on market access' referred to in Article XVI of the GATS, according to which the 'establishment of schools is subject to licence from the central authorities', cannot be considered to relate also to the rule on national treatment under Article XX(2) of the GATS.

97 In that regard, the Commission submits first of all that that condition is worded in such vague and general terms that it enables the obtaining of that licence to be made subject to any specific condition, contrary to the terms of Article XX(1)(a) and (b) of the GATS. Such a condition in relation to the obtaining of a prior licence is, moreover, capable of undermining the purpose of entering into commitments under Articles XVI and XVII of the GATS that is set out in the second paragraph of the preamble to the GATS and consists in the 'expansion of [trade in services] under conditions of transparency and progressive liberalisation'. In addition, even on the assumption that that condition, inscribed in the column relating to 'limitations on market access', does indeed apply to national treatment, the condition as formulated cannot encompass the specific requirement under Article 76(1)(a) of the Law on higher education that the binding application of an international treaty on fundamental support for activities that may be undertaken by a foreign higher education institution in Hungary, concluded between the Government of Hungary and the government of the State in which that institution has its seat, must have been recognised by the parties.

98 Next, the Commission submits that, in accordance with the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), adopted by the WTO's Council for Trade in Services on 23 March 2001 (S/L/92), the authorisation requirements cannot be regarded as limitations on market access under Article XVI of the GATS. Consequently, Hungary cannot shelter behind the requirement of a prior licence in order to rule out any breach of the principle of national treatment.

99 Last, the Commission submits that that requirement is not a measure that falls within the scope of Article XVI of the GATS. Article XVI(2) of that agreement contains an exhaustive list of the limitations falling within the scope of that article. That requirement does not, however, appear in that list, nor does it resemble any of the measures that are listed.

100 The Commission concludes from this that, in the case of mode of supply 3, Hungary has committed itself to applying to service providers from third country members of the WTO treatment no less favourable than that which Hungary accords to its domestic providers.

101 Hungary contends that, in accordance with Article XX(2) of the GATS, the condition which it inscribed in the column relating to 'limitations on market access', mentioned in paragraph 96 of the present judgment, also has effect with respect to the national treatment obligation.

102 Hungary further submits that formulating that condition in general terms permits it to maintain a 'discretionary licence system' the details of which it can freely adjust, if necessary by restricting the establishment of foreign providers, including by requiring the prior conclusion of an international treaty.

*(2) Findings of the Court*

103 First of all, according to Article XVII(1) of the GATS, each member of the WTO is required, in the sectors inscribed in its schedule of specific commitments and subject to any conditions and qualifications set out therein, to

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accord to services and service suppliers of any other member of the WTO treatment no less favourable than that it accords to its own like services and service suppliers.

104 Next, in accordance with Article XVI(1) of the GATS, with respect to market access through the modes of supply identified in Article I of the GATS, each member of the WTO is required to accord services and service suppliers of any other member of the WTO treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule of specific commitments.

105 Last, Article XX(1) of the GATS states that each member of the WTO is required to set out in a schedule the specific commitments it undertakes under Part III of the GATS, which includes Articles XVI and XVII. With respect to sectors where such commitments are undertaken, each schedule must specify the terms, limitations and conditions on market access and the conditions and qualifications on national treatment. Those schedules of specific commitments are an integral part of the GATS.

106 It is apparent, therefore, from Articles XVI, XVII and XX of the GATS that a WTO member's own schedule of specific commitments specifies the commitments which that member has undertaken by sector and by mode of supply. Such a schedule specifies, in particular, the terms, limitations and conditions relating to 'limitations on market access' and the conditions and qualifications relating to 'limitations on national treatment'. That information is set out in two separate columns.

107 Furthermore, in accordance with Article XX(2) of the GATS, measures that are inconsistent with both Articles XVI and XVII of the GATS must, in the interests of simplification, be inscribed only in the column relating to 'limitations on market access' of the schedule of specific commitments of the member concerned, that single inscription being then regarded as providing an implicit condition or qualification in respect of national treatment (see the WTO panel report of 16 July 2012 entitled 'China – Certain measures affecting electronic payment services' (WT/DS 413/R), adopted by the DSB on 31 August 2012, paragraph 7.658).

108 It follows that a condition that is formally inscribed only under Article XVI of the GATS allows for derogation from the national treatment obligation provided for in Article XVII only where the type of measures that it introduces is inconsistent with both the obligation provided for in Article XVI and that provided for in Article XVII of the GATS (see the WTO panel report of 16 July 2012 entitled 'China – Certain measures affecting electronic payment services' (WT/DS 413/R), adopted by the DSB on 31 August 2012, paragraph 7.658).

109 In the present case, the schedule of specific commitments adopted by Hungary (GATS/SC/40 of 15 April 1994) includes, in the column relating to 'limitations on market access', in respect of higher education services supplied by means of a commercial presence, the condition that the establishment of schools is subject to licence from the central authorities.

110 The column relating to 'limitations on national treatment' contains the word 'none' in respect of the subsector of higher education services.

111 In those circumstances, it is necessary to determine whether or not the condition relating to prior licence, referred to in paragraph 109 of the present judgment, inscribed in the column relating to 'limitations on market access', is equally applicable to the national treatment obligation provided for in Article XVII of the GATS.

112 In that regard, it is apparent from the effect of the simplifying rule in Article XX(2) of the GATS, as explained in paragraph 108 of the present judgment, that a condition can be covered by that rule and, therefore, apply equally to Article XVII of the GATS only if it is discriminatory in nature.

113 It must be noted that, as is apparent from the actual wording of the condition relating to prior licence, the condition is intended to cover all educational institutions, regardless of their origin, and therefore does not have any discriminatory element. Consequently, the rule laid down in Article XX(2) of the GATS cannot be applied in the present case. It follows that that condition does not enable Hungary to claim a derogation from the national treatment obligation provided for in Article XVII of the GATS.

114 Having regard to the foregoing considerations, it must be concluded that the Commission is fully entitled to maintain that Hungary's inscription of privately financed higher education services in its schedule of specific

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commitments and, with respect to mode of supply 3, the entry of the word 'none' in the column relating to 'limitations on national treatment' mean that there is no qualification on Hungary's commitments under Article XVII of the GATS in respect of those services.

(b) Modification of the conditions of competition to the benefit of like national providers

*(1) Arguments of the parties*

115 The Commission submits that, in so far as higher education institutions that have their seat in a member country of the WTO other than those of the EEA may supply higher education services in Hungary only if the State in which they have their seat has entered into an international treaty with the Government of Hungary beforehand, the Hungarian legislation accords those service providers less favourable treatment than that enjoyed by like Hungarian providers or those established in an EEA State, contrary to the national treatment obligation provided for in Article XVII of the GATS.

116 Referring to the wording of the Law on higher education, the Commission adds that the Government of Hungary has a discretion as regards the content of that treaty and the decision to enter into negotiations with a view to concluding it. Consequently, it would be open to that government to refuse, even on arbitrary grounds, to conclude such a treaty even though the State in which the service provider has its seat would be prepared to do so.

117 Hungary contends that the primary objective of the requirement of a prior international treaty is to intensify diplomatic efforts in relation to cultural policy. The Government of Hungary has, it maintains, repeatedly declared its readiness to enter into negotiations and makes every effort to ensure that they are brought to a conclusion. The fact that two treaties were signed – one with the State of Maryland (United States) and the other with the People's Republic of China – after the Law on higher education was amended is proof, in its submission, that the measure adopted is not a condition that is impossible to fulfil.

*(2) Findings of the Court*

118 As a preliminary point, it must be noted that the requirement of a prior international treaty, which calls for the conclusion of an agreement between Hungary and another State which is not a member of the EEA, can in any event affect only certain foreign providers. In so far as that requirement imposes on those foreign providers an additional condition for the supply of higher education services in Hungary compared to those applicable to providers of like services that are established in Hungary or in another Member State of the EEA, it introduces formally different treatment of those categories of providers, within the meaning of Article XVII(3) of the GATS.

119 In accordance with that provision, it is necessary therefore to determine whether, by introducing formally different treatment, the requirement of a prior international treaty modifies the conditions of competition in favour of providers of higher education services established in Hungary, or of the services that they supply.

120 In that regard, it must be noted that that requirement, as formulated in Article 76(1)(a) of the Law on higher education, means that Hungary has a discretion both as to whether it is appropriate to conclude such a treaty and as regards its content. In those circumstances, the opportunity for higher education institutions having their seat in a member country of the WTO other than those of the EEA to carry out their activities in Hungary is entirely in the discretion of the Hungarian authorities.

121 This results in competitive disadvantages for service suppliers having their seat in a Member State of the WTO that is not a member of the EEA, with the result that the requirement of a prior international treaty does modify the conditions of competition in favour of Hungarian providers, contrary to Article XVII of the GATS.

(c) Justification under Article XIV of the GATS

*(1) Arguments of the parties*

122 Hungary contends that the requirement of a prior international treaty is necessary for the purposes of maintaining public order and preventing deceptive practices. In its submission, that requirement serves to ensure that the

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State in which the seat of the institution concerned is situated considers that provider to be 'reliable' and supports the institution's future activities in Hungary. The requirement also serves to ensure that the institution concerned complies with the legislation of the State in which it has its seat and which may in some circumstances require certain conditions to be met as a prerequisite to being able to carry on an activity in Hungary.

123 Hungary also contends that there is no alternative, compatible with WTO rules, that would enable the Hungarian legislature's objectives to be attained.

124 In particular, contrary to what is advocated by the Commission, it would be unrealistic to apply the relevant national legislation to the foreign higher education institutions concerned in the same way as to Hungarian institutions.

125 The Commission maintains that the requirement of a prior international treaty cannot be justified on the basis of any of the exceptions permitted by the GATS, in particular those provided for in Article XIV(a) and (c)(i) and (ii) thereof.

126 In that respect, according to the Commission, Hungary has, more specifically, failed to provide any evidence to support its assertion that that requirement contributes to the maintaining of public order, nor has it explained, in that context, the nature of the genuine and sufficiently serious threat allegedly posed to one of the fundamental interests of Hungarian society, or, moreover, clarified how that requirement might be necessary for the purpose of attaining the objective of maintaining public order, assuming that objective to be established, and why there is, in that case, no alternative that would be less restrictive.

127 The Commission further maintains that, because of Hungary's discretion to enter into negotiations with the State in which a foreign higher education institution has its seat, the requirement does not in any event meet the condition laid down in Article XIV of the GATS, according to which measures that might be justifiable in the light of that article must not be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services'.

*(2) Findings of the Court*

128 In the first place, it should be noted that Article XIV of the GATS provides in particular, in paragraph (a) and in paragraph (c)(i), that nothing in that agreement is to be construed to prevent the adoption or enforcement of measures necessary, on the one hand, to protect public morals or to maintain public order, and, on the other, to secure compliance with laws or regulations which are not inconsistent with the provisions of that agreement, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts.

129 In those circumstances, it must be noted that both of the objectives invoked by Hungary, namely, first, maintaining public order and, second, the prevention of deceptive practices, are indeed referred to in the GATS.

130 In the second place, as regards the examination as to whether the requirement of a prior international treaty is justified in the light of the objective of maintaining public order, it is clear from footnote 5, under Article XIV(a) of the GATS, that 'the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'.

131 Hungary has not, however, put forward any arguments that might establish, in a specific and detailed manner, how the exercise, within its territory, of higher education teaching activities by institutions that have their seat in a State that is not a member of the EEA would constitute, in the absence of such a treaty, a genuine and sufficiently serious threat affecting a fundamental interest of Hungarian society.

132 Therefore, it must be concluded that the requirement of a prior international treaty cannot be justified by Hungary's arguments concerning the maintaining of public order.

133 In the third place, as regards the objective of preventing deceptive practices, it is apparent from Hungary's arguments on this point, summarised in paragraph 122 of the present judgment, that Hungary seems to consider the prior conclusion of an international treaty to be necessary for the purpose of obtaining a guarantee from the third

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country concerned that the foreign higher education institution concerned is reliable, and thereby preventing any risks from arising in that respect.

134 Those arguments cannot, however, justify the requirement of a prior international treaty.

135 Article XIV of the GATS provides that the exceptions listed cannot be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.

136 First, it should be noted that, as the Advocate General essentially stated in points 119 and 120 of her Opinion, the requirement of a prior international treaty enables Hungary arbitrarily to prevent an institution from entering its market or from carrying on its activities in that market, since the conclusion of such a treaty and, therefore, the fulfilment of that requirement ultimately depend solely on the political will of that Member State. The requirement is in that respect fundamentally distinguishable from a condition requiring the reliability of a foreign education institution to be evidenced by a unilateral declaration of the government of the third country in which that institution has its seat.

137 Second, in so far as it applies to foreign higher education institutions already present on the Hungarian market, the requirement of a prior international treaty is not, in any event, proportionate, since the objective of preventing deceptive practices could be more effectively met by monitoring the activities of such institutions in Hungary and, if necessary, prohibiting the continuation of only those activities in respect of which it could be established that they had adopted such practices.

138 In those circumstances, the requirement of a prior international treaty cannot be justified by Hungary's arguments based on the prevention of deceptive practices.

139 Having regard to the foregoing considerations, it must be held that, by adopting the measure provided for in Article 76(1)(a) of the Law on higher education, Hungary has failed to fulfil its obligations under Article XVII of the GATS.

### *2. The requirement that the institution concerned provide education in the State where it has its seat*

#### (a) Article XVII of the GATS

140 As a preliminary point, it should be noted, first, that Article 76(1)(b) of the Law on higher education, to which the Commission's complaint relates, requires the foreign higher education institution wishing to carry on an activity in Hungary to offer education or training in the State in which it has its seat, regardless of whether that State is a Member State or a third country, and, second, that the arguments put forward by the Commission in support of that complaint cover the requirement that the institution concerned provide education in the State where it has its seat without any distinction as to whether the requirement applies to foreign higher education institutions having their seat in a Member State or in a third country. Given, however, that, as is apparent from paragraph 73 of the present judgment, Article XVII of the GATS falls within the common commercial policy, that provision is relevant to the examination of this complaint only in so far as that requirement applies to higher education institutions that have their seat in a third country member of the WTO.

141 The scope of Hungary's commitments under Article XVII of the GATS, as regards higher education services, having been clarified in paragraph 114 of the present judgment, it is necessary to examine whether the requirement that the institution concerned provide education in the State where it has its seat, in so far as that State is a third country member of the WTO, modifies the conditions of competition to the benefit of like national providers or the services which they supply, contrary to that provision, and, if so, to examine the arguments by which Hungary seeks to justify that modification on the basis of one of the exceptions provided for in Article XIV of the GATS.

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*(1) Modification of the conditions of competition to the benefit of like national providers*

*(i) Arguments of the parties*

142 The Commission maintains that the requirement that the institution concerned provide education in the State where it has its seat modifies the conditions of competition to the benefit of national providers and, therefore, that it is contrary to the national treatment obligation with which Hungary is required to comply fully under Article XVII of the GATS.

143 More specifically, the Commission submits that the GATS does not require that, in order to be recognised as a provider enjoying the rights guaranteed by that agreement, the provider must supply services in the country of origin. Therefore, in so far as that requirement would have the effect of preventing foreign service providers from initially establishing an institution in Hungary, it is discriminatory in relation to such providers.

144 Hungary refers, *mutatis mutandis*, to the arguments expounded in relation to the requirement of a prior international treaty.

*(ii) Findings of the Court*

145 As a preliminary point, it should be borne in mind that, as is apparent from paragraph 114 of the present judgment, Hungary is committed, under Article XVII of the GATS, to ensuring full national treatment as regards the commercial presence of providers of higher education services.

146 It must be noted that the requirement that the institution concerned provide education in the State where it has its seat specifically covers providers which have their seat abroad.

147 It is therefore necessary to determine whether, by introducing this formally different treatment, the requirement that the institution concerned provide education in the State where it has its seat modifies the conditions of competition to the benefit of Hungarian providers or the services that they supply, as compared to suppliers of like services that have their seat in any third country member of the WTO or to the services that they supply.

148 It should be noted in that regard that providers of higher education services that have their seat in a third country member of the WTO and wish to establish themselves in Hungary are required first to establish an institution in that third country and to genuinely offer higher education in that country.

149 This results in a competitive disadvantage for the foreign suppliers of services concerned, and therefore the requirement that the institution concerned provide education in the State where it has its seat modifies the conditions of competition to the benefit of like Hungarian providers.

*(2) Whether there is justification*

*(i) Arguments of the parties*

150 In order to justify such a modification of the conditions of competition, Hungary relies, first, on the objective of maintaining public order and, second, on that relating to the prevention of deceptive practices.

151 The Commission maintains that the requirement that the institution concerned provide education in the State where it has its seat cannot be justified on the basis of either of those objectives. It claims, more specifically, that Hungary has failed to provide any evidence to support its assertion that that requirement contributes to the maintaining of public order, nor has it explained the nature of the genuine and sufficiently serious threat posed to one of the fundamental interests of Hungarian society, or, moreover, clarified how that requirement might be necessary for the purpose of attaining the objective of maintaining public order, assuming that objective to be established, and why there is, in that case, no alternative that would be less restrictive.

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*(ii) Findings of the Court*

152 As is apparent from paragraphs 128 and 129 of the present judgment, both of the objectives invoked by Hungary, namely, first, maintaining public order and, second, the prevention of deceptive practices, are referred to, respectively, in Article XIV(a) and in Article XIV(c)(i) of the GATS.

153 Hungary refers in that regard, without further substantiation, to its arguments in relation to the requirement of a prior international treaty.

154 It must be observed that, in so doing, Hungary has not put forward any arguments that might establish, in a specific and detailed manner, how the exercise, within its territory, of higher education teaching activities by institutions that have their seat in a State that is not a member of the EEA constitutes, in the event that those institutions do not offer education or training in the State in which they have their seat, a genuine and sufficiently serious threat affecting a fundamental interest of Hungarian society enabling Hungary to rely on the justification of maintaining public order.

155 Likewise, by thus confining itself to referring to its arguments in relation to the requirement of a prior international treaty, Hungary has not provided any specific evidence that might demonstrate why the requirement that the institution concerned provide education in the State where it has its seat is necessary in order to prevent deceptive practices.

156 Consequently, it must be concluded that, by adopting the measure provided for in Article 76(1)(b) of the Law on higher education, Hungary has, in so far as that provision applies to higher education institutions which have their seat in a third country member of the WTO, failed to fulfil its obligations under Article XVII of the GATS.

(b) Article 49 TFEU

*(1) Applicability of Article 49 TFEU*

*(i) Arguments of the parties*

157 Hungary contends, principally, that education and training offered by educational institutions financed largely by private funds cannot be characterised as an 'economic activity' within the meaning of the FEU Treaty if, as in the case of the CEU, it is the service provider itself which finances the teaching activities. It follows, in its submission, that Article 49 TFEU is not applicable in the present case.

158 The Commission maintains, on the contrary, that higher education services supplied by private institutions for remuneration constitute 'services' within the meaning of the FEU Treaty. Consequently, private institutions carrying out teaching and scientific research activities in Hungary on a stable and continuous basis are justified in relying on the right to the freedom of establishment, under Article 49 TFEU.

*(ii) Findings of the Court*

159 Article 49(1) TFEU provides that, within the framework of the provisions in Chapter 2 of Title IV in Part Three of the FEU Treaty, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are to be prohibited.

160 It must first of all be noted in that regard that the Court has ruled that the provision for remuneration of higher education courses is an economic activity falling within Chapter 2 when that activity is carried on by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State (judgment of 13 November 2003, *Neri*, C-153/02, EU:C:2003:614, paragraph 39).

161 In the present case, Article 76(1)(b) of the Law on higher education is applicable to higher education institutions, without any distinction being made as to whether the courses leading to a qualification that are offered by those institutions are offered for remuneration or not.

162 Next, the Court has ruled that freedom of establishment extends to a situation in which a company formed in accordance with the legislation of one Member State, where it has its registered office, wishes to set up a branch in

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another Member State, even where that company was formed, in the first Member State, solely for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (judgment of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 38).

163 Consequently, Article 49 TFEU covers the requirement that the institution concerned provide education in the State where it has its seat in so far as that requirement applies to a higher education institution that has its seat in a Member State other than Hungary and offers education or training for remuneration in Hungary.

*(2) Whether there is a restriction*

*(i) Arguments of the parties*

164 According to the Commission, the requirement that the higher education institutions concerned must, under Article 76(1)(b) of the Law on higher education, satisfy specific conditions in the Member State in which they have their seat in order to be able to establish another institution in Hungary constitutes a restriction on the freedom of establishment within the meaning of Article 49 TFEU.

165 In particular, a Member State cannot deny the advantages of the freedom of establishment to a legal entity on the ground that that entity does not carry on any economic activity in the Member State in which it was formed.

166 Hungary contends, in the alternative, that the requirement that the institution concerned provide education in the State where it has its seat does not restrict the freedom of establishment. The requirement is linked to the exercise of an activity, and not to the formation of companies. In particular, it does not prevent a foreign higher education institution from setting up, for example, as a secondary establishment, a branch in Hungary. Nor does it limit the choice of legal form of the establishment; it merely lays down, in the case of service providers already established in Hungary through a secondary establishment, a condition relating to the exercise of higher education teaching activities.

*(ii) Findings of the Court*

167 In accordance with the case-law of the Court, any measure which prohibits, impedes or renders less attractive the exercise of the freedom of establishment must be regarded as a restriction on that freedom (judgment of 6 September 2012, *Commission* v *Portugal*, C-38/10, EU:C:2012:521, paragraph 26).

168 In the present case, Article 76(1)(b) of the Law on higher education requires that the suppliers of services concerned who wish to supply higher education services in Hungary through a stable institution must genuinely offer higher education in the State in which they have their seat.

169 Such a requirement is liable to render less attractive the exercise of the freedom of establishment in Hungary for nationals of another Member State who wish to establish themselves in Hungary in order to supply higher education services in that country.

170 Consequently, the requirement that the institution concerned provide education in the State where it has its seat constitutes a restriction on the freedom of establishment, within the meaning of Article 49 TFEU.

*(3) Whether there is justification*

*(i) Arguments of the parties*

171 Hungary contends first of all that the requirement that the institution concerned provide education in the State where it has its seat is necessary for the purposes of maintaining public order and preventing deceptive practices. That requirement is, in its submission, also necessary in order to safeguard the quality of the education offered by the institutions concerned in Hungary, particularly as the qualifications which they issue are official documents producing legal effects.

172 Hungary goes on to claim that that requirement is a means of appropriately ensuring that those objectives are observed, in that the competent authority is thus able to satisfy itself that there is a genuine and lawful activity in the

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country in which the service provider has its seat, and does so with the aim of ensuring that university education in Hungary is of a high quality.

173 However, Hungary observes that, in practice, its authorities merely examine the higher education teaching activity, the qualifications already issued, the education or training attested by those qualifications, that is to say, the teaching conditions and programme, and the qualifications of the teaching staff delivering that education.

174 Last, there is no measure that is less restrictive, since the objective of ensuring high standards of higher education can only be met by examining the activity carried on in the State in which the institution has its seat. In any event, in so far as higher education has not been harmonised at EU level, the Member States have significant latitude in that regard.

175 The Commission maintains first of all that the requirement that the institution concerned provide education in the State where it has its seat is not capable of meeting any of the objectives invoked by Hungary. It submits that Hungary has not put forward any convincing arguments as to why that requirement is justified and proportionate with regard to those objectives, nor has it indicated the nature of the abuses that that requirement would serve to prevent.

176 The Commission claims, in particular, that that requirement is inappropriate in that the quality of the education offered in the State in which the institution concerned has its seat does not provide any indication of the quality of the service supplied in Hungary. Furthermore, if its objective was really to prevent fraud and abuses, Hungary should have adopted specific rules in that respect.

177 Last, according to the Commission, the requirement that the institution concerned provide education in the State where it has its seat is disproportionate. The exchange of information with quality assurance agencies and/or accreditation agencies of the State in which the education institution concerned has its seat, as advocated in the Council's conclusions of 20 May 2014 on quality assurance supporting education and training (OJ 2014 C 183, p. 30), and enhanced cooperation within the EEA between higher education authorities are less restrictive alternatives.

*(ii) Findings of the Court*

178 As the Court has consistently held, a restriction on the freedom of establishment is permissible only if, in the first place, it is justified by an overriding reason in the public interest and, in the second place, it observes the principle of proportionality, which means that it is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it (judgment of 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 166).

179 Moreover, it is for the Member State concerned to demonstrate that those cumulative conditions are met (judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 77).

180 In the present case, Hungary relies, in the first place, on the need to maintain public order.

181 It must be borne in mind first of all in that regard that, in the context of the fundamental freedoms guaranteed by the Treaties, reasons of public policy may be relied on only if there is a genuine, present and sufficiently serious threat to a fundamental interest of society (judgment of 19 June 2008, *Commission* v *Luxembourg*, C-319/06, EU:C:2008:350, paragraph 50).

182 Hungary merely states that the requirement that the institution concerned provide education in the State where it has its seat enables the competent authority to satisfy itself that there is a genuine and lawful activity in the country in which the service provider concerned has its seat. As has been noted in paragraph 154 of the present judgment, Hungary has not put forward any arguments that might establish, in a specific and detailed manner, how the exercise, within its territory, of higher education teaching activities by such institutions constitutes, should that requirement not be met, a genuine, present and sufficiently serious threat affecting a fundamental interest of Hungarian society.

183 Accordingly, it must be concluded that the existence of such a threat has not been established in the present case.

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184 In the second place, Hungary invokes the objective of preventing deceptive practices. Without further substantiating its reasoning, Hungary seems to consider that access of foreign higher education institutions to the Hungarian market entails a risk of such practices developing.

185 In relying on a general presumption, Hungary fails to demonstrate, notwithstanding the burden of proof which it bears, as noted in paragraph 179 of the present judgment, what the precise nature of such a risk is, and how the requirement that the institution concerned provide education in the State where it has its seat would obviate that risk.

186 In any event, as the Advocate General essentially noted in point 185 of her Opinion, Hungary has not explained why the objective of preventing deceptive practices could not be attained if a supplier that was not already providing higher education in the Member State in which it had its seat were permitted to establish by any other means that it complies with the legislation of that State and that it is, moreover, reliable.

187 In the third place, the objective, invoked by Hungary, of ensuring high standards in the quality of higher education is indeed capable of justifying restrictions on the freedom of establishment (see, to that effect, judgment of 13 November 2003, *Neri*, C-153/02, EU:C:2003:614, paragraph 46).

188 It should, however, be noted that the requirement that the institution concerned provide education in the State where it has its seat does not include any details as to the standard required as regards the quality of the education offered by the foreign institution in the Member State in which it has its seat, nor does it prejudge, moreover, in any respect the quality of the education that will be provided in Hungary, with the result that it is not in any event capable of guaranteeing that that objective will be attained.

189 It follows from the foregoing considerations that the requirement that the institution concerned provide education in the State where it has its seat cannot be justified by Hungary's arguments based on maintaining public order, nor on those based on overriding reasons in the public interest relating to the prevention of deceptive practices and the need to ensure the good quality of higher education.

190 Consequently, it must be concluded that, by adopting the measure provided for in Article 76(1)(b) of the Law on higher education, Hungary has, in so far as that provision applies to higher education institutions which have their seat in another Member State, failed to fulfil its obligations under Article 49 TFEU.

(c) Article 16 of Directive 2006/123 and, in the alternative, Article 56 TFEU

*(1) Applicability of Directive 2006/123*

*(i) Arguments of the parties*

191 Hungary contends that education or training offered by educational institutions financed largely by private funds cannot be characterised as an 'economic activity' within the meaning of Article 4(1) of Directive 2006/123 if, as in the case of the CEU, it is the service provider itself which finances the teaching activities. Consequently, that directive is not applicable in the present case.

192 The Commission maintains that, in accordance with Article 2 of Directive 2006/123, and also Article 4(1) thereof, which refers to the definition of services included in the FEU Treaty, the scope of that directive includes teaching activities and training courses that are financed essentially by private contributions. Consequently, private institutions carrying out teaching and scientific research activities in Hungary on a temporary basis are justified in relying on the right to the freedom to provide services under that directive.

*(ii) Findings of the Court*

193 In accordance with Article 2(1) of Directive 2006/123, the directive is to apply to services supplied by providers established in a Member State.

194 In accordance with Article 4(1) of that directive, 'service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU.

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195 In the present case, Article 76(1)(b) of the Law on higher education concerns in general terms education services that may be provided by foreign higher education institutions in Hungary and, therefore, also the provision of education or training courses for remuneration. Such provision constitutes an 'economic activity' within the meaning of Article 4(1) of Directive 2006/123. Accordingly, that directive is applicable in the present case.

*(2) Whether there is a restriction*

*(i) Arguments of the parties*

196 The Commission maintains that, in so far as the requirement that the institution concerned provide education in the State where it has its seat also covers higher education institutions which intend to supply cross-border services in Hungary, the requirement constitutes a restriction on the freedom to provide services, guaranteed in Article 16 of Directive 2006/123. In the alternative, the Commission maintains that that requirement infringes Article 56 TFEU.

197 Hungary contests those arguments.

*(ii) Findings of the Court*

198 As a preliminary point, it should be noted that, in accordance with the second subparagraph of Article 16(1) of Directive 2006/123, the Member State in which the service is provided is to ensure, in particular, free exercise of a service activity within its territory.

199 In the present case, Article 76(1)(b) of the Law on higher education requires that the institutions concerned offer higher education in the State in which they have their seat.

200 When considered in the light of Directive 2006/123, such a requirement is, in so far as it imposes an additional condition on service providers that have their seat in another Member State, capable of restricting the right of such providers to the free exercise of higher education teaching activities in Hungary, if they wish first to carry on their activity in Hungary rather than in the Member State in which they have their seat, or if they plan to carry on such an activity only in Hungary.

*(3) Whether there is justification*

*(i) Arguments of the parties*

201 Hungary contends that the requirement that the institution concerned provide education in the Member State where it has its seat is necessary for the purposes of maintaining public order. In that regard, Hungary refers, *mutatis mutandis*, to its arguments in relation to the plea alleging infringement of Article 49 TFEU.

202 The Commission submits that Hungary has not demonstrated that the education services supplied on a temporary basis by higher education institutions established in a Member State had an effect on public order in Hungary, as nevertheless required by Article 16(3) of Directive 2006/123.

*(ii) Findings of the Court*

203 Under Article 16(3) of Directive 2006/123, the Member State to which the provider moves may impose requirements with regard to the provision of a service activity where these are justified, inter alia, for reasons of public policy and public security, and in accordance with paragraph 1 of Article 16.

204 It must, however, be recalled that, as is apparent from the case-law cited in paragraph 181 of the present judgment, to which reference is made in recital 41 of Directive 2006/123, reasons of public policy and public security presuppose, in particular, that there is a genuine, present and sufficiently serious threat affecting a fundamental interest of society. As has been noted in paragraphs 154 and 182 of the present judgment, Hungary has not put forward any arguments that might establish, in a specific and detailed manner, how the exercise, within its territory, of higher education teaching activities by institutions that have their seat in another Member State constitute, should the requirement that the institution concerned provide education in the State where it has its seat

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not be met, a genuine, present and sufficiently serious threat affecting a fundamental interest of Hungarian society.

205 Accordingly, it must be held that that requirement cannot be justified in the light of Article 16(3) of Directive 2006/123.

206 It follows from the foregoing that, by adopting the measure provided for in Article 76(1)(b) of the Law on higher education, Hungary has, in so far as that provision applies to higher education institutions which have their seat in another Member State, failed to fulfil its obligations under Article 16 of Directive 2006/123. Consequently, there is no need to examine whether Hungary has infringed Article 56 TFEU, which the Commission raised only in the alternative.

207 Having regard to the foregoing considerations, it must be held that, by adopting the measure provided for in Article 76(1)(b) of the Law on higher education, Hungary has failed, in so far as that provision applies to higher education institutions which have their seat in a third country member of the WTO, to fulfil its obligations under Article XVII of the GATS and, in so far as the provision applies to higher education institutions having their seat in another Member State, to fulfil its obligations under Article 49 TFEU and Article 16 of Directive 2006/123.

### *3. Article 13, Article 14(3) and Article 16 of the Charter*

#### (a) Applicability of the Charter

##### *(1) Arguments of the parties*

208 The Commission submits that, when Member States perform their obligations under international agreements concluded by the Union, such as the GATS, they are 'implementing Union law', within the meaning of Article 51(1) of the Charter, with the result that they are obliged to respect the provisions of the Charter.

209 Furthermore, in so far as Article 76(1)(b) of the Law on higher education restricts fundamental freedoms guaranteed by the FEU Treaty, Directive 2006/123 and the GATS, that provision must be compatible with the Charter.

210 Hungary contends that, first, a national measure which infringes the commitments undertaken by the Member States within the framework of the GATS cannot be considered part of the implementation of EU law, within the meaning of Article 51(1) of the Charter.

211 Second, given that, according to Hungary, neither the provisions of the FEU Treaty concerning the freedom to provide services nor the provisions of Directive 2006/123 apply in the present case, and that, therefore, the measures at issue do not constitute a restriction that infringes the fundamental freedoms laid down by the FEU Treaty or Directive 2006/123, they do not fall within the scope of EU law, and therefore the Charter is of no relevance.

##### *(2) Findings of the Court*

212 So far as the actions of the Member States are concerned, the scope of the Charter is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only 'when they are implementing Union law'.

213 In the present case, first, as has been noted in paragraph 71 of the present judgment, the GATS forms part of EU law. It follows that, when the Member States are performing their obligations under that agreement, including the obligation imposed in Article XVII(1) thereof, they must be considered to be implementing EU law, within the meaning of Article 51(1) of the Charter.

214 Second, where a Member State argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the FEU Treaty is justified by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter (judgment of 18 June

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2020 *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 101 and the case-law cited). The same applies with respect to Article 16 of Directive 2006/123.

215 Consequently, the measures at issue must comply with the fundamental rights enshrined in the Charter.

216 In those circumstances, it is necessary to examine whether those measures limit the fundamental rights invoked by the Commission and, if so, whether they are nevertheless justified, as Hungary contends.

(b) Whether there are limitations on the fundamental rights concerned

*(1) Arguments of the parties*

217 According to the Commission, the measures at issue affect, in the first place, academic freedom, guaranteed in Article 13 of the Charter, and, in the second place, the freedom to found educational establishments and the freedom to conduct a business, enshrined, respectively, in Article 14(3) and in Article 16 of the Charter.

218 As regards academic freedom, the Commission considers those measures to affect the ability of the foreign higher education institutions concerned to conduct research freely in Hungary and to disseminate scientific knowledge and advances.

219 As regards the freedom to found educational establishments and to conduct a business, in the Commission's view, the measures at issue restrict the right of individuals to carry on a commercial activity and the right of undertakings to benefit from a certain stability with respect to their business.

220 Hungary contends, with regard to academic freedom, that the fact that a higher education institution must meet certain legal obligations does not affect the academic freedom of the institution concerned nor that of its staff. Such obligations do not inevitably affect the ability to undertake scientific activities, whether from the point of view of the institution or that of the staff.

221 So far as the freedom to found educational establishments and the freedom to conduct a business are concerned, Hungary does not dispute, in essence, the fact that the measures at issue limit the exercise of the former.

*(2) Findings of the Court*

222 As regards, in the first place, academic freedom, this is enshrined in general terms in the second sentence of Article 13 of the Charter, according to which 'academic freedom shall be respected'.

223 Under Article 52(3) of the Charter, rights enshrined therein which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') must be given the same meaning and, at the very least, the same scope as those laid down by that convention.

224 It is true that the text of the ECHR makes no reference to academic freedom. However, it is apparent from the case-law of the European Court of Human Rights that that freedom is associated, in particular, with the right to freedom of expression enshrined in Article 10 of the ECHR (ECtHR, 15 April 2014, *Hasan Yazıcı v. Turkey*, CE:ECHR:2014:0415JUD004087707, § 55 and 69, and ECtHR, 27 May 2014, *Mustafa Erdoğan and Others v. Turkey*, CE:ECHR:2014:0527JUD000034604, § 40 and 46), as is also confirmed by the comments on Article 13 of the Charter in the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

225 From that specific perspective, academic freedom in research and in teaching should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction, although it should be made clear that that freedom is not restricted to academic or scientific research, but that it also extends to academics' freedom to express freely their views and opinions (ECtHR, 27 May 2014, *Mustafa Erdoğan and Others v. Turkey*, CE:ECHR:2014:0527JUD000034604, § 40).

226 That being the case, as the Advocate General stated in points 145 and 146 of her Opinion, the concept of 'academic freedom' must be understood more broadly.

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227 In that regard, the Court considers it helpful, for the purposes of clarifying the various elements inherent in academic freedom and of determining whether the measures at issue constitute limitations on that freedom, to take into consideration the content of Recommendation 1762 (2006), adopted by the Parliamentary Assembly of the Council of Europe on 30 June 2006 and entitled 'Academic freedom and university autonomy', from which it is apparent that academic freedom also incorporates an institutional and organisational dimension, a link to an organisational structure being an essential prerequisite for teaching and research activities. Also relevant is point 18 of the Recommendation concerning the status of higher-education teaching personnel, adopted on 11 November 1997 by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (Unesco), meeting in Paris from 21 October to 12 November 1997, at its 29th session, according to which 'autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions'. Point 19 of that recommendation makes clear that 'Member States are under an obligation to protect higher education institutions from threats to their autonomy coming from any source'.

228 In the light of the foregoing, it must be held that the measures at issue are capable of endangering the academic activity of the foreign higher education institutions concerned within the territory of Hungary and, therefore, of depriving the universities concerned of the autonomous organisational structure that is necessary for conducting their academic research and for carrying out their educational activities. Consequently, those measures are such as to limit the academic freedom protected in Article 13 of the Charter.

229 As regards, in the second place, the freedom to found educational establishments and the freedom to conduct a business, these are enshrined, respectively, in Article 14(3) and Article 16 of the Charter.

230 Under Article 14(3) of the Charter, the freedom to found educational establishments with due respect for democratic principles must be respected, in accordance with the national laws governing the exercise of such freedom.

231 Moreover, Article 16 of the Charter provides that the freedom to conduct a business in accordance with EU law and national laws and practices must be recognised.

232 As a preliminary point, it should be noted that, as is apparent from the Explanations relating to the Charter of Fundamental Rights, the freedom to found educational establishments, whether public or private, is guaranteed as one of the aspects of the freedom to conduct a business, and it is therefore appropriate to examine them together.

233 In that regard, it must be noted that the measures at issue are, depending on the circumstances, such as to render uncertain or to exclude the very possibility of founding a higher education institution, or of continuing to operate an existing higher education institution, in Hungary.

234 Consequently, those measures must be regarded as limiting both the freedom to found educational establishments guaranteed in Article 14(3) of the Charter and the freedom to conduct a business enshrined in Article 16 of the Charter.

(c) Whether there is justification

*(1) Arguments of the parties*

235 Hungary maintains that the measures at issue are justified in the light of the requirements set out in Article 52(1) of the Charter.

236 As regards, in particular, the freedom to found educational establishments and the freedom to conduct a business, Hungary submits that these must be exercised with due respect for democratic principles and within the framework of national provisions governing the exercise of those freedoms. Accordingly, a Member State cannot be accused of having introduced an unlawful limitation if the Member State is regulating an economic activity with the aim of enabling others to exercise those freedoms.

237 The Commission submits that the limitations – as a result of the measures at issue – on the freedoms enshrined, respectively, in Article 13, Article 14(3) and Article 16 of the Charter are not justified in the light of the requirements set out in Article 52(1) of the Charter.

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238 According to the Commission, Hungary has not demonstrated, in the present case, that the limitations which the measures at issue place on academic freedom and the freedom to found educational establishments meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, nor has it demonstrated that those limitations are proportionate.

*(2) Findings of the Court*

239 Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

240 In the present case, the Court has concluded, in paragraphs 132, 138, 154, 155 and 189 of the present judgment, that the measures at issue were not justified by any of the objectives of general interest recognised by the Union upon which Hungary relied.

241 It follows that those measures, which place limitations on the rights enshrined, respectively, in Article 13, Article 14(3) and Article 16 of the Charter, as the Court has ruled in paragraphs 228 and 234 of the present judgment, do not in any event meet those objectives of general interest.

242 Having regard to the foregoing considerations, it must be held that, by adopting the measures at issue, Hungary has failed to fulfil its obligations under Article 13, Article 14(3) and Article 16 of the Charter.

243 In the light of all of the foregoing considerations, it must be held that:

– by adopting the measure provided for in Article 76(1)(a) of the Law on higher education, Hungary has failed to fulfil its obligations under Article XVII of the GATS;

– by adopting the measure provided for in Article 76(1)(b) of the Law on higher education, Hungary has failed, in so far as that provision applies to higher education institutions which have their seat in a third country member of the WTO, to fulfil its obligations under Article XVII of the GATS and, in so far as the provision applies to higher education institutions having their seat in another Member State, to fulfil its obligations under Article 49 TFEU and Article 16 of Directive 2006/123; and

– by adopting the measures at issue, Hungary has failed to fulfil its obligations under Article 13, Article 14(3) and Article 16 of the Charter.

**Costs**

244 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, since Hungary has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, by adopting the measure provided for in Article 76(1)(a) of Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény (Law No CCIV of 2011 on national higher education), as amended by 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), which makes the exercise, in Hungary, of teaching activities leading to a qualification by foreign higher education institutions situated outside the European Economic Area subject to the condition that the Government of Hungary and the government of the State in which the institution concerned has its seat have agreed to be bound by an international treaty, Hungary has failed to fulfil its obligations under Article XVII of the General Agreement on Trade in Services, in Annex 1B to the Agreement establishing the World Trade Organisation, signed in Marrakesh**

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**and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994);**

2. **Declares that, by adopting the measure provided for in Article 76(1)(b) of Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény (Law No CCIV of 2011 on national higher education), as amended by 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), which makes the exercise, in Hungary, of the activities of foreign higher education institutions subject to the condition that they offer higher education in the State in which they have their seat, Hungary has failed, in so far as that provision applies to higher education institutions which have their seat in a third country member of the World Trade Organisation, to fulfil its obligations under Article XVII of the General Agreement on Trade in Services, in Annex 1B to the Agreement establishing the World Trade Organisation, signed in Marrakesh and approved by Decision 94/800, and, in so far as the provision applies to higher education institutions having their seat in another Member State, to fulfil its obligations under Article 49 TFEU and 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;**

3. **Declares that, by adopting the measures provided for in Article 76(1)(a) and (b) of Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény (Law No CCIV of 2011 on national higher education), as amended by 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), Hungary has failed to fulfil its obligations under Article 13, Article 14(3) and Article 16 of the Charterof Fundamental Rights of the European Union;**

4. **Orders Hungary to pay the costs.**

[Signatures]

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