Policy Papers on Transnational Economic Law

No. 55

The role of the EU in supervising Member State compliance with WTO Law

Observations on the Opinion of Advocate General *Kokott* in Case C-66/18-*Commission v Hungary*

Sven Leif Erik Johannsen

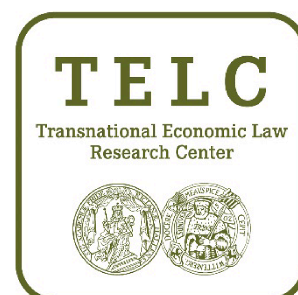
TRANSNATIONAL ECONOMIC LAW RESEARCH CENTER

Law School
Martin Luther University
Halle-Wittenberg
Universitätsplatz 5
06108 Halle (Saale)
Germany

Tel.: +49 345 / 55 23149
/ 55 23180
Fax: +49 345 / 55 27201

E-Mail: telc@jura.uni-halle.de
www.telc.uni-halle.de

June 2020



A. Introduction

The Common Commercial Policy is one of the main policies of the European project since 1958 when the Treaty of Rome became effective. It enables the European Union (hereinafter referred to as EU) to establish trade policies with respect to non-member countries. In spite of its long history and its particular importance, the Common Commercial Policy is still in a state of transition. In some places there is still controversy with regard to the scope of the Common Commercial Policy and legal consequences. The infringement proceeding (Article 258 TFEU) brought by the Commission against Hungary (Case C-66/18) provides ground for the Court of Justice of the European Union (hereinafter referred to as CJEU; this abbreviation is also used to refer to the Court of Justice of the European Communities as it was named previously) to address one of the major legal issues which remain unclear: the relationship between WTO rules and EU Law.

As a result of an amendment to the Hungarian Law on national higher education in 2017, higher education institutions from countries outside the European Economic Area (hereinafter referred to as EEA) may carry on teaching activities leading to a qualification in the territory of Hungary only if a binding application of an international treaty on fundamental support for teaching activities in Hungary, concluded between the Government of Hungary and the State responsible on the basis of the seat of the foreign higher education institution has been recognised by the parties (Paragraph 115(7), Paragraph 76(1)(a), Paragraph 77(2) Law XXV of 2017 amending Law CCIV of 2011 on national higher education, quoted from: Opinion of Advocate General Kokott, Case C-66/18, *Commission v Hungary*, 5 March 2020, paras. 22 et seq.; hereinafter referred to as Opinion AG Kokott).

According to Article 258 TFEU, the CJEU holds jurisdiction over cases related to alleged violations of "obligations under the Treaties" by Member States. The term "Treaties" refers to the Treaty on European Union and the Treaty on the Functioning of the European Union (Article 1(2) TFEU). The EEA consists of all EU Member States and the EFTA countries except Switzerland. Consequently, the provision of the Hungarian Law outlined above does not apply to nationals of EU Member States.[1] Against this background, it appears doubtful whether Hungary's "obligations under the Treaties" within the meaning of Article 258 TFEU could have been violated.

[1] The article focuses exclusively on the relationship between EU Law and WTO Law. Therefore, another provision of the Hungarian Law on higher national education which addresses foreign higher education institutions including those from inside the EEA is not examined although this provision is also subject to the infringement proceedings.

In attempts to circumvent this issue, Advocate General *Kokott* argues, in her Opinion delivered on 5 March 2020, that the Hungarian Law on national higher education is inconsistent with the principle of national treatment pursuant to Article XVII of the General Agreement of Trade in Services (hereinafter referred to as GATS). The EU and Hungary are both parties to this agreement in the framework of the World Trade Organization (hereinafter referred to as WTO). In this context, it needs to be assessed if the purpose of infringement proceedings is also to ensure that obligations under international agreements are adhered to by Member States (see B.) and whether this could also be assumed when Member States' compliance with WTO rules has to be assessed (see C.).

B. Infringement proceedings against Member States and obligations under international law

The term "Treaties" within the meaning of Article 258 TFEU has been interpreted broadly in the past. In 1974, the CJEU ruled that provisions of international agreements concluded by the EU form an "integral part of the Community legal system" (CJEU, Case C-181/73, *Haegeman v Belgium*, 30 April 1974, [1974] ECR, 449, 460, para. 5). However, on the basis of *this* decision, it cannot be assumed that a failure to comply with such provisions can be subject to infringement proceedings pursuant to Article 258 TFEU. The Court's reasoning in the case of *Haegeman v Belgium* is closely related to the wording of the provision regarding the preliminary ruling procedure (Article 267 TFEU) and not to infringement proceedings (*Kuijper/Wouters/Hoffmeister/Baere/Rampoulos*, The Law of EU External Relations, 2013, p. 929-930). Preliminary rulings can be requested on the "interpretation of the Treaties" (Article 267 para. 1 lit. a TFEU). However, the CJEU is also entitled to give requested rulings on "the validity and interpretation of acts of the institutions [...] of the Union" (Article 267 para. 1 lit. b TFEU). The CJEU based its jurisdiction in the case of *Haegeman v Belgium* on an earlier version of Article 267 para. 1 lit. b TFEU. It outlined that an international agreement is an act of one of the institutions within the meaning of Article 267 para. 1 lit. b TFEU if the international agreement was concluded by such an institution, e.g. the Council. Consequently, it cannot be stated that the CJEU confirmed that international agreements fall under the term "Treaties" within the meaning of Article 258 TFEU in this case. On the contrary, it would have been more logical to conclude that international agreements do not fall under the term "Treaties" because Article 267 para. 1 lit. a TFEU was not applied by the CJEU and its jurisdiction was based on Article 267 para. 1 lit. a TFEU exclusively.

The leading case-law on the issue is *Commission v Germany* from 1996

where the CJEU ruled that Article 258 has to be read in conjunction with Article 17(1) TEU. (CJEU, Case C-61/94, *Commission v Germany*, 10 September 1996, [1996] ECR I-3989, 4012, para. 15). According to Article 17(1) TEU, the Commission shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. The CJEU stated that the Commission would be hindered to succeed in this task when it would not be able to bring infringement proceedings before the Court where a Member State has failed to fulfil its obligations under such an agreement. Consequently, the purpose of infringement proceedings is also to ensure that obligations under international agreements concluded by the EU are adhered to by Member States. This assumption is in line with *Kokott*'s Opinion delivered on 5 March 2020.

C. Obligations of Member States under WTO Law

Though in principle, international agreements form an "integral part" of EU Law and therefore constitute binding obligations within the meaning of Article 258 TFEU, this does not imply that all of their provisions have "direct effect" and can be invoked directly before EU and national courts accordingly. A provision of an international agreement concluded by the EU and a non-member country must be regarded as having direct effect only if the nature and the broad logic of the agreement in question do not preclude this and the provisions appear, as regards their content, to be unconditional and sufficiently precise (CJEU, Case C-308/06, *Intertanko and Others*, 03 June 2008, [2008] ECR I-4100, 4120 para. 45).
On this basis, it has to be assessed if WTO rules can be invoked directly before and applied by the CJEU (see I.) and whether the conclusion reached is also valid when Member States are alleged to have violated WTO rules (see II.).

I. Application of WTO rules by the CJEU

It is widely accepted that the "very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts" (PCIJ, *Jurisdiction of the Courts of Danzig*, Advisory Opinion No. 15, 3 March 1928, para. 37). However, Article 26 VLCT provides that every treaty in force is binding upon the contracting parties to it and has to "*be performed by them in good faith*". The CJEU refers to the wording "performance in good faith". It points out that WTO rules are characterised by the principle of reciprocity. If an international agreement is characterised by the principle of reciprocity, its provisions could only have direct effect, when the other contracting parties also recognise the direct effect of these provisions. As the most

important trading partners of the EU do not recognise the direct effect of WTO rules, the CJEU rejects the direct effect of WTO rules correspondingly. Moreover, the CJEU argues that ensuring the compliance with WTO rules could "deprive the legislative or executive organs [...] of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners" (CJEU, Case C-149/96, *Portugal v Council*, 23 November 1999, [1999] ECR I-8425, 8436-8439, paras. 34-48).

For example, the United States explicitly denies the direct effect of WTO provisions in Appendix III Section 102 (1) of its Uruguay Round Agreement Act: "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." (in this context see also: *Abendroth/Scholz*, The Legal and Political Structure of Foreign Trade Relations between the United States and the European Union: A Symposium Report, Policy Papers on Transnational Economic Law, No. 4 (2004), p. 3). The WTO system does not provide for a mechanism to guarantee the equal application of WTO law in domestic courts. For example, US Courts found that the so-called "zeroing method" was compatible with the WTO Antidumping Agreement (US Court of Appeals, Fed. Cir., 395 F 3d 1343, *Cours Staal BV v Department of Commerce*, 21 January 2005) despite decisions to the contrary by the WTO Appellate Body (WTO, *EC – Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, 1 March 2001, WT/DS141/AB/R, para. 86; WTO, *US – Final Dumping Determination on Softwood Lumber from Canada*, 31 August 2004, WT/DS264/AB/R, para 117).

Consequently, there is an issue of potential discrimination against EU nationals if WTO law would have direct effect: foreign companies would be able to invoke WTO provisions before EU and national courts in their favour whereas EU nationals would not be able to do likewise in US Courts or other countries that refuse to recognise a direct effect of WTO rules (see Opinion of Advocate General Tesauro, Case C-53/96, *Hermès v FHT*, 13 November 1997, [1998] ECR I-3606, 3629, para. 31).

As a result, provisions of WTO agreements only have effect where an act of an EU institution intends to implement a particular obligation assumed in the context of WTO law (CJEU, Case C-69/89, *Nakajima v Council*, 07 May 1991, [1991] ECR I-2169, 2178, para. 30) or such an act refers expressly to provisions of the WTO agreements precisely (CJEU, Case C-70/87, *Fediol v Commission*, 22 June 1989, [1989] ECR 1825, 1830-1831, paras. 19-22). In such cases, the EU has already chosen to narrow its "scope for manoeuvre" and transposed WTO rules for the purpose of *maintaining* the principle of reciprocity (see EGC, Case T-19/01, *Chiquita Brands v Commission*,

3 February 2005, [2005] ECR II-321, 377 para. 168; *Gattinara*, in: Del Vecchio (Ed.), New International Tribunals and New International Proceedings, 2006, p. 252; *Heidfeld*, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union, 2012, p. 230; *Zipperle*, EU International Agreements, 2017, p. 56). Existing EU legislation may also be interpreted in the light of WTO Law (CJEU, Case C-53/96, *Hermès v FHT*, 16 June 1998, [1998] ECR I-3637, 3647 para. 28).

The common strand that binds these cases is that WTO rules can only be relevant where applicable EU legislation has already entered into force. It may therefore be inferred, *a contrario*, that provisions of WTO agreements are not relevant when existing EU legislation cannot be applied (see Opinion of Advocate General Tesauro, Case C-53/96, *Hermès v FHT*, 13 November 1997, [1998] ECR I-3606, 3629, footnote 45; critical on this issue: *Tietje*, in: Tietje (Ed.), Internationales Wirtschaftsrecht, 2nd ed., 2015, p. 812-813).

II. Non-compliance with WTO rules by Member States

The next question that needs to be answered is whether this conclusion also applies when Member States violate WTO rules. The CJEU explicitly referred to the preamble of Council Decision 94/800 when it stated that WTO agreements are "not in principle among the rules in the light of which the Court is to review the legality of measures by the Community institutions" (CJEU, Case C-149/96, *Portugal v Council*, 23 November 1999, [1999] ECR I-8425, 8439, para. 48). The preamble reads as follows:

> „[...] Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts, [...]"

The wording is not limited to measures by EU institutions. This suggests that WTO rules also cannot be applied directly when Member States fail to fulfil their obligations under WTO agreements and the relevant provision has not already been transposed to EU law.

However, *Kokott* does not concur with this conclusion based on Council Decision 94/800. Instead, she presents several arguments to the contrary in her Opinion. Her approach needs to be examined in detail:

1. Inapplicable case law: *Commission v Germany* (Case C-61/94)

To reach the opposite conclusion, *Kokott* relies primarily on inapplicable case law, specifically, *Commission v Germany* from 1996. She believes that the CJEU already reviewed national measures in the light of WTO law:

> "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)." (Opinion AG Kokott, para. 63, typographical error in the original text)

In this regard, *Kokott* provides incomplete information. It has to be admitted that the CJEU examined indeed if German authorities failed to fulfil obligations under the International Dairy Agreement, an agreement within the framework of the GATT, in the first place. However, the CJEU subsequently assessed if Article 5 of Regulation No 1999/85 was violated by German authorities. In this context, the CJEU interpreted EU secondary law (here: Regulation No 1999/85) *"in a manner that is consistent with those agreements"* (CJEU, Case C-61/94, *Commission v Germany*, 10 September 1996, [1996] ECR I-3989, 4012, para. 52). Consequently, the international agreement served to interpret existing EU secondary law. This approach is in line with the case law outlined above (see C. I.). Contrary to what *Kokott* stated in her Opinion, it thus cannot be concluded from this case law that the CJEU moreover intended to confirm the direct effect of WTO rules in cases where Member States fail to fulfil obligations arising from those agreements when none of the provisions of EU law are applicable *ipso facte*.

The decision in the case of *Commission v Germany* reads as follows:

> "[...] Germany has failed to fulfil its obligations under Article 6(1)(a) of Annex I and Article 6(a) of Annexes II and III to the IDA, *and under Regulation (EEC) No 1999/85*." (CJEU, Case C-61/94, *Commission v Germany*, 10 September 1996, [1996] ECR I-4006, 4023, para. 63).

According to this wording, the CJEU did not undertake an examination on the basis of an international agreement only. In this context, it remains uncertain whether the CJEU would have also found that Germany failed to fulfil obligations under an international agreement within the GATT framework if the applicable Regulation No. 1999/85 would not have been in force. Hence, the decision in the case of *Commission v Germany* (Case C-61/94) is not relevant with regard to the infringement proceeding against Hungary (Case C-66/18) because, in the latter case, by contrast, EU legislation is not applicable (see A.).

2. Double standard

Kokott's approach would inevitably lead to an unreasonable double standard between Member States and EU: The Commission could initiate infringement proceedings against Member States for a failure to comply with WTO rules, whereas individuals and Member States would not be able to invoke the same rules before EU and national courts although the

Member States and the EU, are contracting parties to the WTO agreements.

> "However, this only means that WTO law cannot, as a rule, serve as the standard of review for EU acts in proceedings before the EU Courts. It is a different question whether the EU Courts may review national measures in the light of WTO law." (Opinion AG Kokott, para. 63)

In this context, it has to be recalled that the European Union is not just a political project: The EU is founded on the values of the rule of law (Article 2(1) TEU). It is widely accepted that the rule of law pursuant to Article 2(1) TEU requires the existence of a legal order where subjects to this order are judicially protected against any unlawful exercise of power of EU institutions (see CJEU, Case C-294/83, *Les Verts v Parliament*, 23 April1986, [1986] ECR 1357, 1365, para. 23). *Kokott* believes 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" (Opinion AG Kokott, para. 64, emphasis added)

If the CJEU was *"essentially correct"* that acts of EU institutions cannot be reviewed in the light of WTO rules then it has to be assumed that this approach does not constitute a denial of justice in violation of Article 2(1) TEU. To justify its judicial self-restraint, the CJEU has only referred to the "principle of reciprocity" and the "great flexibility" of WTO rules so far (critical on this issue: *Petersmann*, in: Govaere/Quick/Bronckers (Ed.), Trade and Competition Law in the EU and Beyond, 2011, p. 214). If the CJEU would review national measures in the light of WTO law, these arguments could not be used anymore. With regard to the "principle of reciprocity" and the "great flexibility" of WTO rules, it makes no difference if provisions are applied to national measures or acts of EU institutions. Consequently, there is no compelling justification for the double standard outlined above.

3. *Argumentum a fortiori*

To counter the impression of an unjustified double standard, *Kokott* applies *a fortiori* reasoning:

> "[...] according to settled case-law, it is for the Court to review the legality even of EU acts in the light of the WTO rules. This must apply *a fortiori* to the measures of a Member State." (Opinion AG Kokott, para. 67)

An *a fortiori* argument has to be examined in the context of inductive analogy: The principle is that if something is true where it is less likely, it is true where it is more likely (*Aritstotle*, Rhetoric, 2:23 para. 4). According to this, an *a fortiori* argument empha-

sises that there are even more compelling reasons for applying a rule in a novel situation at issue than in the cases where it has already been established and accepted.

Kokott's reasoning is not convincing since she ignores which rule she has to apply following her *a fortiori* argument. In this context, she correctly quotes the *Fediol* and *Nakajima* case-law (Opinion AG Kokott, footnote 34). According to this case-law, the legality of certain measures has to be reviewed in the light of WTO rules only where the EU has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements (see C. I.). In the case of *Commission v Hungary*, there is no EU regulation or directive which implemented the relevant provisions of the GATS according to these requirements. Therefore, it has to be concluded that the WTO rules cannot be invoked in the case of *Commission v Hungary*. It remains unclear how *Kokott* reaches the opposite conclusion.

4. Political considerations

In addition, *Kokott* refers to merely political considerations. Political considerations may help to interpret EU law but they cannot replace legal arguments. However, even these political considerations do not appear plausible:

> "The Court's jurisdiction to find infringements of the GATS by the Member States in infringement proceedings is further suggested by the fact that the European Union may be held liable by a third country for such an infringement before the WTO dispute settlement bodies." (Opinion AG Kokott, para. 48)

In WTO case law, the EU, and not its Member States, was held liable when Member States *merely executed EU legislation* in areas of exclusive Union competence (WTO, *EC – Measure Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R; WTO, *EC – Customs Classification of certain computer equipment (LAN)*, Report of the Panel, 5 February 1998, WT/DS62/R, WT/DS67/R, WT/DS68/R; WTO, *EC – Measures Affecting the Approval and Marketing of Biotech Products*, Report of the Panel, 29 September 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R). However, it is not certain whether the EU may also be held liable when Member States do not merely execute EU legislation. Hungary has not executed EU Law in the present case. Therefore it appears doubtful whether the EU could be held liable in this case.

Even if the EU could be held liable, it is not immediately clear why it should be necessary to conduct infringement proceedings against Member States without a legal basis in EU legislation. It could also be expected that the EU has to transpose WTO Law into EU legislation which is in line

with the requirements stipulated in the case-law (*Nakajima* or *Fediol*) first before it is entitled to enforce these WTO rules towards Member States. At least, this approach would be consistent with the case-law regarding the direct effect of WTO rules (see C. I.). *Kokott*'s considerations are also not in line with the „reciprocity principle" and the premise of the EU to retain a "scope for manoeuvre" (see C. I.). If the CJEU finds that an obligation under WTO rules has not been fulfilled by Hungary, it would narrow the EU's scope for manoeuvre to the disadvantage of its Member State Hungary. This result is not convincing with regard to the "reciprocal nature" of WTO rules. Hungary could be prohibited from regulating market access with regard to universities from countries outside the EEA whereas Hungarian universities could be deprived of market access in other countries that refuse to recognise the direct effect of WTO agreements. This is all the more relevant since the United States currently takes the view that there is no obligation to comply with recent WTO rulings because those are issued by a panel of invalid judges (WTO, *US – Countervailing Measures on supercalendered paper from Canada*, 17 April 2020, WT/DS505/12, Communication from the United States). Against this background, it appears inconsistent with the principle of "reciprocity" to apply WTO rules in favour of US nationals while EU nationals cannot be confident that the United States recognises its obligations towards them alike.

D. Conclusion and outlook

In the literature, Case C-66/18 is seen as a means of "defending the rule of law" (*Uitz*, EuConst 15 (2019), p. 1(13)). In this context, the words of *Murray Newton Rothbard* provide a deeper understanding of the issue: "If a man cannot affirm a proposition without employing its negation, he is not only caught in an inextricable self-contradiction, he is conceding to the negation the status of an axiom." (*Rothbard*, The Ethics of Liberty, 2002, p. 33) The Opinion of Advocate General *Kokott* shows: If the CJEU upholds the approach established in the case of "*Portugal v Council*" (see C. I.) that provisions of WTO agreements have no direct effect it will not be able to find that Hungary violated its obligations without demonstrating a questionable understanding of the rule of law (see C. II. 1.-4.). In this case, the EU would harm its own interest by damaging confidence in the rule of law while aiming at strengthening it.

Against this background, the infringement proceeding against Hungary provides ground for the CJEU to *completely* rethink the relationship between WTO rules and EU law.

Prof. Dr. Sven Leif Erik Johannsen, LL.M.oec. is Professor for Public Law at the University of Applied Sciences Kehl.