The EU Member States in the WTO – Status, obligations and the effects of the WTO law

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The Marrakesh Agreement Establishing the World Trade Organization is a mixed agreement, meaning that both the European Union and its Member States are members of the WTO. For the Member States, this status of 'double membership' raises complex issues: although the WTO membership of the EU countries gives rise to their responsibilities under international law, the framework for the exercise of these responsibilities is, at the same time, shaped by their obligations under EU law. This article aims to examine this challenging issue and its major question is how this intersection of international as well as EU law can practically determine the responsibilities of EU Member States for the implementation of WTO law. The analysis focuses on two major aspects of this question. First, the article examines this special status of EU Member States in the WTO and determines their responsibilities as well as distinguishes it from the responsibilities of the EU. Second, it explores the effects of the GATT as well as WTO law and how EU Member States are obliged to implement directly these obligations in the light of development of CJEU case law.

I. Introduction

The leeway enjoyed by Member States of the European Union (EU) in international trade relations is largely determined by the fact that the EU itself is a founding member of the World Trade Organization (WTO). This is because the Member States have conferred much of their trade powers upon the EU. The parallel membership of the EU and its Member States in the WTO has given rise to multifaceted liability issues, which are intertwined with EU and Member States' legal systems and international law. In this context, the jurisprudence of the Court of Justice of the European Union (CJEU) provides a number of approaches that well reflect this multi-layered system of rules and indicate how the GATT-WTO obligations can be practically implemented. This article argues that despite the fact that all EU Member States are also members of the WTO, and from the angle of the international law, they are – on their own – bound by the WTO law, the enforcement of these rules are highly dependent on the actual policy decisions of the EU. This is because the CJEU underscores the flexible character of the WTO law, providing for the EU a large room for manoeuvre in its external trade policy. The article sheds light on two major aspects of this complexity. Chapter II provides an insight into the status of the

Member States as well as the EU in the WTO and examines the concept of joint responsibility. Then, Chapter III assesses the effects of the WTO law and specifies the Member States' obligations to comply with the provisions of the WTO law by analysing the development of the CJEU's related case law.

II. Membership and status of Member States in the WTO

The Bretton Woods negotiations that established the world economic order after the Second World War were the starting point for the gradual elimination of trade barriers, which led to the adoption of the Havana Charter in 1948, when fifty-three states decided to create the International Trade Organization (ITO). Eventually the ITO did not come into being because of the United States' opposition, but the General Agreement on Tariffs and Trade (GATT), which was drawn up in 1947 and laid down substantive rules, entered into force on 1 January 1948.[1] From the point of view of international law, no new international organisation was formally created, as the latter lacked attributes such as a permanent institutional structure, but the practice of the following decades led to the recognition of GATT as a quasi-international organisation.

The European integration organisations, which were set up a few years later, were also established as economic integration, with their Member States also being contracting states to GATT. The emerging competence overlaps were dealt with in such a way that, by decision of the GATT contracting states, the High Authority of the European Coal and Steel Community could be present in negotiations on coal and steel.[2] This was an even more fundamental issue in the case of the European Economic Community (EEC), which implemented a customs union and a common commercial policy[3] and which, with the approval of the GATT contracting states, exercised the rights and obligations arising from the Agreement autonomously from 1960.[4] As a result of its status as a *de facto* contracting party, the EEC has adopted most of the agreements negotiated under the GATT from 1970 onwards alone, without the approval of its Member States.[5] This specific position has been confirmed by the Court of Justice of the European Communities. On the one hand, it has ruled that the transfer of powers defined by the EEC Treaty reflected the intention of the Member States to impose the obligations on the Community from GATT 1947, a fact recognised by the GATT contracting parties.[6] On the other hand, it estab-

1 U.N.T.S., vol. 55, No. 814, 194.

2 Romualdo Bermejo García/Rosana Garciandía Garmendia, The EU as an actor at the WTO: its strengths and weaknesses throughout history, EJES 3 (2012), p. 52.

3 For rules on customs unions, see GATT 1947 Article XXIV.

4 Julija Brsakoska Bazerkoska, The European Union and the World Trade Organization: Problems and Challenges, CYELP 7 (2011), pp. 279-280.

5 Bermejo García/Garciendía Garmendia, 53.

6 Judgment of 12 December 1972, International Fruit Company, 21-24/72, EU:C:1972:115, paras. 15-16 and 18.

lished exclusive Community competence for the common commercial policy,[7] thereby limiting the scope of Member State actions to the adoption of implementing legislation.

As result of the more active international role of the European Communities in particular, the international legal environment has over time also responded to the process of international organisations becoming parties to an increasing number of bilateral and multilateral agreements. The 1983 amendment to the 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) used the term Regional Economic Integration Organisation (REIO), allowing them to become parties to the Convention.[8] The relationship between the organisation and its member states is linked to the former's obligation to make a declaration of competence, which appeared earliest in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[9] In these documents, they are required to provide information on the competences which the member states have transferred to the organisation in the context of the implementation of the international treaty in question. The declaration is constitutive in nature, by making the international organisation a party to the Convention to the extent of its content, and creates a presumption that competences not attributed to international organisations continue to be vested in their member states. The declaration also constitutes the basis of the liability which, in the absence of a document, UNCLOS calls joint and several in the case of a contracting organization and its member states for the obligations assumed under the Convention.[10]

The most comprehensive reform of GATT 1947 was the Marrakesh Agreement (WTO Agreement), which was adopted as result of the Uruguay Round from 1986 to 1994.[11] In addition to the GATT 1994, the reform of the substantive rules was marked by the adoption of the agreements on trade in services and on trade-related aspects of intellectual property rights (GATS and TRIPS respectively). The latter have raised the question of whether the common commercial policy, as an exclusive competence of the Community, can be extended to these areas. In its Opinion 1/94, the European Court of Justice (ECJ) reversed the competence dynamic that had existed until then[12] and held that, since both GATS and TRIPS covered areas outside the scope of commercial policy, these agreements could be concluded jointly by the Community and the Member States as so-called mixed agreements.[13] An important innovation in their status was the creation of

7 Opinion of 11 November 1975, 1/75, EU:C:1975:145, 1363-1364.

8 OJ L 75, 19.3.2015, 14. Pieter Jan Kuijper, International Responsibility for EU Mixed Agreements, in Christoph Hillion/Panos Koutrakos (eds.), Mixed Agreements Revisited: The EU and its Member States in the World, Oxford and Portland, Oregon 2010. pp. 221-222.

9 OJ L 179, 23.6.1998, 3. Joni Heliskoski, EU Declarations of Competence and International Responsibility, in Malcolm Evans and Panos Koutrakos (eds.), The International Responsibility of the European Union: European and International Perspectives, Oxford and Portland, Oregon 2013. pp. 189-191.

10 See UNCLOS, Annex IX, Article 6(1)-(2). OJ L 179, 23.6.1998, 114.

11 OJ L 336, 23.12.1994, 3.

12 Balázs Horváthy, Common commercial policy and Member State interests, in Marton Varju (ed.), Between Compliance and Particularism: Member State Interests and European Union Law, Cham, 2019. p. 307.

13 Opinion of 15 November 1994, 1/94, EU:C:1994:384, paras. 95-98 and 103-105.

the World Trade Organization, which serves as a forum for negotiation and dispute settlement for the GATT-WTO regime. As a sort of continuation of the de facto contracting party status[14] , the Marrakesh Agreement refers to the "European Communities" as one of the original members of the WTO.[15] Contrary to the wording, this de jure membership did not extend to all three Communities, since under Opinion 1/94 the European Community could conclude international agreements under the aegis of the common commercial policy also for products covered by the ECSC and Euratom Treaties.[16] However, the original membership of the European Community did not replace the membership of its Member States in the WTO, which, in addition to the lack of competence, was motivated by political considerations to avoid creating new friction between the Member States, in addition to the many controversial innovations introduced by the Maastricht Treaty adopted a few years earlier.[17]

The Lisbon Treaty, which entered into force in 2009, brought a further change to the content of the status of the integration organisation and its Member States within the WTO. The Reform Treaty not only conferred legal personality on the European Union, which was intended to be the first step towards political integration,[18] but also made it the successor to the European Community, formally replacing the EC as a member of the WTO. A major substantive innovation was the reform of the common commercial policy, which was extended to the conclusion of tariff and trade agreements relating to trade in services and the adoption of measures relating to the commercial aspects of intellectual property rights and foreign direct investment.[19] This change essentially brought the GATT-WTO regime as a whole within the scope of the common commercial policy, which is the exclusive competence of the EU, with the result that Member States have no competence to regulate these matters, but only shape them through their participation in EU decision-making.[20]

The EU position in the WTO is developed with the involvement of a wide range of institutional actors, reflecting both supranational considerations in line with the EU's treaty objectives and the current interests of Member States as articulated by intergovernmental bodies. The central body for EU diplomacy in the WTO is the European Commission and its Directorate General for Trade (DG Trade),[21] which makes recommendations to the Council and then negotiates on the basis of its mandate. The Council controls the process through the Trade Policy Committee, composed of representatives of the Mem-

14 Brsakoska Bazerkoska, p. 281.

15 WTO Agreement, Article XI, paragraph 1.

16 Opinion 1/94, paras. 23-27.

17 Bermejo García/Garciendía Garmendia, p. 55.

18 Article 47 TEU.

19 Article 207(1) TFEU.

20 Andrés Delgado Casteleiro/Joris Larik, The 'Odd Couple': The Responsibility of the EU at the WTO, in Malcolm Evans and Panos Koutrakos (eds.), The International Responsibility of the European Union: European and International Perspectives, Oxford and Portland, Oregon 2013. p. 250.

21 Brsakoska Bazerkoska, p. 283.

ber States, which DG Trade is obliged to consult.[22] The Council also decides on the conclusion of the agreement, but the innovation introduced by the Lisbon Treaty means that in most cases this requires the consent of the European Parliament, or at least consultation of the body.[23] Despite the complexity of the mechanism, it is one of the most effective areas of the EU's external relations, as the Member States effectively accept that the Commission alone negotiates on their behalf[24] or initiates dispute settlement procedures.[25]

Although the Marrakesh Agreement was concluded by the Member States and the Community as a mixed treaty, it does not contain a declaration of competence statement delimiting the scope of Member States' and the EU's obligations and responsibilities within the WTO, unlike other similar multilateral treaties.[26] This is problematic not only from an international law perspective, but also in the light of the principle of sincere cooperation recognised by EU law,[27] which requires the Union and its Member States to respect and assist each other. Following the conclusion of the Uruguay Round, the Permanent Representatives Committee drew up a 'code of conduct' for the Council, the Member States and the Commission on the negotiation of financial services, which was in force until 1997, when these negotiations were concluded,[28] but no such document of a general nature has been produced since.[29] Although it is true that the Lisbon Treaty has brought the GATT-WTO regime virtually entirely under EU competence and that the Commission's action is tacitly accepted by the Member States, it nevertheless seems necessary to adopt a declaration of competence, since the Member States remain members of the WTO alongside the EU, and third-country members initiate dispute settlement proceedings against the Member States in parallel with the EU.

Participation in decision-making is a key element of the WTO membership of Member States and the EU. In order to protect the rights of the other members of the organisation, the Agreement does not merely stipulate that the Union has a number of votes equal to the number of its Member States, but emphasises that the number of votes of the EU and its Member States "shall in no case" exceed the number of EU Member States.[30] Despite the guarantee rule, this model has been the subject of much criticism, primarily from the United States, which has criticised the fact that the characteristics of membership mean that EU interests are given multiple weight in informal negotiations.[31] The importance of this representation is underlined by the fact that previously one Commission delegation was accredited to the international organisations in Geneva, but the High

22 Article 207(3) TFEU.

23 Article 218(6) TFEU.

24 Delgado Casteleiro/Larik, p. 251.

25 Gracia Marín Durán, Untagling the International Responsibility of the European Union and Its Member States in the World Trade Organization Post-Lisbon: A Competence/Remedy Model, EJIL 28 (2017), p. 709.

26 Ibid. 701.

27 Article 4(3) TEU.

28 Bermejo García/Garciendía Garmendia, 61.

29 Brsakoska Bazerkoska, p. 281.

30 WTO Agreement, Article IX, paragraph 1.

31 Brsakoska Bazerkoska, p. 283.

Representative for Foreign Affairs and Security Policy split this in 2010, with a separate permanent delegation to the WTO[32] and one to the UN and other international organisations representing the EU.[33]

The membership of the European Union and its Member States in the World Trade Organization implies a complex status. The WTO Agreement contains guarantee provisions that the Union's voting rights cannot exceed those of its Member States, which theoretically precludes the possibility of simultaneous joint action, a situation best described by the concept of parallel membership. However, practice has shown that, since the creation of the organisation, the Member States have accepted action by the Commission on issues which do not fall exclusively within the competence of the Union. This has not lost its importance since the Lisbon Treaty, which extended EU law to essentially the whole GATT-WTO regime, as the other WTO members initiate dispute settlement procedures against the EU and its Member States simultaneously, typically in cases where the latter have wide enforcement powers.[34] The 'floating' of jurisdictional issues resulting from the absence of a corresponding declaration is beneficial for the other WTO members in that it establishes the joint and several liability of Member States and the EU,[35] but is counterbalanced by the system of multiple representation, which gives the latter considerable informal leverage.

III. The effects of the WTO law in the EU Member States

1. Development of the ECJ case law regarding the status of GATT/WTO law

As explained above, due to the principle of joint responsibility, the EU Member States are metaphorically under double pressure as regards the effects of WTO law. On the one hand, they have to assume their obligations under WTO law as a member of an international organisation, but on the other hand, they also have to fulfil their specific obligations as members of the EU. However, the key to this contradiction is the latter legal order, the EU law: the European Court of Justice has attempted to settle the relationship between GATT/WTO obligations and EU law from the outset. [36]

32 Bermejo García/Garciendía Garmendia, pp. 56-57.

33 Communication from the European Commission to the Council and the European Parliament: Establishment of an EU Delegation to the UN in Geneva (Brussels, 26.5.2010 COM(2010) 287 final).

34 Marín Durán, pp. 725-726.

35 As also recognised by the European Court of Justice, see Judgment of 16 June 1998, Hermès, C-53/96, EU:C:1998:292, para. 24.

36 For detailed analysis, see Petra Jeney, Judicial Enforcement of WTO Rules before the Court of Justice of the European Union, ELTE Law Journal 3 (2015), pp. 83-89; John Errico, The WTO in the EU: Unwinding the Knot, Cornell International Law Journal 44 (2011) pp. 179-208; Peter Hilpold, Die EU im GATT/WTO-System, Frankfurt am Main, 2009; Piet Eeckhout, External relations of the European Union: legal and constitutional foundations, Oxford and New York, 2004.

The direct judicial enforceability or 'direct effect' of WTO law (originally GATT rules) was elaborated by the Court in its early case law, and the underlying arguments were later clarified. In so doing, it has both transposed the applicable principles in relation to the different types of GATT-WTO norms – substantive treaty provisions and the dispute settlement decisions as secondary law –, and carved out also the framework for indirect enforcement. [37] The Court proved the direct effect first time in the International Fruit Company case,[38] it was assessed, whether the provisions of the GATT could be directly applicable in relation to individuals. The Court refused this concept on the basis of the flexible, indeterminate nature of the GATT, i.e. the fact that, by allowing for a large number of exceptions, the contracting parties intended to give a loose shape for this multilateral trade agreement. This meant that, in principle, the judgment did not rule out the chance that GATT rules could be subject to review in other ways, for example, if Community institutions or Member States would ask the validity of community law within an action for annulment. More importantly, it had not been decided whether direct effects of GATT rules were excluded only for private individuals or whether this was not allowed for Member States either.

Such uncertainties about the justifiability of the direct effect of GATT were finally dispelled by the Court of Justice in the 1990s, most comprehensively in the series of 'banana cases.' At the centre of these disputes was the preferential tariff regime for bananas introduced by a Council regulation, which was considered discriminatory under GATT rules.[39] The regulation established significantly more favourable conditions for banana imports from African, Caribbean and Pacific (ACP) countries, which were institutionally linked to the Community by a trade agreement, than for fruit imports from other regions. The Community regulation also adversely affected Community operators importing from non-ACP countries. This was the reason why Germany brought an action before the European Court of Justice seeking the annulment of the discriminatory rules of the banana regime on the grounds that they were contrary to GATT provisions (*Germany v Council).*[40] The Court of Justice, confirming its previous arguments, made it clear that GATT provisions could not be invoked directly, neither by individuals, nor by Member States. It was a clear signal that the Court began to interpret the earlier non-supportive position in an absolute way. In other words, Member States cannot bring an action

37 By "enforceability", "enforcement" or "applicability" is meant here that the GATT-WTO law is applied and referred to by the Court of Justice of the European Union or by the domestic courts of the Member States. Similarly, Petra Jeney, p. 83. The enforcement can hypothetically be done in a direct way (direct enforceability, applicability or effect), where individuals (companies or Union citizens) are implied by the legal norm directly, i.e. they can rely upon or refer to it. In addition, GATT-WTO rules can also be enforced indirectly (indirect enforceability, applicability or effect) will mean legal instruments such as the principle of conforming interpretation, as described below. See Hilpold.

38 Judgment of 12 December 1972 in Joined Cases, 21-24/72 International Fruit Company and Others v Produktschap voor Groenten en Fruit, ECLI:EU:C:1972:11513, para. 18.

39 See Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, OJ L 47, 25.2.1993, p. 1-11.

40 Judgment of 5 October 1994, C-280/93 Germany v Council, ECLI:EU:C:1994:367 ('Germany v Council').

for annulment before the Court of Justice against EU legislation that is incompatible with GATT rules.[41] This was thought-provoking if only because the EU Member States are all members of the World Trade Organization and are therefore themselves responsible for the implementation of GATT-WTO rules.[42] In essence, this meant that the Court had definitively refused the possibility of assessing the validity of EU law against GATT obligations. This position of the Court has been confirmed in other proceedings relating to the 'banana cases.' [43]

A new milestone was the judgment of the European Court of Justice of 23 November 1999 *(Portugal v. Council)*. [44] Although the underlying dispute arose after the WTO was established, the Court did not change its previous negative stance and definitively abolished the chance for a Member State to rely directly on the rules of GATT-WTO in an action for annulment against a Council decision.[45] The dispute was based on an agreement on textiles concluded by the Community with Pakistan and India[46] with the express aim of allowing producers from these countries to export their products to the EU under favourable treatment. Portugal brought an action against the decision, challenging its legality, which was no doubt motivated by the fact that the competing Portuguese industry was at a considerable disadvantage. In order to the justify its invalidity, reference was made to the WTO Textiles and Clothing Agreement, [47] which is part of the Marrakesh Agreements. Although the Court found that the WTO Agreement is now substantially different in nature from the previous GATT, including the improved effectiveness of the dispute settlement procedure, it nevertheless rejects the possibility of providing for the WTO rules direct effect. The Court emphasized that, in the context of the newly created WTO, negotiations between the parties are still of paramount importance. The Court underlined that the new WTO dispute settlement system allows a member, which has been condemned not automatically to withdraw its infringing act but to enter into negotiations with the other parties concerned with a view to resolving the adverse effects by other available concessions.[48] In addition, another important argument is that if direct ef-

41 'Germany v Council' para. 112. Cf. with Armin von Bogdandy/Tilman Makatsch, Kollision, Koexistenz oder Kooperation? – Zum Verhältnis von WTO-Recht und europäischem Außenwirtschaftsrecht in neueren Entscheidungen, EuZW 11 (2000), p. 267.

42 Ernst-Ulrich Petersmann, Darf die EG das Völkerrecht ignorieren?, EuZW 8 (1997), p. 327.

43 Judgment of 9 November 1995, C-465/93 Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesamt für Ernährung und Forstwirtschaft, ECLI:EU:C:1995:369.; Judgment of 12 December 1995, C-469/93 Amministrazione delle Finanze dello Stato v Chiquita Italia SpA, ECLI:EU:C:1995:435.

44 Judgment of 23 November 1999, C-149/96 Portugal v Council, ECLI:EU:C:1999:574 ('Portugal v Council').

45 For a critical analysis, see Piet Eeckhout, Judicial Enforcement of WTO Law in the European Union - some Further Reflections, JIEL 5 (2002), pp. 91-110.

46 Council Decision 6/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products.

47 WTO Agreement, Annex 1(A) - Agreement on Textiles and Clothing.

48 WTO Agreement, Annex 2 - Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 22.

fect were to be recognised, the principle of reciprocity would not apply.[49] In other terms, the EU would be placed at a less advantageous position vis-à-vis WTO members that have not recognised the direct effect of the WTO Agreement.[50] Finally, the Court referred to the preamble to Council Decision 94/800/EC ratifying the Marrakesh Agreements, which explicitly states that ratification does not automatically entail the direct applicability of those treaties either by the CJEU or by the Member States' domestic courts. [51]

2. Indirect application of GATT-WTO law and the EU Member States

Although the ECJ has rejected the direct applicability of GATT-WTO on the basis of the reasoning outlined above, in other cases it has identified aspects, which allow for indirect applicability of GATT-WTO norms. In these cases, the related GATT-WTO provisions were not applied as a separate international law norms, but by becoming an integral part of an EU law source (regulation, directive, etc.), whereby the applicability of GATT-WTO law has been 'indirectly' determined by the former EU legal act. A number of specific situations have arisen in the jurisprudence of the Court in which the 'indirect effect' of a GATT-WTO provision was exceptionally established.

The disputes that arose before the creation of the WTO generally concerned the litigation rights of individuals, trading companies and the obligations of Community institutions. The concept developed at that time were becoming slightly the permanent case law of the Court, and especially two landmark judgments stand out from the early case law. In *'FEDIOL III,'* it was held that a GATT provision became indirectly applicable where it was expressly referred to by a Community legal act.[52] Later, in the Nakajima case, the Court refined the concept of indirect applicability to some extent and added other requirements.[53] The judgment held that the GATT provisions could be invoked by private individuals if the explicit purpose of a Community act was to implement a provision of the GATT. Putting it differently, the essential prerequisite for indirect enforceability according to the Nakajima principle is the actual intention of the Community to implement a specific GATT obligation. The Court interpreted these conditions in a very narrow manner as it always required an express intention to implement in the particular case and the GATT norm to be implemented must be specific. Therefore, merely a general obligation to adopt or implement on behalf of the Community could not trigger the concept of indirect applicability in terms of the Nakajima principle. While the GATT

49 Portugal v Council, para. 42.

50 Outside the EU, limited and indirect enforceability are given e.g. in USA, Canada and Japan.

51 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 L 336, 23.12.1994, p. 1–2; last sentence of the preamble: "(...) 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 (...)." Accordingly, only the Court of Justice of the EU is entitled to determine the effects of the WTO law within the EU, see Stefan Griller, Judicial enforceability of WTO law in the European Union. Annotation to Case C-149/96, Portugal v. Council, JIEL 3 (2000), p. 462.

52 Judgment of 22 June 1989, C-70/87 Fediol v Commission, ECLI:EU:C:1989:254 ('Fediol III').

53 Judgment of 7 May 1991, C-69/89 Nakajima All Precision v Council, ECLI:EU:C:1991:186 ('Nakajima').

Anti-Dumping Code in Nakajima was considered to be a specific norm, GATT rules in general have not been considered by the jurisprudence to be sufficiently concrete and have therefore been excluded from enforcement in this indirect way.

All this highlights the most important shortcoming of the indirect applicability criteria developed by the Court. Indeed, in cases where the Community had no intention of implementing certain GATT obligations, the enforceability of those rules cannot be considered indirectly, since there is no Community legislation and no express intention of implementation, which would justify the application of the GATT provision in question. If we add to this the fact that the Court has consistently rejected any form of direct applicability on the basis of the reasoning set out in the previous subchapter, it can be seen that only the validity of a very narrow segment of Community law could be challenged under the GATT rules.

After the WTO was established in 1995, the question of indirect applicability arose in the *Hermès case* first time, [54] which implied the obligations of Member States' enforcement authorities. The case concerned a dispute over a trademark belonging to the fashion company Hermès, which asked the Dutch authorities for provisional measures. However, there was a conflict between the Dutch procedural rules and the WTO TRIPS Agreement and the competent Dutch domestic court referred the case to the Court of Justice in a preliminary ruling procedure. In its judgment, the Court relied upon the mixed contractual nature of the TRIPS Agreement and stressed that it had jurisdiction to rule on any question of interpretation which concerns EU law, including agreements concluded jointly by the EU and the Member States. In other words, even if the Court did not wish to rule on the direct applicability of the TRIPS Agreement, it retained the right to interpret as well as apply the TRIPS Agreement and to compare it with the rules of national (Dutch) law in order to answer the questions posed by the domestic court. Therefore, the Court activated the principle of conforming interpretation as it emphasized the necessity to interpret the procedural, implementing domestic rules in line with the GATT-WTO provisions, thereby indirectly giving effect to the rules of the TRIPS Agreement.[55]

The Court was later confronted with a similar situation in the *Dior case*,[56] which also involved the TRIPS Agreement. In that case, however, the underlying dispute concerned not only the legal framework for trade marks covered by the EU law, but also patent law as regulated by the Member States. In its judgment, the Court pointed out that the TRIPS Agreement, by its very nature, does not have direct effect and does not confer rights on individuals.[57] However, it delimited the cases where the EU or the Member States carried out obligations under the TRIPS Agreement. These cases must be regarded differ-

54 Judgment of 16 June 1998, C-53/96 Hermès International v FHT Marketing Choice, ECLI:EU:C:1998:292.

55 The Court finally held, that the Dutch procedural law was in line with the concept of 'provisional measures' referred to in Article 50 of the TRIPS Agreement and hypothetically declared the Dutch law to be in conformity with the TRIPS rules.

56 Judgment of 14 December 2000 in Joined Cases, C-300/98 and C-392/98 Dior and Others, ECLI:EU:C:2000:688 ('Dior ').

57 Dior, para. 41-42.

ently, because where EU law is relevant for the implementation of the WTO agreement (in the field of trade marks), the courts of the Member States must, as far as possible, take into account of the wording and purpose of TRIPS. On the other hand, in matters where the EU has not adopted any legal framework (in this case, the patent law), it was for the Member State to decide how to ensure the implementation of the TRIPS Agreement.[58] In these terms, the Dior ruling can be seen as more than the Hermès decision, because it explicitly stated that in areas where Member States retained competences, they could decide for themselves whether to give direct effect to a WTO obligations. However, in both cases, the Court did not make explicit reference to the principles previously developed in the FEDIOL III and Nakajima cases. If we compare these judgments with the earlier concept of indirect enforceability developed under GATT, we can see that the technique used by the Court here is identical in light of the outcome. The GATT-WTO law is indirectly enforced by the Court through its conforming interpretation, and the rules of EU law as well as the law of the Member States implementing these rules have to be considered in this very complexity. At the heart of this method is the principle of conforming interpretation of EU law (as well as the domestic law of the Member States implementing EU law), which allows for indirect applicability only in relation to an existing EU secondary law source in light of GATT-WTO obligation. The Court has maintained this approach in its subsequent jurisdiction.[59]

3. The application of WTO law in the recent case law: The 'Lex CEU' case

Although the *FIAMM-Fedon case*[60] could have provided an opportunity for the ECJ to reconsider the criteria of both direct and indirect application, the Court ultimately rejected the new approaches. It kept up the limits to the enforcement of WTO law as it was established in the above discussed Portugal v Council, making the restrictive approach permanent. However, in 2020 the CJEU's judgment in the case related to licensing system of foreign universities in Hungary [61] has caused a major stir and it was significant also to the status of the EU Member States vis-à-vis the application of the GATS.[62]

58 Dior, para. 45.

59 Judgment of 30 September 2003, C-93/02 P Biret International SA v Council of the European Union, ECLI:EU:C:2003:517; Judgment of 1 March 2005, C-377/02, Léon Van Parys NV v Belgisch Interventie-en Restitutiebureau (BIRB), ECLI:EU:C:2005:121. The Van Parys case rooted in the above discussed 'banana dispute', see Antonis Antoniadis, The Chiquita and Van Parys judgments: rules, exceptions and the law, Legal Issues of Economic Integration 32 (2005) p. 460. Later cases addressed also this aspect of the effects of WTO law, see: Judgment of 18 July 2007, C-310/06 F.T.S. International BV v Belastingdienst/Douane West, ECLI:EU:C:2007:456; and Judgment of 27 September 2007, C-351/04 Ikea Wholesale Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2007:547.

60 Joined Cases C-120/06 P and C-121/06 P Fabbrica Italiana Accumulatori Motocarri Montecchio SpA (FIAMM), Fabbrica Italiana Accumulatori Motocarri Montecchio Technologies Inc (FIAMM Technologies) v Council of the European Union, Commission of the European Communities and Giorgio Fedon & Figli SpA, Fedon America, Inc. v Council of the European Union, Commission of the European Communities, ECLI:EU:C:2008:476 ('FIAMM-Fedon').

61 Judgment of 6 October 2020, Commission v Hungary, Case C-66/18, ECLI:EU:C:2020:792 ('Lex CEU')..

62 The GATS was not first time the subject of the CJEU's interpretation. Earlier, in the ŘLP case (Judgment 7 June 2007, C-335/05. Řízení Letového Provozu ČR v Bundesamt für Finanzen, ECLI:EU:C:2007:321)

The case was a result of an infringement procedure against Hungary, in which the European Commission examined the rules applicable to foreign higher education institutions operating in Hungary. In 2017, the Hungarian Parliament adopted an amendment *('Lex CEU')* to the Higher Education Act[63] that formally aimed at ensuring the high quality of higher education, but in fact, the only institution adversely affected by the new rules regarding the licensing system was the Central European University (CEU). The CEU has been operating in Budapest since 1991, but due to the amendment, the university became eventually unable to maintain its operation, and was forced to relocate to Austria in 2019. Although the focus of the arguments in the related debates was on academic freedom,[64] already the Opinion of Advocate General Kokott[65] submitted to the case gave a prominent role to the international trade law context, namely the effects of the GATS rules.[66] Finally, the main argument of the Court was also embedded in the narrative of the international trade law.

The most relevant among these have been the arguments in support of the Court's findings on the jurisdiction, replying the counterclaim of Hungary, on whether the Court could examine Hungary's compliance with the GATS rules. In this regard, the Court's point of departure was the status of international agreements in the EU law. The international agreements concluded by the Union form an integral part of EU law from the moment they enter into force. The Marrakesh Agreement concluded originally by the EC also incorporated the text of the GATS and, accordingly, the Court considered the provisions of the GATS to be part of EU law.[67] It was also essential that the obligations covered by the GATS, such as the commitments made in relation to the trade liberalisation in private education services, fall within the scope of the common commercial policy. Accordingly, these commitments are covered by the exclusive competence of the EU. This logic resulted in the second important point, that the Court has the power to enforce the rules of the GATS against Member States, and it is despite the fact that the WTO has its own separate dispute settlement mechanism. Within this framework, the Court seeks to support its position in two separate reasons. On the one hand, it highlights the present case and the underlying facts differ fundamentally from the previous cases, especially from

the Court had to interpret EU tax law directives in a preliminary ruling procedure and highlighted the significance of GATS in finding the adequate extent of the EU law concepts, i.e. the CJEU interpreted the EU law in the light of the GATS obligations.

63 Act XXV of 2017 amending Act CCIV of 2011 on National Higher Education (4 April 2017, Hungarian Official Gazette 2017, No 53).

64 Dezső Tamás Ziegler, It's Not Just About CEU: Understanding the Systemic Limitation of Academic Freedom in Hungary, Verfassungsblog (2019/03/26); https://verfassungsblog.de/its-not-just-about-ceu-understanding-the-systemic-limitation-of-academic-freedom-in-hungary/.

65 Opinion of Advocate General Juliane Kokott in Case C-66/18 European Commission v Hungary, ECLI:EU:C:2020:172.

66 The very reason behind this argumentation, i.e. as the decision has been channelled largely into the domain of the international trade law and GATS was that the Hungarian legislative amendment could not be considered in the context of the rule of law due to lack of competence, see Csongor István Nagy, The Commission's Al Capone Tricks: Using GATS to protect academic freedom in the European Union, Verfassungsblog (2020/11/20), https://verfassungsblog.de/the-commissions-al-capone-tricks/.

67 Lex CEU, para. 71.

the logic behind the Portugal v Council, because here the EU wishes explicitly to comply with the requirements of WTO law. This also means that the EU wants to avoid incurring international liability for breach of GATS provisions that would be the result of conduct of an EU Member State.[68] On the other hand, the Court refers to the obligation to comply with international law (principle of *pacta sunt servanda*), stressing that, the Union is bound to comply fully with international law in the exercise of its powers according to permanent case-law.

The Court interpreted also the scope of the relevant provisions of the GATS concerning Hungary. First, it examined the original commitments made by Hungary under its schedule of concessions at the time, when the WTO was established in 1994. Although Hungary has made a reservation in relation to market access (Article XVI GATS), according to which the establishment of an educational body in Hungary requires prior authorisation, the Court held that this reservation, since the authorisation in question applies to everyone, does not exempt Hungary from the obligations arising from the national treatment principle. Hungary has to comply without restrictions with the requirements of national treatment in the field of higher education services laid down in Article XVII of the GATS.

In light of this argumentation, Hungary breached its obligations the GATS, when it required the foreign suppliers of educational services to have a prior bilateral international agreement as a prerequisite. This requirement was not in line with the national treatment standard.[69] Applying the this logic, the Court reached the same conclusion in relation to the other requirements introduced by the 'Lex CEU.' In doing so, the requirement that the institution concerned must also provide training in the state in which it is established, was also found to be contrary to Article XVII of the GATS.[70] The Court examined also the availability of an exemption on grounds of public policy (Article XIV GATS), but found no justification for these requirements.[71] The Court's reasoning went beyond international trade law concerns, finding that Hungary was also in breach of internal market rules (Article 49 TFEU, Services Directive) and the Charter of Fundamental Rights as well.[72]

Given the importance of the *'Lex CEU'* case, it is clear that the Court's decision is not without precedent and can be seen as a new ramification in the complexity of relation-

68 Lex CEU, para. 81.

69 Lex CEU, para. 121.

70 Lex CEU, para.149.

71 Lex CEU, para. 138-139; and 156.

72 For this larger context, see Erich Vranes, Enforcing WTO/GATS law and fundamental rights in EU infringement proceedings: an analysis of the ECJ's ruling in Case C-66/18 Central European University, Maastricht Journal of European and Comparative Law 28 (2021) pp. 699-713; Andi Hoxhaj, The CJEU in Commission v Hungary Higher Education Defends Academic Freedom Through WTO Provisions, MLR 85 (2022), pp. 773-786; Louise Fromont/Arnaud Van Waeyenberge, La liberté académique au sein de l'Union européenne : une première consécration jurisprudentielle, JDE (2021), pp. 224-227; Nora Chronowski/Attila Vincze, The Hungarian Constitutional Court and the Central European University case: justice delayed is justice denied, ECLR 17 (2021)pp. 688-706.

ship between WTO obligations and EU law. The closest example in previous case law came up in the *Commission v Germany*,[73] where the Court concluded that Germany had breached certain provisions of an international agreement concluded by the Community. The common aspect emerging in the reasoning in both cases from the status of international agreements concluded by the EU. As these obligations bind the Member States equally, it paves the way to the enforcement of these obligations against EU Member States.

IV. Conclusions

The WTO is intended to be the prominent multilateral forum for international trade relations, with the capacity to shape the domestic legal instruments applied in the cross border economic relations. The position of the EU Member States is fundamentally determined by the EU law and by the EU itself, which is empowered with exclusive competences in international trade relations. This unique concept of membership would require the adoption of a declaration of competence, but this has not been done yet, which is due to the fact that Member States principally accept the Commission's action even in issues that would fall within the responsibility of Member States. From the perspective of the other WTO members, this results in the Union and its Member States being jointly responsible for the WTO obligations. Taking all these factors into account, in practice, the EU and its Member States are most likely to be common or joint members.

As far as the enforcement of the WTO law is concerned, it was clear that the Court refuses the direct applicability of GATT-WTO norms in the context of preliminary rulings, actions for annulment and actions for damages. This exclusion applies irrespective of whether the action is brought either by a Member State, or an individual or a company. When underpinning this approach, the Court finds arguments in the great flexibility of the GATT-WTO law. In other words, granting direct applicability would restrict the EU's freedom in the trade policy and preclude it from negotiating the issues with the WTO member third countries and mutually agree on a possible solution. As an exception, the Court provides applicability for GATT-WTO norms in a very restricted manner, only if the EU implements a specific obligation or an EU act grants rights to legal entities by express reference to provisions of the WTO agreements. Moreover, the principle of conforming interpretation could help implementing WTO obligations indirectly. Putting it differently, the effects of the WTO law depends on the EU's intention to comply. If the EU wants to implement concrete obligations arising from the WTO law, these rules will be form a standard not only over the validity of the EU legal acts, but over the Member States as well, as the CJEU can these WTO obligations enforce against them. Conversely, if there is no will to implement and therefore the EU violates the WTO law, the Member States have no choice but to live with this situation, as they could not challenge the validity of an EU legal act breaching WTO law. All this is the result of the concept of

[73] Judgment of 10 September 1996, C-61/94 Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:1996:313.

exclusive competence conferred on the EU in the areas of the common commercial policy. This metaphorically means that the Member States are sailing in the same boat on the waves of global trade facilitated by the WTO, but the first captain is the European Union, whose policy decisions can actually set the main course of the vessel.

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