



# A discussion on Case C-66-18 Commission v Hungary of the 6th of Oct 2020

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## TRANSCRIPT

Hello, Andrea Biondi, professor of European Law at King's College, London. Today, we're just going to focus on a single judgment. A single judgment handed by the Court of Justice very recently, which in my view, it's very intriguing and interesting on itself. Also, it looks – how can I put it, like an exam question. It does touch upon every single point that you somehow you should be really focusing on when you study and preparing for the exam. We'll use it to discuss exactly what's going on in European law. At the same time, it's should we say, a revision. Let's put it like that.

The case I'm now going to discuss briefly, it's the Case C-66/18, Commission against Hungary decided by the court on the 6th of October, 2020. We're going to discuss the legal issues here and the implications step by step.

First of all, the legal question. The Commission brought an action against Hungary. The Commission argued that Hungary failed to comply with its treaty obligations. In particular, there were some issues concerning international law, which we don't want to deal with it. The main point we would like to discuss here is that according to the Commission, Hungary breached A, free movement and in particular a free movement of establishment and services. And B, Hungary also breached certain provisions of the Charter of Fundamental Rights. Why? Hungary passed new legislation dealing with the universities, institutes of higher education in Hungary, in particular, foreign universities, foreign institutes of higher education. Hungary required those institutions to have an authorization to open and teach in Hungary. In particular, the Hungarian law required that in order for universities or for foreign universities to open and operate in Hungary they had to show that they will actually also teaching in their home state. In other words, if you want to teach in Hungary, yes, and a university which is already fully operating in other member states can do so.

However, if it's just basically, we're talking about only money or funds that have been coming from outside Hungary to the institutions in Hungary, that was not good enough. Obviously, all the background here, perhaps just look on Google; you'll understand all the background of this controversy. It's the idea that the university, which were supported and funded by Mr. Soros, should not have actually operated in Hungary. There's a little bit of political background on this case. Let's look it from the perspective of EU law.

First of all, the idea that you have to show that you're already a university in your home state in order to actually open another campus in Hungary, is that a question for European law? Is this a violation of free movement? What kind of articles of the treaties can be engaged here? Obviously, the Commission argued, it is a violation of the right of

establishment because a university, a higher education institution is obviously business. Students pay to go there. There's an economic activity there. What the Commission argued, was that we were dealing with a restriction on the right to establish a business in another member state, and at the same time, also a restriction on the right to provide an economic activity in that member state. Is this restriction, the idea that you have to ask for authorization and you have to show that you already been teaching or carry out an academic activity in another member states before you are able to open up in Hungary? Well, you know the answer; constant case law of the court on the application of Article 49 and 56 of the treaty, "Any kind of measure, which restricts access to the market, is a violation of the treaty." The court here concur with the European Commission. They found that by requiring these institutions to go through a process of authorization, and in particular to show that they were actually teaching already in the home member states, that actually constitutes a measure, which was actually capable of restricting access to the market, made the exercise of the right to establishment and the right to provide a service more difficult. Therefore, it actually have to be considered as a violation. This is classic consistent case law of the court on free movement. Any measure, which makes the exercise of one of the fundamental freedoms more difficult, is a violation of the treaty. Gone... first.

Second point, -you see that is exact the structure of a problem question. Second point, of course, anything can be a breach, however, as you know the second step of any kind of internal market cases, what kind of justifications Hungary could actually come up with. Hungary to say, "Well, we have a public policy argument here. Some sort of public aims that needs to be protected, and in particular, the integrity of the system of education we are providing." As you recall, any justification is valid. Member states can actually-, especially under the label of public policy, or members' requirements, you can actually come up with any kind of justifications you like. Therefore, in theory, that could have been a good justification. However, as you know, from your studies, any kind of justification is subject to the test of proportionality. A member state also has to prove that the measure was strictly necessary, and there were no less restrictive alternatives available. On this point, the court very strongly says, "I don't believe you." The court seemed to say, "I don't see the link between the requirements on authorizations and protecting the integrity of the education system. It is not there. Again, you could have actually thought about and many more less restrictive alternatives, some transparency requirement or whatever, but in the measure completely disproportionate; you went beyond what was really necessary in order to ensure the high quality of higher education. "The quality of education does not depend on authorization, it depends on other factors," that's what the court is saying. What you got here is a strict application of the proportionality test, court of justice impose a high standard of proof on the member state.

Next, you could simply say, "That's it. Done." It's a violation of the treaty, no justification, end of the story. Again, you need to link it to the studies you're going to carry throughout the year, the Commission and the court. Simply said, "There is another further dimension here." What could be this further dimension? By restricting the access for opening up a different university in Hungary, the Commission and the court actually agree with that. The Commission argued that in reality, Hungary also violated the Charter of Fundamental Rights, and in particular, academic freedom. This is probably one of the very first case

where academic freedom has been argued. At the charter, which you really would need to become familiar throughout the year, in its Article 13, says, "The arts and scientific research should be free of constraint. Academic freedom should be respected."

What can we say about this point? Now, first of all, you need to ask yourself-- We already established that it's a violation of the treaty proportionality. Another step? Yes, another step, because as you will study Article 51 of the Charter of Fundamental Rights says that the charter rights, all the articles of the charters are binding on European institutions, fair enough, but also on member states when they're acting within the scope of EU law. That's the Fransson case. In this case, the court says "Clearly, I already established that the Hungary violated freedom of establishment and freedom of services. Therefore, Hungary is acting within the scope of EU law; therefore, they're also bound to respect the charter." First point.

Once the court established that, they actually also went further and simply said, "Academic freedom is not only about guaranteeing the personal academic freedom of your profession, not just an individual dimension, but it has a collective dimension. It's about being able even to set up a university." This kind of system, according to the European Court of Justice, did violate Article 13 of the charter. The court also had Article 14, which is about the right of education. In reality, the court says, "If you don't get funding if you're not able to open it, you're not going to actually be able to spread education and be able to teach and research and so on, so forth."

In summary, yes, checking what foreign universities are doing in Hungary is a restriction to trade, cannot be justified, and it's also a violation of the Charter of Fundamental Rights. That's exactly the structure of any kind of full freedom case. Is there a breach? What kind of justification, proportionality and now the charter as well. Are we are also dealing with a violation of fundamental rights?

Very final point, of course, you realize that this is another of these cases in your guide, you will study all the cases brought by the Commission against Poland, on the independence of the judiciary, where it seems to me that EU law and the extremely delicate national political decisions can actually come in a little bit of tension. The Court has been very strong in reaffirming that even in those areas, independence of judiciary, higher education, the Court has jurisdiction to apply EU law to its full. Think about the possible repercussion, the implications on national sovereignty, and so on and so forth. Is that a little bit too much or is the Court simply saying, "You signed the treaty, you have to respect the obligations you signed to?" Think about it. See you very soon.