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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

HUNGARY

PRELIMINARY OPINION

ON
ACT XXV OF 4 APRIL 2017
ON THE AMENDMENT
OF
ACT CCIV OF 2011
ON NATIONAL TERTIARY EDUCATION

on the basis of comments by:

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I. Introduction

1. On 27 April 2017, in its Resolution 2162 (2017),¹ the Parliamentary Assembly of the Council of Europe requested the opinion of the Venice Commission on the compatibility with Council of Europe standards of the Hungarian Act XXV of 4 April 2017 (hereinafter “the Law”) on the Amendment of Act CCIV of 2011 on National Tertiary Education (CDL-REF(2017)029).

2. The Venice Commission appointed Ms Regina Kiener, Mr Ben Vermeulen and Mr Dennis Farrington (expert of the Education Department of the Directorate General of Democracy (DGII) of the Council of Europe) as rapporteurs for this opinion. In the light of the urgency of the matter due to the strict deadlines imposed by the Law, the Enlarged Bureau authorised the rapporteurs to send to the Hungarian authorities and to publish a preliminary opinion prior to the Plenary Session of October 2017.

3. On 30 June - 1 July 2017, a delegation of the Venice Commission, composed of Ms Kiener, Mr Vermeulen and Mr Farrington, accompanied by Mr Thomas Markert, Director, Secretary of the Venice Commission and Ms Artemiza Chisca, Head of the Democratic Institutions and Fundamental Rights Division, visited Budapest and had exchanges with representatives of the Hungarian authorities, of the academic sphere, including the Hungarian Rectors’ Conference and the Central European University, and civil society organisations. The Venice Commission delegation is grateful to the Hungarian authorities and the stakeholders for their excellent cooperation during the visit.

4. The present preliminary opinion was prepared on the basis of the English translation of Act XXV of 4 April 2017 on the amendment of Act CCIV of 2011 on National Tertiary Education and other documents as provided by the Hungarian authorities. Inaccuracies may occur in this opinion due to incorrect translations.

5. *The present preliminary opinion² was prepared on the basis of contributions by the rapporteurs and sent to the Hungarian authorities on ... 2017 and was published on the same day on the Venice Commission’s website. It will be submitted to the Commission for endorsement at its 112th Plenary Session on 6-7 October 2017...*

II. Preliminary remarks

A. Background

1. Constitutional and legal framework

6. Fundamental rights in the field of education and science are set out in Articles X and XI of the 2011 Fundamental Law of Hungary, under the Section “*Freedom and responsibility*”. Article X reads as follows:

“(1) Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge and, within the framework laid down in an Act, the freedom of teaching.

¹ Resolution 2162 (2017) of the Parliamentary Assembly of the Council of Europe: *Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University* (<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>), para. 11.

² Preliminary Opinions are issued in urgent cases when the facts in the light of the national legislation so requires (Article 14a of the Venice Commission’s Rules of Procedure). They are sent to the authorities (and made public) prior to their submission to the Plenary.

(2) The State shall have no right to decide on questions of scientific truth; only scientists shall have the right to evaluate scientific research.

Hungary shall protect the scientific and artistic freedom of the Hungarian Academy of Sciences and the Hungarian Academy of Arts. Higher education institutions shall be autonomous in terms of the content and the methods of research and teaching; their organisation shall be regulated by an Act. The Government shall, within the framework of an Act, lay down the rules governing the management of public higher education institutions and shall supervise their management.”

7. Article XI reads as follows:

“(1) Every Hungarian citizen shall have the right to education.

(2) Hungary shall ensure this right by extending and generalising public education, by providing free and compulsory primary education, free and generally accessible secondary education, and higher education accessible to everyone according to his or her abilities, and by providing financial support as provided for by an Act to those receiving education.

(3) An Act may provide that financial support of higher education studies shall be subject to participation for a definite period in employment and/or to exercising for a definite period of entrepreneurial activities, regulated by Hungarian law.”

8. Furthermore, Article VIII paragraph 2 of the Fundamental Law recognizes “*the right to establish and join organisations*”.³

9. Further constitutional provisions of relevance for the present Opinion include:

- *Article B (1): “Hungary shall be an independent, democratic rule-of-law State.”*

- *Article T (3): “No legal regulation shall conflict with the Fundamental Law.”*

- *Article I (3): “The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.*

(4) Fundamental rights and obligations which by their nature apply not only to man shall be guaranteed also for legal entities established by an Act.”

10. Until April 2017, the accreditation and operation of foreign higher education institutions in Hungary was regulated by the Act CCIV of 2011 on National Higher Education (the Higher Education Act 2011, hereinafter the “2011 HEA”⁴), having itself replaced the 2005 Act on Higher Education.

³ The Hungarian Constitutional Court has indicated in its case law that the right to freedom of association “*is primarily about the selection of the objective, and furthermore the freedom of establishment of an organisation for a given purpose, voluntary accession thereto and possibility of voluntary succession*”. (Constitutional Court of Hungary, Decision No. 22/1994, para. 128.)

⁴ See in particular Article 76

(http://www.mab.hu/web/index.php?option=com_content&view=article&id=336&Itemid=677&lang=en, website of the Hungarian Accreditation Committee, accessed 4 August 2017):

“(1) A foreign higher education institution may deliver programmes leading to a diploma in the territory of Hungary if it qualifies as a state-recognised higher education institution in its home country, the programme to be delivered in the territory of Hungary (and the diploma awarded for its completion) is equivalent to a programme leading to a tertiary degree (diploma) recognised by the state, and its operation has been authorised by the educational authority [...].

(2) The issue of the operating authorisation may be refused on the grounds of the expert opinion obtained by the educational authority from a higher education accreditation organisation if it allows the establishment that the

11. The Act XXV of 2017 amending the Act CCIV of 2011 on National Higher Education (hereinafter “the Law”) introduced new, more restrictive requirements for the licensing and operation of foreign universities. It was adopted on 4 April 2017 and promulgated on 10 April 2017. The effective dates are: **11 April 2017** - entry into force, with exceptions, see Section 8(1) of the Act; **1 September 2017** - entry into force of some provisions, Section 8(2) of the Act; **11 October 2017** - the ultimate date when the requirement must be met that the preliminary agreement by the central government in the case of federal states shall be concluded within six months following the entry into force, see Section 4(1) of the Act; and **31 December 2017** - when in particular the requirements must be fulfilled that an international agreement has been concluded and that the foreign university actually performs tertiary education in the country of its seat (the ‘campus requirement’, discussed below), see Section 4(1) of the Act; as well as the deletion of Article 104(7) clause (ba), allowing third-country nationals to be admitted to work at higher education institutions without working permit, see Section 7(b) of the Act.

12. According to the official explanation,⁵ the adoption of the Law follows up on the findings of the Hungarian Education Authority having examined foreign universities in the autumn of 2016 and discovered discrepancies and serious irregularities in their functioning.⁶ In addition, it was explained that the new regulatory framework was also meant to respond to wider policy imperatives related to the establishment and functioning of foreign higher education institutions in Hungary, including foreign policy and international cooperation in the field, as well as national security concerns.⁷

13. The adoption of the Law has given rise to much criticism, both in Hungary (including, reportedly, protests of tens of thousands of demonstrators in the streets of Budapest) and internationally.⁸ Beyond the criticism related to the adoption procedure and the lack of opportunities for appropriate consultations prior to its adoption, most reports have highlighted

operating and study conditions applicable in the home country significantly differ from those applied in Hungary. The expert opinion shall cover the human resources, material conditions and quality of the programme concerned.

(3) The operating authorisation may be refused if the completed studies attested by the foreign diploma cannot be recognised in Hungary. Foreign higher education institutions holding an operating authorisation shall be registered by the educational authority. The Minister shall exercise the powers set out in Article 65 and 66 over the operation of foreign higher education institutions. The educational authority shall review operating authorisations at least every five years [...].

[...]

6) Foreign higher education institutions awarding a foreign diploma, as referred to in paragraph (1), may be established and operate in Hungary under an international agreement. The educational authority shall register such higher education institutions ex officio and, in the absence of provisions to the contrary in the international agreement promulgated in a law [...].

[...]

(8) The higher education institutions regulated in this Article shall be required to register in and supply data to the higher education information system. The educational authority shall keep a register of foreign higher education institutions authorised to operate in Hungary, which shall be published annually, in December, in the official journal of Hungary and on the website of the ministry headed by the Minister.”

Section 77 applies to institutions with a registered seat in an EEA member state.

⁵ See Hungarian Minister of Human Capacities, Press statement, 4 April 2017

(<http://www.kormany.hu/en/ministry-of-human-resources/news/the-legislative-amendment-serves-the-interests-of-hungary-and-the-hungarian-people>).

⁶ See 2016 *Report for the Government on the operation of foreign institutions of higher education in Hungary*, at http://www.kormany.hu/download/2/f2/01000/Jelente%CC%81s%20a%20ku%CC%88fo%CC%88di%20felo%CC%8Boktata%CC%81si%20inte%CC%81zme%CC%81nyekro%CC%8BI_EN.pdf.

⁷ *General explanatory memorandum of the Government concerning the Law*, sent to the Rapporteurs on 18 July 2017

⁸ See Resolution 2162 (2017) of the Parliamentary Assembly of the Council of Europe - Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University, and related Report by Committee on Political Affairs and Democracy of the Parliamentary Assembly of the Council of Europe (<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23666&lang=en>);

See also, *inter alia*, the statement issued on 12 April 2017 by the European Association of Institutions in Higher Education (<https://www.eurashe.eu/library/mission-phe/1704-EURASHE-statement-on-CEU.pdf>).

concerns over the serious consequences that the new requirements entail on the operation and even continued existence, in Hungary, of existing higher education institutions, and primarily the Central European University, a reputed institution of post-graduate education, well respected for the quality of its academic staff and the education that it provides.⁹

14. Furthermore, on 27 April 2017, based on an *“in-depth legal assessment of the Hungarian Higher Education Law”*, the European Commission launched an infringement procedure against Hungary. According to the European Commission, *“the law is not compatible with the fundamental internal market freedoms, notably the freedom to provide services and the freedom of establishment but also with the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union, as well as with the Union’s legal obligations under international trade law”*.¹⁰

15. In its Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP), the European Parliament urged the Hungarian Government *“to immediately suspend all deadlines in the act amending the National Higher Education Act, to start immediate dialogue with the relevant US authorities in order to guarantee the future operations of the Central European University issuing US-accredited degrees, and to make a public commitment that the university can remain in Budapest as a free institution”*.¹¹

16. Likewise, in its Resolution 2162 (2017) adopted in April 2017 in respect of Hungary,¹² the Parliamentary Assembly of the Council of Europe called on the Hungarian Government to engage in an open dialogue concerning the new legislation, as well as *“to co-operate with the Venice Commission and suspend, pending the adoption of the latter’s opinion, the implementation of the act amending the National Higher Education Act [...]”*

2. Act XXV of 2017 amending the 2011 HEA

a. New requirements for foreign universities

17. Under the new regulations, a foreign university may only operate in Hungary (*“offer study programmes resulting in the issuance of certificates in the territory of Hungary”*) if:

- there is an international agreement concluded between the government of Hungary and the government of the university’s country of seat: *“the contracting parties have recognized the obligatory application of the international agreement on the theoretical support of its operation in Hungary, concluded between the Government of Hungary and the Government of the country of the seat of the foreign institutions of tertiary education – in the case of a federal state, if not the central government is entitled to recognize the obligatory application of an international agreement, based on a preliminary agreement concluded with the central government thereof”* (new Article 76 (1) (a)); according to new article 77 (2), institutions of tertiary education based in another EEA state are exempted from this requirement);

⁹ CEU’s high recognition in the international academic life is acknowledged by the messages of solidarity and support it received, since the adoption of the new regulations, from outstanding international academic institutions and representatives of the academia from Hungary and abroad, including a number of Nobel laureates (<https://www.ceu.edu>)

¹⁰ http://europa.eu/rapid/press-release_MEX-17-1116_en.htm

¹¹ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-216&language=EN&ring=B8-2017-0295>.

¹² See footnote 7.

- it is recognized by the state of seat as an institution of tertiary education and has a campus in the state of origin, that is, “operating in the country of its seat and actually performing tertiary education there” (new Article 76 (1) (b));
- its name is not misleading or confusing and clearly different from the names of any State-recognised higher education institution in Hungary or any other foreign institution of tertiary education operating in Hungary (new Article 9 (2a) and (2b)).

18. In addition, all academic staff coming from outside the EEA will in future have to require work permits, since the Law removes the existing exemption, under Article 104 HEA (7) clause (ba), for third-country nationals recruited for educational, scientific research and artistic activities.

19. Furthermore, the Law alters the conditions enabling foreign universities to deliver educational programmes and corresponding degrees (recognized by the foreign state), through a Hungarian university, based on a programme-cooperation agreement between the two universities (Article 77(4) of the HEA 2011). Under the modified legal framework, this will no longer be possible for foreign universities based in non-EEA OECD countries.

20. As required by new Article (115) 7, “[t]he Educational Authority shall withdraw the operating license of foreign institutions of tertiary education not compliant with the conditions, and after 1 January 2018 no students shall be admitted to the first year of the training in Hungary of the foreign institutions of tertiary education, providing that Hungarian training courses already in progress on 1 January 2018 may be completed in a system of phasing out, with unchanged conditions, but not later than the academic year of 2020/2021.” This means that the licence will be withdrawn, when: (i) in case of federal states which have no competence in the field of education, on 11 October 2017 no preliminary agreement with the central government of that state has been reached [new Article 115(7)]; (ii) on 1 January 2018 no international agreement with the governments of Hungary and the state of origin has been concluded [new Article 76(1)(a)]; (iii) on 1 January 2018 no higher educational services are offered by the foreign higher education institution in its country of origin [new Article 76(1)(b)].

b. Scope of application

21. According to official information, 24 foreign universities are operating in Hungary. Formally, the Law applies to all 24 universities, although most of its provisions do not concern universities based in EEA countries, which in practice means that only 6 universities, having their registered address in non-EEA countries, are affected by the recent amendments: three universities registered in the United States of America; one in China; one in the Kingdom of Thailand; and one in Malaysia.

22. The Law is worded in a neutral way and does not refer to any particular higher education institution. Established institutions as well as potential new foreign universities aiming at operating in Hungary are equally affected by the new rules. However, as previously mentioned, the Law has been widely criticized by domestic and international commentators as being directed specifically at the Central European University (hereinafter “the CEU”).

23. It is undisputed that the new provisions directly hit CEU, as this is an institution which is based outside the EEA with its legal seat in a federal State member of the OECD (the USA); which does not have a campus in its country of origin; which employs non-EU academic staff; and whose Hungarian partner bears the name of the Hungarian translation of “Central European University” (Közép-európai Egyetem, KEE). It should also be noted that on 4 April

2017, in an exposé launching the debate on the Bill to amend the Act on Higher Education in Parliament, speaking about the reasons for the new regulations,¹³ the Hungarian Minister of Human Capacities made specific reference to the CEU and its founder Mr George Soros. The Minister mentioned both (the CEU and its founder) in connection with the purpose of the Bill and the aims pursued with the new requirements, and in relation to the irregularities found following a review of foreign universities in the autumn of 2016. Particular mention was made of the peculiarities of the CEU legal status and the CEU unique position in this respect. Therefore, it may be useful to explore the status of CEU in some detail.

The Central European University and its dual legal status

24. **The Central European University (CEU)** is a highly reputed establishment of higher education, well known at European and international levels, including for its having trained prominent leaders and civil society personalities from European and other countries in democratic transition, as well as from well-established democracies. Although figures vary slightly, the CEU welcomes nearly 1500 students from over 110 countries, including about 400 Hungarian students each year, and brings together academic staff from over 40 countries. Because of its academic excellence, it has been ranked among the world's top universities and maintains fruitful co-operation relations with prominent educational and scientific institutions all over the world.¹⁴ It is undisputed that CEU, since its establishment, has provided a significant contribution to Hungary's academic and scientific life.

25. The CEU is a private higher educational institution established in Budapest in 1991, chartered in accordance with the law of the State of New York. Based on expert academic evaluation in terms of New York State education standards, it has been granted a charter by the Board of Regents of the New York State Education Department, under section 210 of the State Education Law.¹⁵ The CEU is accredited with regard to its Hungarian operation by the Middle States Commission on Higher Education. The Middle States Commission is also the accrediting body that evaluates all American universities in the "middle states" area, including institutions like New York University, Columbia University, Princeton University, Johns Hopkins University, as well as the American Universities of Cairo, Beirut, Paris, Puerto Rico, and Rome. The Middle States Commission continuously supervises the operation of the CEU and conducts an overall review on the basis of the criteria for accreditation every four years.

26. The CEU obtained its licence to operate in Hungary as a foreign university from the Ministry of Culture and Education in 1995, by Resolution No. 5563/94 of 5 January 1995. This operational licence was modified based on the Ministerial resolution No. 2123-8/2005 of 18 April 2005, in such a manner that it authorized the continued operation of CEU in Hungary under the name of the "Central European University, New York". A *Declaration* to support its activities in Hungary was signed in April 2004 by the Governor of New York State and the then Prime Minister of Hungary.

¹³ <http://www.kormany.hu/en/ministry-of-human-resources/news/the-legislative-amendment-serves-the-interests-of-hungary-and-the-hungarian-people>

¹⁴ According to the information available on the CEU website, CEU ranks among the world's top 200 universities in eight disciplines, and in political science and international studies, it is among the top 50 (<https://www.ceu.edu/>).

¹⁵ <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO> (current at 6 June 2017). The Board of Regents of the NY State Education Department has been chartering universities outside the US since the 19th century, apparently as a means of permitting foreign nationals to access US-style higher education 'to New York standards', through overseas-based institutions (its power to do so was confirmed by the State Attorney-General in 1925), and so is allowed by the Education Law to issue a licence to non-resident institutions (Education Consolidated laws, Article 1 Section 210: "*The Regents may register domestic and foreign institutions in terms of New York standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in this State*").

27. The CEU offers postgraduate (Master's and doctoral) programs in social sciences, humanities, law, management and public policy. All academic programs offered by the CEU are individually reviewed and authorized by the Board of Regents of the New York State Education Department. They are also registered in Hungary, and authorized by the Hungarian authorities as programs of CEU, as a foreign university. Students studying in these programs receive a US diploma. The governance and daily operations of CEU as a US university have to meet the legal requirement set by US law and are regularly monitored by the US accreditation agency (cf. para. 25). The CEU describes itself as a US university offering US academic programmes leading to US-accredited degrees, operating in Hungary with a licence as a foreign university. In view of its US-based accreditation, the CEU is formally referred to as CEU New York (hereinafter CEU NY). The CEU NY has an office in New York and a Board of Trustees based there but does not carry out any academic activity in the United States.

28. This being said, it is important to note that the CEU actually has a dual legal identity, since it operates in Budapest through two legal entities - one American, the CEU NY, and one Hungarian, the Közép-európai Egyetem - forming "one integrated academic community". According to the information available to the Venice Commission, there are no other universities in the European Higher Education area (EHEA) with such dual legal identity.¹⁶

29. **Közép-európai Egyetem** (which name is the literal translation of *Central European University* in Hungarian, hereinafter **KEE**), is a Hungarian university offering academic programmes accredited under Hungarian law and issuing Hungarian diplomas. It was recognized following a joint *Declaration* of the Governor of the State of New York and the Hungarian Prime Minister on 5 April 2004. The *Declaration* expressed support for the CEU and confirmed the parties' joint agreement to support CEU's goal of achieving Hungarian accreditation, while at the same time maintaining its status as an accredited American university.

30. Following the *Declaration* in 2004, Hungary promulgated a special law on the establishment of KEE as a Hungarian university (Act LXI of 2004¹⁷ adopted by the Hungarian Parliament on 21 June 2004 and entered into force on 9 April 2005). KEE as an institution was duly accredited by the competent Hungarian authorities (the Higher Education and Science Committee, and the Hungarian Accreditation Committee). For several years, the KEE has been operating as a "higher education institution of international nature", a category which was introduced in the 2005 HEA in August 2009 and repealed in September 2012. Annex 1 to 2011 HEA, containing the list of "State recognised higher education institutions", mentions KEE under

¹⁶ The American University in Blagoevgrad, Bulgaria has been identified (by the Hungarian authorities) as the closest equivalent of CEU, being founded by an NGO with support of the US and Bulgarian governments, the University of Maine and the Open Society Institute. However, this institution, although it has dual accreditation, does not have dual legal identity, as it is chartered by the Bulgarian Assembly (<https://www.aubg.edu/accreditation>, accessed 3 July 2017).

¹⁷ **ACT LXI of 2004 on State Recognition of Közép-európai Egyetem:**

In order to achieve the goals expressed in the joint declaration issued on April 5, 2004 by the Prime Minister of the Republic of Hungary and the Governor of the State of New York, to recognize Közép-európai Egyetem (Central European University) recognized in the State of New York (United States of America) as Hungarian, non-state university, to strengthen the international character of the national higher education, to introduce foreign experiences and to expand tertiary expertise that may be obtained in a foreign language – with respect to Articles 4 (3) and 6 (1) of Act LXXX of 1993 on higher education (hereinafter as "Ftv.") - the Parliament passes the following Act.

1. § (1) *Közép-európai Egyetem (hereinafter as the "University") is a higher education institution operated and maintained jointly by Central European University as a non-profit institution with a seat in New York and Central European University Foundation of Budapest.*

[...]

2. § *The University is entitled to use the name "university" as well as its foreign language equivalent, provided it has the ability and competence to provide a specialization in several programs of at least one scientific area.* [...]"

the section “private universities”, governed by special regulations. In compliance with Hungarian law, KEE has a university senate and a rector, the latter appointed by the President of Hungary. The governance and daily operations of KEE as a Hungarian university have to meet the legal requirements set by Hungarian law. The Hungarian Education Authority monitors KEE’s compliance with Hungarian legal rules. Under the 2011 HEA, following the cancellation of the category of “higher education institution of international nature”, the Educational Authority was required to review the operation permit of KEE by 1 September 2017 (see Section 11((7) of 2011 HEA).

31. On 29 October 2009, a co-operation agreement was signed between CEU NY and KEE. Until 2012, the CEU NY also acted as the maintainer of the KEE under the HEA (this involves approval of the founding charter of KEE and subsequent amendments, consultation on the use of KEE assets, decision on the candidate to the rector’s position - appointed by the President of Hungary, appointment and removal of KEE’s financial manager, institutional development plan budget etc.). Upon amendment of the HEA in 2012 prohibiting foreign maintainers of Hungarian universities, CEU NY was replaced by a Hungarian registered Foundation (Central European University Budapest Foundation – CEUBF) as KEE’s maintainer.

32. According to the information provided to the Venice Commission by the CEU NY, KEE was created to allow CEU NY to better integrate into the Hungarian higher education system under Hungarian law. KEE co-operates with CEU NY in delivering the latter’s programs relying on a so-called licence agreement, under Article 77(4) of the HEA. In practical terms, certain graduate and doctoral CEU NY programs (reportedly, a small number) have received Hungarian accreditation as well, as KEE programs under Hungarian law. Students enrolled in the programs of CEU NY receive an American diploma, while those enrolled at the programs of KEE (except those delivered on the basis of the licence agreement) receive a Hungarian diploma.¹⁸

33. It is worth observing that, notwithstanding the legal distinction between the two entities, the CEU is known and referred to usually as one university, which is confirmed by the fact that, in practice, there is only one campus, one academic staff, and one computer network. The Rector - President of CEU NY is at the same time the rector of KEE.¹⁹

34. Based on the information available, one can assume that, until the recent change, the Hungarian authorities have recognized CEU NY as a legitimate US university operating in Hungary, compliant in all relevant respects with the Hungarian law. As to the “irregularities” identified during the 2016 review based on the 2011 HEA, these irregularities were not specific to CEU NY, but such irregularities were identified in the functioning of most of the foreign universities. It appears that they were of minor administrative nature and by the time of the visit of the Venice Commission delegation to Budapest on 30 June 2017, had been resolved or were being addressed to the satisfaction of the Hungarian Education Authority.

35. It should be noted that, as the situation stands at the date of this Opinion, if CEU NY does not fulfil the conditions required by the amended Law, the Hungarian Educational Authority may revoke its operating licence as early as 11 October 2017 (i.e. 6 months after the entry into force of Law XXV of 2017) or 1 January 2018 (cf. para. 20), and that no student may be admitted to CEU NY’s programmes after 1 January 2018. Existing students may finish their studies under the same conditions in a phasing-out process, no later than in the academic year 2020/21. As described in the presentation by CEU NY’s President and Rector on 30 June 2017,

¹⁸ See Memorandum sent by the CEU NY, on 3 April 2017, to the Hungarian Parliament. (<https://www.ceu.edu/sites/default/files/attachment/article/17920/memoparliament02042017engfinal.pdf>)

¹⁹ The CEU Board of Trustees recommends one candidate to the President of Hungary.

PhD students follow a six-year programme so that many will not have completed it by that time. Furthermore, the President and Rector stressed that CEU NY would start its recruitment process on 1 September 2017, so a solution is required by that time. And indeed, *time is of the essence*. An education institution whose continued existence is in doubt will become demoralized, immediately losing current and potential students, as well as valuable staff members: even if there is a chance to legally survive, through legal action and procedures, there is the great risk of a slow death.²⁰

B. Scope of the Opinion

36. The aim of the present opinion is to assess the new regulations introduced by the Hungarian Act XXV of 4 April 2017 (the Law) in respect of foreign universities operating in Hungary, in the light of relevant Council of Europe and other international standards.

37. The purpose of the present opinion is not to address in an exhaustive and detailed manner all provisions of the amending Law, nor to examine the legal situation of only one particular university, but to address the main legal issues which, in the Commission's view, would require further consideration. Nor is it the intention of the Venice Commission to engage into an analysis of the constitutionality of the Law, or of its compliance with the standards and principles of EU Law and GATS, in particular with respect to the freedom of establishment and the right to provide services. The Commission is aware that there is a case currently pending before the Constitutional Court of Hungary concerning the constitutionality of the Law,²¹ and that, with regard to EU Law, an infringement procedure against Hungary has been launched by the European Commission.²² It is a matter for the Hungarian Constitutional Court to determine whether the Law is in line with the relevant constitutional provisions,²³ and for the EU competent bodies to establish its conformity with applicable EU law.

C. Standards

38. Until this opinion, the Venice Commission has not dealt extensively with an issue concerning the legal norms and values with regard to (the right to and freedom of) education.²⁴ For that reason, it is useful to give here a somewhat broad exposition of the Commission's views with regard to these norms and values.

²⁰ New Article 115(7) HEA euphemistically speaks of a "system of phasing out".

²¹ According to the information available, opposition parties in Hungary have lodged a complaint with the Hungarian Constitutional Court (filed at the Constitutional Court under no. II/01036/2017)

²² In its statement on the current situation in Hungary, the European Commission said that its review of Hungary's new higher education law concluded that it is not compatible with the fundamental internal market freedoms, notably the freedom to provide services and the freedom of establishment, but also with the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union, as well as with the union's legal obligations under international trade law. (see footnote 10)

²³ The Venice Commission in 2011 adopted a comprehensive opinion on the revised Constitution of Hungary (CDL-AD(2011)016), where it stated that "*Hungary has adopted a new Constitution which aims to meet the general features of a modern Constitution within the framework of the Council of Europe. In particular, the Venice Commission welcomes the fact that this new Constitution establishes a constitutional order based on democracy, the rule of law and the protection of fundamental rights as underlying principles. (...). A particular effort has been made to follow closely the technique and the contents of the ECHR and to some extent the EU Charter*" (para. 18)

²⁴ The *Amicus curiae* brief of the Venice Commission on "The compatibility with human rights standards of certain articles of the Law on Primary Education of the Sarajevo Canton of the Federation of Bosnia and Herzegovina"(CDL-AD(2012)013) dealt with a very specific issue.

39. The right to education and the freedom of education is guaranteed by Article 2 of Protocol No. 1²⁵ to the European Convention on Human Rights (ECHR), which states: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” It is important to point out that whilst the freedom of teaching and to organize teaching in the setting of an educational institution - the freedom to establish private schools, universities etc. - as such is not explicitly contained in Article 2 Protocol 1 ECHR (as it is in Article 13(4) ICESCR), in its report in the *Kjeldsen, Busk Madsen and Pedersen Case*, the former Commission took the view that the right “to the establishment of and access to private schools or other means of education outside the public school system” falls under the this provision.²⁶ In its judgment in the same case the European Court of Human Rights (ECtHR), too, by reference to the *travaux préparatoires*, has recognized that the freedom to provide for private education, though not expressly set forth in the text of this provision, had been present to the minds of the drafters in the different phases of the drafting process, so that an interpretation which also covers this right should not be excluded.²⁷ And indeed, the individual’s right to education guaranteed in the first sentence of Article 2 of Protocol 1 ECHR, as well as the room for pluralism in education as required in its second sentence, demand that - read in conjunction with Article 10 and 11 of the Convention - there should be a wide freedom to establish and maintain education institutions coexisting alongside the state-run system of public education. It must also be stressed that the Court has indicated that these provisions are relevant both for primary, secondary and tertiary education.²⁸

40. Furthermore, of particular relevance for the present analysis is the interpretation given by the Court that Article 2 of Protocol No. 1 also guarantees, as part of the right to education, “a right of access to educational institutions existing at a given time”, to which it associates the individual’s “right to obtain, official recognition of the studies” which the pupil or student has completed.²⁹

41. On the other hand, the Court accepts that, since the right of access “*by its very nature calls for regulation by the State*”, and provided that the substance of the right is not affected, the right to education may be subject to limitations. The Court has clarified however that, within the

²⁵ When it interpreted this provision, the ECtHR has relied on further relevant international instruments, including the Universal Declaration of Human Rights (1948), the Convention against Discrimination in Education (1960), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the UN Convention on the Rights of the Child (1989) (*Catan and Others v. the Republic of Moldova and Russia* [GC], Applications nos. 43370/04, 8252/05 and 18454/06, §§ 77-81), the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (*Leyla Şahin v. Turkey* [GC], Application no. 44774/98, 10 November 2005, § 66), and the revised European Social Charter (*Ponomaryovi v. Bulgaria*, Application no. 5335/05, Final 28 November 2011, § 35).

²⁶ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, EComHR, 21 March 1975 (report), Applications nos. 5095/71, 5920/72 and 5926/72; *Verein Gemeinsam Lernen v. Austria*, Application no. 23419/94, EComHR, 6 September 1995 (decision)

²⁷ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Applications nos. 5095/71, 5920/72 and 5926/72, 7 December 1976, § 50; *Jimenez Alonso and Jimenez Merino v. Spain*, Application no. 51188/99, 25 May 2000.

²⁸ *Leyla Şahin v. Turkey* [GC] cited above, §§ 134 and 136; see also *Kjeldsen, Busk Madsen et Pedersen cited above*, § 50.

²⁹ *Ali v. United Kingdom*, Application no. 40385/06, 11 January 2011, Final 11 April 2011, § 51: “Article 2 of Protocol No. 1 guarantees, *inter alia*, a right of access to educational institutions existing at a given time (see *Belgian Linguistics Case*, cited above, p. 28, § 4 and *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23, pp. 25-26, § 52). Nevertheless, such access constitutes only a part of the right to education. For the “right to education” to be effective, it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed (*Belgian Linguistics Case*, cited above, p. 28, § 4).”

margin of appreciation left to the State *“in order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness”*; these restrictions must be foreseeable for those concerned, must respond to a legitimate aim and must be proportioned to the aim pursued.³⁰

42. While academic freedom is not explicitly provided for in the ECHR, the ECtHR has on several occasions, in its case-law,³¹ brought matters related to academic freedom within the ambit of the European Convention, mostly under Article 10, which guarantees the right to freedom of expression. It seems obvious that, as a key pre-requirement for the effective enjoyment of this freedom, States should refrain from undue interference with the university teaching and the freedom of organising teaching and research. Such interference would, of course, also be in breach of the requirements of pluriformity inherent in Article 2 of Protocol 1 ECHR³² and Article 11 ECHR. Only such limitations that are prescribed by law, are in line with legitimate aims, and are – in the light of these aims - proportionate and necessary in a democratic society, as foreseen by Article 10, Article 11 ECHR and implicit in Article 2 of Protocol 1 ECHR, may be allowed.

43. The International Covenant on Social, Economic and Cultural Rights (ICESCR)³³ devotes two articles to the right to education, Articles 13 and 14.

44. Article 13 ICESCR in particular is relevant, while it specifically guarantees academic freedom and institutional autonomy.³⁴ Its paragraph 4 states: *“No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State”*. Hence, under this provision, everyone, including non-nationals, has the liberty to establish and direct educational institutions. The liberty also extends to ‘bodies’, i.e. legal persons or entities. It includes the right to establish and direct *“all types of educational institutions, including nurseries, universities and institutions for adult education”*.³⁵

45. The UN Committee on Economic, Social, and Cultural Rights (CESCR) emphasised, in the General Comment on Article 13, that the *“right to education can only be enjoyed if accompanied by the academic freedom of staff and students”*, and described the scope of academic freedom in the following terms: *“[t]he enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an*

³⁰ *Ali v. United Kingdom*, cited above, §§ 52 -53

³¹ *Hertel v. Switzerland*, Application no. 25181/94, 25 August 1998; *Wille v. Liechtenstein* Application no. 28396/95, 28 October 1999; *Stambuk v. Germany*, Application no. 37928/97, 17 October 2002; *Lombardi Vallauri v. Italy*, Application no. 39128/05, 20 October 2009; *Sorguç v. Turkey*, Application No. 17089/03, 23 June 2009; *Sapan v Turkey*, Application no. 44102/04, 6 July 2010; *Mustafa Erdoğan v. Turkey* (Applications nos. 346/04 and 39779/04), 27 May 2014.

³² *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, cited above, § 50; see also *B.N. and S.N.; v. Sweden*, no. 17678/91, EComHR (decision), 30 June 1993; *Konrad and others v. Germany*, Application no. 35504/03, 11 Sept. 2006 (admissibility decision).

³³ The ICESCR was ratified (on 17 January 1974) and is in force for Hungary and forms part of the country's international obligations under Article Q(2) of the Constitution.

³⁴ Moreover, Article 15 ISECR recognises academic freedom as part of a human right to *“enjoy the benefits of scientific progress and its applications”*, and requires that: *“[t]he States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.”*

³⁵ See UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13, E/C.12/1999/10, para. 30.

appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible".³⁶

46. In its comment on Article 13 (para 39), the CESCR also stated that "[m]embers of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction."

47. It follows from this definition that academic freedom encompasses other internationally protected fundamental rights, including freedom of opinion, expression, association, and assembly, which are enumerated in the Universal Declaration of Human Rights and guaranteed by the International Covenant on Civil and Political Rights (ICCPR).³⁷ In stricter terms, under the ICCPR it is generally considered that academic freedom is covered by the free speech guarantees as enshrined in Article 19.

48. There is also a set of soft law instruments of relevance for the matters regulated by the Law, including Council of Europe recommendations expressly recognizing the importance of academic freedom and institutional autonomy as "essential values of higher education", serving "the common good of democratic societies."³⁸ These instruments include:

- *Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy;*
- *Recommendation Rec(2007)6 of the Committee of Ministers to member states on the public responsibility for higher education and research;*
- *Parliamentary Assembly Recommendation 1762 (2006) on "Academic freedom and university autonomy";*
- *Recommendation R (97)1 of the Committee of Ministers on the Recognition and Quality Assessment of Private Institutions of Higher Education, of 4 February 1997;*
- *Magna Charta (a document that was signed by 388 rectors and heads of universities from all over Europe and beyond on 18 September 1988, the 900th anniversary of the University of Bologna)*
- *Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, (Lima, 10 September 1988)*
- *UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, 11 November 1997*

49. Of particular relevance for the recognition of private universities for States members of the Council of Europe is the Committee of Ministers' Recommendation R (97)1, now 20 years old but still in force. Notably, this document recommends specific criteria to be applied with regard to the authorisation, recognition and quality assessment of foreign higher education institutions operating local branches through a campus, to distance learning or to programmes "franchised" from foreign higher education institutions.³⁹ Hungary has indeed taken steps in its

³⁶ Idem, paras. 38 and 40

³⁷ International Covenant on Civil and Political Rights (ICCPR), 16 December, 1966, ratified by Hungary on 17 January 1974

³⁸ See Recommendation CM/Rec (2012)7.

³⁹ The Final Report of the Council of Europe Legislative Reform Programme (LRP) 1991-2000 (<https://goo.gl/pkedQC>, accessed 3 July 2017), which also led to this Recommendation, included a synthesis of the suggested allocation of competences drawn from the work of the LRP, shown as an Appendix to the second

higher education laws over the past two decades to improve the framework for private higher education and to prescribe accreditation procedures, until recently governed by the 2011 HEA. The legislation up to 2011 appears to reflect properly the Council of Europe Recommendations.

50. Also, it is important to note that, according to the Committee of Ministers' Recommendation (2007)6, "*higher education and research is a public responsibility*" and "*public authorities must exercise their responsibility with a view to adapting it to the requirements of modern, complex societies.*" The Appendix to Recommendation CM/Rec(2007)6 clearly states that public authorities have a responsibility to promote autonomy for higher education and research institutions, as well as academic freedom for individual members of the academic community, in accordance with international standards, and in particular those of the European Higher Education Area. The Appendix at the same time explains that "*[p]ublic responsibility for higher education and research can be exercised in different ways and at different levels (national, regional, local or combinations of these) in different countries.*"

51. The present opinion aims to assess the Law in the light of the standards resulting from the above instruments, with a particular focus on the compliance of the new regulations introduced by the Law with the rule of law requirements and fundamental rights principles. Specific attention has been given, in the assessment of the Law, to the criteria and principles contained in the Venice Commission's Rule of Law Checklist.⁴⁰

III. Analysis

A. General remarks

1. Adoption procedure

52. Critics claim that the adoption of the Law in April 2017 did not comply with existing rules concerning the legislative procedure, in particular the requirements of Act CXXX of 2010 on Law-Making⁴¹ and of Act CXXXI of 2010 on social participation in the preparation of legislation⁴², as the Law was not preceded by appropriate information, impact assessment and consultation.

53. The discussions held in Budapest confirmed that the law was adopted following an exceptional procedure, in accordance with the Parliament's Rules of Procedure (Article 61), allowing such a procedure. The reason given for using the expedited procedure was that it was urgent to adopt the law to allow it to enter into force before the next academic year. This reason seems not very convincing since there was no urgent need to change the applicable rules. Existing rules under the 2011 HEA already enabled the authorities to address the irregularities

part of the Final report: The Policy Model of the LRP, Survey by the Secretariat (DECS/EDU/LRP (99)23. Tier 1, primary legislation, includes '*permit the creation of private universities*', '*delimit circumstances under which private institutions may be accredited*' and '*define and regulate the use of the word "university"*.' Hungary was an active participant in the LRP, and in particular CEU hosted two expert meetings in 1996 and 1998 which indicates its recognition by the then Hungarian authorities. Hungarian law complies with the LRP recommendations (see D.J. Farrington: *Governance in Higher Education: issues arising from the work of the Legislative Reform Programme for Higher education and Research of the Council of Europe (DECS/LRP (99) 28)*).

⁴⁰ CDL-AD(2016)007, Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)

⁴¹ Article 17 of Act CXXX of 2010 on Law-Making requires that an impact assessment be prepared in relation to a Bill submitted for adoption; according to article 19 (2), "*the one responsible to prepare the legislation shall make sure that the draft of the legislation is available for information and comments [...]*."

⁴² Article 5 (1) of Act CXXXI of 2010 on social participation in the preparation of legislation provides that "*the draft law and its reasoning shall be submitted for social reconciliation*".

noted in the framework of the 2016 review.⁴³ It appears also that, before introducing the amendments, the Government did not consult with either the affected universities,⁴⁴ nor with those members of the Hungarian academic community entitled to express their opinion, such as the Hungarian Academy of Sciences and the Hungarian Rectors' Conference, which is the statutorily established representative of the higher education sector. No impact assessment was made and no public consultation took place, as the draft law was presented to parliament and adopted within a few days. In view of the lack of time and framework for genuine consultations, the Rectors' Conference decided to make known the position agreed among its members by way of a Statement published the day before the Law was adopted⁴⁵.

54. The Venice Commission has on several occasions, in its past opinions,⁴⁶ expressed concern over the approach taken by the political majority in the Hungarian parliament when adopting legislation. The Commission reiterates that caution and self-restraint are essential when making use of an exceptional procedure; although allowed under the Hungarian legal framework, such an approach may not be suitable for legislating on certain complex and sensitive matters, having a significant social and political impact, and is clearly questionable in the light of the principles of transparency, inclusiveness, democratic legitimacy and accountability. As it results from the Venice Commission Rule of Law Checklist (Section A.5), these are key requirements of any democratic processes in society governed by the rule of law.⁴⁷ (See also CM/REC (2012)17, para 9, where the Committee of Ministers acknowledges that states are responsible for the organisation and content of their education system but "*this requires dialogue between higher education institutions, students and staff and public authorities*").

55. From a more pragmatic perspective, prior appropriate information and communication on the Bill, coupled with consultations with all the parties concerned, could have contributed to a proper understanding of the aims pursued with the new rules, and help identify the most suitable ways to address existing concerns regarding the legal status and functioning of foreign universities in Hungary.

2. A new regulatory framework for foreign universities

56. As shown by the recommendations adopted by both the Parliamentary Assembly and the Committee of Ministers in this field, academic freedom has been and remains an issue of high concern for the Council of Europe and, as such, a matter that falls under the public responsibility, together with the responsibility for the framework within which higher education and research are conducted.

57. The different texts addressing the issue (see under the section "Standards"), while emphasizing the responsibility of public authorities for academic freedom and institutional autonomy, at the same time acknowledge that "*member States are responsible for the*

⁴³ See 2016 *Report for the Government on the operation of foreign institutions of higher education in Hungary*

⁴⁴ According to the information provided to the Venice Commission, CEU requests for consultations during the high-speed legislative process have been refused.

⁴⁵ See <http://www.mrk.hu/en/2017/04/03/statement-of-the-hungarian-rectors-conference/>.

⁴⁶ See *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, CDL-AD (2012)001 para. 9; *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, CDL-AD(2012)004, para. 12; see also ECtHR in *Karacsony and Other v. Hungary* [GC], Applications nos. 42461/13 and 44357/13, 17 May 2016, §147; *Leyla Sahin v. Turkey* [GC], § 108.

⁴⁷ See Rule of Law Checklist, footnote 35.

organisation and content of their education systems,”⁴⁸ i.e. have the “responsibility for the system level framework.”⁴⁹

58. As mentioned before, Recommendation CM/Rec(2007)6 and its Appendix explain that “[p]ublic responsibility for higher education and research can be exercised in different ways and at different levels (national, regional, local or combinations of these) in different countries.” The same Appendix describes the content and limits within which this “public responsibility” needs to be exercised, as follows:

“9. Public authorities should assume exclusive responsibility for the framework within which higher education and research are conducted. This should include responsibility for:

- the legal framework;
- the degree structure or qualifications framework of the higher education system;
- the framework for quality assurance;
- the framework for the recognition of foreign qualifications;
- the framework for information on higher education provision.

10. In elaborating or amending the legal framework, in accordance with the constitution and the legislative practice of each country, public authorities should consult with higher education institutions and their organisations, research institutes and bodies, organisations of students and staff and other relevant stakeholders.

11. Public authorities should determine the degree structure or qualifications framework of the higher education system for which they are responsible in accordance with international standards, and in particular those of the European Higher Education Area. Public recognition and funding of higher education institutions and programmes could be made conditional on their compliance with national qualifications frameworks.”

59. This approach was further confirmed in the Recommendation CM/Rec(2012)7 of the Committee of Ministers, where the Committee of Ministers once more acknowledged the value of academic freedom and institutional autonomy, the role and responsibility of public authorities in this respect, but also the importance of a “continuous dialogue” between higher education institutions, students and staff and public authorities on the future of higher education. As mentioned in its paragraph 9, the recommendation sets out principles to be observed “regardless of how education systems are organised.”

60. Paragraph 21 of Recommendation CM/Rec(2012)7 summarizes this approach in the following terms: “public authorities should have exclusive responsibility for the provision of the framework within which higher education and research is conducted. National qualifications frameworks and quality assurance mechanisms should be in accordance with the principles of academic freedom and institutional autonomy and take due account of the basic values and variety of purposes of higher education.” It is worth noting that, as stated in paragraph 22, the responsibility of public authorities also encompasses “monitoring the sources of funding of higher education institutions and possible intrusions on academic freedom and institutional autonomy”, as well as ensuring “transparent information about higher education systems” and “providing guidelines for information on specific higher education programmes and offers.”

⁴⁸ See Recommendation CM/Rec(2007)6 of the Committee of Ministers to member states on the public responsibility for higher education and research, 17 May 2007.

⁴⁹ See Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy, 20 June 2012.

61. One may conclude from the above that, within the Council of Europe members states, academic freedom and related requirements and principles are to be protected by states under their domestic legislation, in accordance with international standards, while at the same time taking due account of the specificity of the national education system and of the national constitution and the legislative practice, and - not least - of national policies and priorities in the field. In principle therefore, a broad margin of appreciation is left to the national authorities as to the specific rules or frameworks for recognition/accreditation of foreign qualifications, quality assurance, information on higher education provision, co-operation in the field etc.

62. In addition, as shown by the overview on the Hungarian Tertiary Education (hereinafter "Government Brief")⁵⁰ provided to the Rapporteurs by the Ministry of Human Capacities, national rules and practice are highly diverse in this field. Some states have adopted stricter conditions and rules than others on foreign universities wishing to operate on their territory, and there are even examples of countries where it is simply not possible for foreign universities to settle.

63. From this perspective, the regulatory framework proposed by the Law, as far as it applies to the establishment of new foreign universities (or their branches) which are not yet active in Hungary, and provided that the application of this framework takes into account the aforementioned guarantees for the effective enjoyment of academic freedom and institutional autonomy, does not appear to contradict applicable international standards and norms. It responds to concerns expressed by the Hungarian authorities for a clearer legal framework with regard to the operation of foreign universities, for more transparency supported by prior bilateral agreements as a guarantee for ensuring quality of the education provided, and for protecting future students as to the claims of higher education institutions to be established. These are legitimate concerns in respect to institutions which have not been operating in Hungary and wish to provide an educational offer in Hungary in the future, as opposed to existing institutions of higher education, such as the CEU, whose reputation is firmly established in Hungary and abroad.

3. Impact on existing foreign universities in Hungary

a. Fundamental rights guarantees and implications

64. The amendments introduced by the Law entail, at least for some of the currently established foreign educational institutions in Hungary, severe consequences for the enjoyment of their rights and freedoms laid down in the ECHR and in the ICESCR, as well as guaranteed by the Hungarian Constitution and other international instruments to which Hungary is a party. These rights and freedoms include the right to and freedom of education; academic freedom, as part of the freedom of education, expression and association; the institutional and regulatory autonomy of higher education institutions guaranteed through these aforementioned rights and freedoms; as well as the right to freely pursue scientific research.

65. To be more specific: should higher education institutions not be able to fulfil all new requirements within the strict timeframes provided by the Law, the following consequences may occur: students, especially PH-D students following six-year programmes - only ending after the

⁵⁰ According to the Government brief, in Poland at present not a single foreign tertiary educational institution or affiliated institution operates, because of a complex licensing procedure. The same situation may be found in Norway, Sweden. In Greece "*university education may only be provided by the state, thus the private (including foreign-owned) tertiary educational institutions may only be colleges*"; in Slovakia Republic, a foreign university may operate if its country of seat is a EU member state or EEA state or Switzerland, while, in order to operate in the Czech republic, a university must be registered in a EU state. The Netherlands also requires that the country of seat be an EEA state in order to use the name of "university" (with possible exceptions for "world class universities"), but allows a non EEA-institution to award foreign academic degrees.

deadlines established by the Law for fulfilling the new requirements - may not be able to complete their studies and would be deprived of the corresponding diplomas; institutions may be obliged to cease programmes which are currently being delivered through licence-agreements with Hungarian partner universities, to stop such academic/scientific partnerships and to review their academic offer; they will have to adjust their educational and scientific offer according to the availability of academic staff entitled to work in Hungary; and, ultimately, in case of licence withdrawal for failure to meet the new conditions, they will have to close their operations in Hungary.

66. As previously mentioned, the Constitution - the Hungarian Fundamental Law - offers constitutional protection to the above rights, as enshrined in the international instruments to which Hungary is a Party. While Article XI of the Constitution guarantees the right of citizens to education, Article X (3) protects higher education institutions' autonomy in the field of teaching and research,⁵¹ and entrusts the state with the responsibility to establish governing rules for the management of such institutions, and to supervise their application. Both students and the education institutions are therefore protected by these provisions.

67. It is important to point out that Hungary, although it enjoys a broad margin of appreciation in this field, nevertheless - given the combined effect of the relevant provisions of its Constitution as well as of the ECHR and ICESCR - is also bound to act with full respect for the requirements to be fulfilled when applying limitations to the above rights under the relevant instruments. Furthermore, the state not only has the duty to prevent any undue interference with the right to education (expression, association) and the right to academic teaching and scientific research, but also has the obligation to act in a way that actively guarantees the free exercise of these rights, not only those rights laid down in the relevant ECHR and ICESCR provisions, but also enshrined in the constitutional provisions, like Article X - on freedom of scientific research and university autonomy- and Article XI - on the right to education. In addition, the Hungarian state is required to act in a way that respects the rule of law, as it results from Articles B and U of the Hungarian Fundamental Law. As emphasised by the Strasbourg Court in its case-law, "*the rule of law, one of the democratic principles of a democratic society, is inherent in all articles of the Convention.*"⁵²

68. It is also important to recall in this context that, according to the general limitation clause set out in Article 4 ICESCR, to be applied *inter alia* to Article 13 ICESCR, "*the States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.*"

69. In its General Comment, referring to this limitation clause, the CESCR has emphasized that this clause is "*primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State. Consequently, a State party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.*"⁵³

⁵¹ As to the scope of the right to autonomy, see Constitutional Court Decision No. 41/2005. (X. 27.), ABH 2005, 474, 476; Constitutional Court Decision No. 51/2004 (XII. 8.), ABH 2004, 679, 686; Constitutional Court Decision No. 39/2006 (IX. 27.), ABH 2006, 500.

⁵² *Golder v. United Kingdom*, Application no. 4451/70, 23 February 1975, § 34; *Amuur v. France*, Application no. 19776/92, 25 June 1996, § 50; *Iatridis v. Greece* [GC], Application no. 31107/96, 25 March 1999, § 58

⁵³ Para. 42

b. Necessity and aim of the new regulations

Proportionality issues

70. Considerations of different nature have been put forward by the Hungarian authorities as regards the actual reasons that motivated the Law. These include: the introduction of additional educational quality guarantees for students; imperatives of international cooperation in the field of higher education (i.e. to better determine and guarantee the direction and scope of such cooperation, and to ensure that there is a government will on both sides to support such cooperation); foreign policy and national security considerations; concerns of transparency and non-discrimination among foreign universities with operations in Hungary.

71. As emphasized in the Government Brief (p.50), the new regulations intend to respond to a legitimate public order aim, i.e. to put in place a transparent and non-discriminatory legal framework for operating licences, names, and co-operation modalities for foreign higher education institutions. Moreover, it is justified that the authorities want to fulfil their duty to secure “high level” tertiary education (by filtering “virtual, not real study programs”) and to provide appropriate rules and guarantees with regard to degrees that are issued by foreign universities within the jurisdiction of Hungary.

72. The Venice Commission is fully aware that all countries of the European Higher Education Area (EHEA) regulate the system of higher education within their jurisdiction. Most countries have reformed their higher education laws to cope with the emergence of the Bologna Process, new forms of quality assurance and the rise of private providers, including those foreign providers which wish to establish physical facilities in the country. The aim pursued with such laws is indeed to protect students from exploitation by private citizens and corporations, to remove possibilities of fraud and to secure that the quality of the education provided at least matches that of public providers. The Commission acknowledges that these are legitimate concerns and that Hungary has the right to address these concerns.

73. The Venice Commission also points out that, in the light of the autonomy of the European states in the field of education, and in the absence of clear unified European norms or models in the field⁵⁴, there is a broad margin of appreciation of the Hungarian state to establish, and periodically review, the most appropriate legal regime applicable to foreign universities on its territory, and to seek to improve this regime. Also, it belongs to the Hungarian authorities to assess when and whether this regime needs to be updated and adapted to new challenges, in line with the democratic standards of the rule of law and with due observance of fundamental rights and freedoms (see above comments under the Section “A new regulatory framework for foreign universities“, paras. 56 ff.).

74. Yet, the intended goals - as described in the official discourse - seem rather vague and broad, and have little connection as far as existing universities are concerned, with the actual scope of the new restrictions imposed by the Law. In view of the considerations of a more political and ideological nature that have been invoked to justify the Law and taking into account the wider socio-political context surrounding its adoption, it is doubtful whether the Law responds to a genuine need in respect of universities which are already active in Hungary. Moreover, the Law has not adequately taken into account the consequences for constitutional and treaty rights, and in particular whether the restrictions entailed are the most suitable means to pursue the officially stated aims.

⁵⁴ This is confirmed by the comprehensive list of examples of existing European legal systems and practices in this field, compiled by the Hungarian Government’s experts.

75. The deadlines for compliance with the new requirements are unrealistic. Within six months after the entry into force of the Law, thus before 11 October 2017, a preliminary agreement with the central authorities of a federal state has to be reached. And within eight and a half months after the entry into force - so before 1 January 2018 - an international agreement must be concluded and corresponding teaching/academic activities in the country of seat must have been launched. The severe legal consequences for failing to comply are further aspects of relevance for the proportionality test. In particular, it is of special concern that, as stipulated by the Law, such failure *must* lead to licence-withdrawal and closure of educational institutions.

76. The Venice Commission notes in this respect the position expressed by the Hungarian Rectors' Conference (HRC), in their public Statement prior to the adoption of the Law.⁵⁵ The HRC "*acknowledges the intention of the government to introduce more obvious regulation regarding the Hungarian degree programs of the foreign higher education institutions, and to require law-abiding behaviour based on the current legislation, which is also in the interest of the Hungarian higher education and the youth wishing to continue their studies at the university.*" At the same time, the HRC rightly points out that "*this regulatory requirement must not lead to the closure of institutions pursuing high-quality education and research activities, and the constriction of the international cooperation opportunities of the Hungarian higher education institutions.*" The Commission welcomes the suggestion of the HRC that the expected deadline of the compliance with the law should be adjusted to allow all the involved actors sufficient time to fulfil the conditions.

Legal certainty issues. Foreseeability and legitimate expectations

77. In particular, it would seem necessary and justified for the Law to make a clear distinction between already established institutions, with long-time operations under the past legal framework until April 2017, and foreign universities seeking in the future to open a branch or develop educational programmes in Hungary. While new regulations may legitimately be imposed to future subjects, applying more stringent rules, without solid grounds, to those having lawfully operated for many years within the existing system appears problematic.

78. The abrupt change of the framework not only raises issues of arbitrariness and proportionality, but by radically altering it also interferes with the right of already established institutions to rely on the existing set of rules and organise their continued operation⁵⁶, and thus fails to satisfy the principles of foreseeability and legitimate expectations⁵⁷, as part of the general principle of legal certainty.⁵⁸ As stated in the Venice Commission Checklist on the Rule of Law, "*[I]aw can be changed, but with public debate and notice, and without adversely affecting legitimate expectations.*"⁵⁹

79. The Hungarian Government, in a Note⁶⁰ sent to the Venice Commission on 18 July 2017, indeed endorsed the view that the new rules introduced by the Law, applying to existing foreign institutions of tertiary education, should only impose *feasible conditions, and should*

⁵⁵ <http://www.mrk.hu/en/2017/04/03/statement-of-the-hungarian-rectors-conference/>.

⁵⁶ See *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Applications nos 70945/11, 23611/12, 26998/12 et al., Final 8 September 2014; *Vékony v. Hungary*, Application no. 65681/13, 13 January 2015; *Bélané Nagy v. Hungary*, Application no. 53080/13 ([GC], 13 December 2016).

⁵⁷ See Venice Commission Checklist on the Rule of Law, para. 61.

⁵⁸ The ECtHR has consistently stated that the principle of lawfulness also implies that legal rules are sufficiently accessible, precise and foreseeable (*Sunday Times v. The United Kingdom (no.1)*, Application no. 6538/74, 26 April 1979, § 49; more recently, *Beyeler v. Italy*, Application no 33202/96, 5 January 2000, § 109; *Broniowski v. Poland* [GC], Application no. 31443/96, 22 June 2006, § 147).

⁵⁹ See Venice Commission Checklist on the Rule of Law, para 60.

⁶⁰ Titled: *Why is it necessary to apply the condition related to the establishment of an international government of an international agreement and educational activity in the state of accreditation to existing institutions?*

provide for enough time for the transition. Regarded in this light, it is difficult to understand the position of the Government that the new requirements formulate attainable conditions, providing for sufficient time. According to the Government, the new Article 115(7), demanding that the condition of a preliminary agreement requirement is fulfilled on 11 October 2017, and the requirements of an international agreement and a home campus are met on 1 January 2018, provides enough time for the necessary transition, because Articles 8(2) and 76(3) in force before the adoption of the Law provided that the Educational Authority shall review the operating licence of each tertiary education institution every five years, before 1 September 2017.

80. This is not easy to understand. The mere fact that there is an existing competence of the Education Authority to review the licence of an institution every five years does not imply that a fundamental change of the relevant legal requirements, just half a year before the end of this five years-period (while the Education Authority has already made its assessment, in autumn 2016), provides established institutions with sufficient time to adapt themselves. It has to be stressed that Article 115(7) until April 2017 merely stated that the Educational Authority shall review the operating authorisations (licences) of higher education institutions having international status pursuant to the 2005 HEA, and shall initiate through the Minister “the revocation of state *recognition if the operating conditions do not comply with **this Act.***” The Government presumes that legislative changes of the framework in the 5 years period, at whatever time (even within the last months of that period) and with whatever content (even very substantial new restrictions) can be applied to higher education institutions, because the new rules by definition impose feasible conditions, providing for enough time to implement them. That presumption is incompatible with legal certainty.

81. Furthermore, reference has been made, as a reason to justify the Law, to irregularities found, during the 5-yearly review in 2016, in respect of most of the foreign universities registered in Hungary: only one was free of irregularities (from the conclusions of the 2016 Report⁶¹, it appears that most of the problems found were of a minor administrative nature). One may question however whether the new requirements are actually necessary to prevent or mitigate the deficiencies found, instead of addressing these through less intrusive means available under the existing framework.

B. Specific remarks. New requirements introduced by the Law

1. To conclude an international agreement

82. Under new Article 76(1)(a) introduced by the Law, a prior international agreement between Hungary and the seat-country will need to be concluded, recognized by the two parties as of binding application, to provide an “in-principle” support for the operation of the foreign university in Hungary. Universities originated in another EEA state are exempted from this requirement. While under the previous rules (2011 HEA article 76 (6)) conclusion of an international agreement was optional (as a viable way for a foreign university to be established and operate in Hungary, and to be registered *ex officio* by the Educational Authority), it has become an obligatory condition under the amended rules.

83. The Law (article 115 (7)) further stipulates that if the foreign partner is a state in a federation, a preliminary agreement of its federal government allowing the state to conclude the required international agreement is needed by 11 October 2017. In the case of the American universities concerned, this means that a prior agreement has to be signed by the Federal Government of the United States of America. Subsequently, a binding international agreement

⁶¹ See 2016 *Report for the Government on the operation of foreign institutions of higher education in Hungary* (see Footnote 5 above).

between the state concerned and the Hungarian government needs to be concluded before January 2018. It is hard to conceive how these deadlines can be met. Furthermore, their fulfilment is not dependent on objective factors, and seems to depend solely on the discretion of the governments concerned.

84. This new requirement has very serious implications regarding the universities' future operation in Hungary.

85. First, if the condition in the Law is interpreted in a strict manner, for the American universities operating in Hungary⁶² it cannot be met. Since the Federal Government of the USA has no competence in the field of education, it also lacks the competence to enter into a preliminary agreement authorising the New York authorities to conclude the required agreement. The New York authorities are autonomous, and do not need such an authorisation.

86. Furthermore, this new requirement implies that the Hungarian government (or Parliament), by refusing to conclude the international agreement, can prevent the operation of the respective universities in Hungary - including an institution such as the CEU NY, which has operated lawfully in the country for over 25 years - without any obligation to justify the need⁶³ to act this way or its proportionality.

87. According to the official explanations, it is important for the Hungarian authorities to be assured that there is, on both sides, clear support to the operations of a foreign university in Hungary, as well as, formalized in an international agreement, clear responsibilities and guarantees for its lawful operation. Further considerations of international cooperation in higher education and the realization of foreign policy aims and national security have been mentioned.⁶⁴

88. Foreign policy and national security concerns, as well as the Hungarian authorities' effort to ensure clearer rules, guarantees and transparency as to the establishment and operations of foreign universities in Hungary, may be legitimate aims. International and bilateral co-operation on educational matters constitutes a useful way to achieve these goals and could be strengthened. It is questionable however, in the light of the principle of university autonomy, whether such co-operation should go so far as to making the operation of private education institutions, as well as the termination of their operation, entirely dependent on political decisions which may sometimes be influenced by considerations that are unrelated to academic interests. One may question also the added value of the required agreement in terms of quality assurance, taking into account the additional conditions related to the accreditation and state-recognition, in its country of seat, of the university and its educational programmes.

89. While a prior international agreement may legitimately be required for a new university wishing to open branches in Hungary, it seems difficult to justify its necessity and usefulness for already operating universities. This is even more difficult in the specific case of the CEU NY, in view of the clear support already been given to it by the two governments concerned in the first years of its operation, more than twenty years ago (see the joint *Declaration* of support to the CEU signed in April 2004 by the Government of Hungary and the Governor of the State of New York). Since none of the irregularities found in 2016 appear to require an international agreement in order to be remedied, the restriction, in addition to being unjustified, also seems disproportionate.

⁶² While Malaysia is also a federal country, the issue of the lack of competence of the central authorities does not seem to arise there.

⁶³ See Rule of Law Checklist, para 65 ("it is contrary to the Rule of Law for executive discretion to be unfettered power. Consequently, the law must indicate the scope of any such discretion, to protect against arbitrariness").

⁶⁴ See *General explanatory memorandum of the Government concerning the Law*, sent to the Rapporteurs on 18 July 2017.

90. Moreover, for universities currently operating in Hungary, based on rules which have been in place and accepted for more than twenty years, this requirement raises clear issues with regard to legal certainty, notably in the light of the principle of legitimate expectations (cf. para. 78).

91. The provision in the Law requiring an international agreement (new Article 76(1)(a)) also seems to pose problems of legal clarity (and thus foreseeability of the Law): during the exchanges held in Budapest, differing views have been expressed as to whether a binding treaty or a non-binding agreement was required, and which authorities would need to approve it. For instance, it was unclear whether parliamentary approval is needed.

92. In terms of implementation measures, one can only welcome the first steps taken by the Hungarian Government with a view to negotiating and concluding, as soon as possible, the agreements required to enable continued operation of the non-EEA universities. First, it is noted that a governmental experts' working group has been established for consultations with the concerned universities prior to the envisaged negotiations. Also, as indicated by Government officials, talks have already been initiated with the various countries for 6 universities (3 in the USA), with positive signals for the upcoming negotiations.

93. As for the US-based universities, the difficulty due to the lack of competence in educational matters on US federal level seems - as it results from the discussions held with the Hungarian authorities - to have been overcome. A first exploratory discussion has been held and an exchange of letters with the US Secretary of State for Education have shown openness on both sides towards a solution enabling these universities - including the CEU NY- a continued operation in Budapest under the new conditions set out by the Law. It is significant that the Hungarian Ministry of Foreign Affairs and Trade seems to interpret a letter received (on 15 June 2017) from the US Secretary of Education as in effect complying with the need for a preliminary agreement with the US federal authorities. Also, the Venice Commission Rapporteurs were pleased to learn that, on 14 July 2017, an agreement was signed between the Government of Hungary and the State of Maryland on cooperation in the field of higher education, which ensures the continued operation of the McDaniel College's Budapest Campus (Western Maryland College) under the amended HEA. As indicated by the Hungarian authorities, the agreement - the first of this kind - stipulates that the college must award degrees to its students in Budapest as a US-accredited institution. The Hungarian authorities also indicated that they "*will continue the negotiations with the states of New York and Massachusetts in the same spirit*".

94. This is encouraging information, which needs to be further confirmed and consolidated in the framework of the forthcoming negotiations. In view of the legal complications and difficulties raised by the new requirement, a constructive and flexible approach, including in terms of implementation deadlines, is essential for a successful output of the ongoing negotiations and ultimately, for allowing the universities concerned to operate in accordance with the new rules.

2. To provide higher education in the country of origin

95. New Article 76 (1) (b) of the Law stipulates that, to be permitted to operate in Hungary, a foreign higher education institution will have to be "*qualified as an institution of tertiary education recognized by the state, operating in the country of its seat and actually performing tertiary education there*".

96. The obligation set out in the second part of the provision not only seems imprecise, but also appears to be extremely difficult to fulfil within such a short time (less than nine months after the promulgation of the Law).

97. First, the sentence “*operating in the country of its seat and actually performing tertiary education there*”, is open to various interpretations. Whether it would be required of the foreign university to establish physical facilities in the country of its seat or, alternatively, to offer graduate programmes through distance learning and/or joint degrees with locally licensed institutions is unclear.

98. Second, apart from the obvious costs and practical difficulties of establishing an institution/a campus in the country of seat, depending on national rules and regulations, specific administrative and or even legislative arrangements may be required, which would be hardly possible to achieve within the deadlines established by the law.

99. In practice, the CEU NY, which apparently is the only university which is affected by this new requirement - since the other universities have a campus in their country of origin -, would need to provide education in the US with a US campus running by 1 January 2018. It is self-evident that this task is impossible to fulfil.

100. Like a number of other US operating universities abroad,⁶⁵ including some well-known universities such as the American University in Cairo or the American University in Beirut, CEU NY does not have a campus in the US and is not required to have one under US law. Although it is possible to envisage an interpretation of the Law as merely requiring some teaching and/or research activity to take place in the US, through an association with an existing institution, it is not clear that this is the intention of the Hungarian Government and Parliament. Anyhow, even establishing serious joint programmes would take substantial time.

101. At the same time, there appears to be no objective reason to impose an obligation on a foreign university having its programmes already being operated in Hungary to have a “campus” in its state of seat. The accreditation in the state of origin and the fact that the education it provides needs to be considered, in that state, as state-recognized education, should in principle suffice to assure the Hungarian authorities of the quality of the teaching provided. In particular, it would be difficult to envisage this argument for a highly reputed institution such as the CEU NY, which, as already mentioned, was accredited, by the same agency that accredited some of the most prestigious universities (see paragraph 25 above). The CEU NY has operated on the current basis since it was founded over 25 years ago, not being confronted with serious objections until the drafting and adoption of the new Law. For a university which provides for 25 years quality education in Hungary, the requirement that it should provide education also in its country of origin cannot be justified by the need to ensure the quality of its education.

102. In the absence of serious objective grounds to justify this requirement, which in fact probably applies to one single university out of all foreign universities covered by the Law, it can be questioned from the point of view of its arbitrary, disproportionate and potentially discriminatory nature, and may be qualified as an infringement of the prohibition of discrimination in Article 14 of, and the Protocol 12 to the ECHR⁶⁶ (see also paragraphs 39-42 above on the relevance of Article 2 Protocol 1 ECHR and articles 10 and 11 ECHR). In view of its unclear wording and taking into account the radical change that it introduces to the existing

⁶⁵ The rapporteurs have been provided with a list of over 20 American universities operating abroad without having a campus in the US.

⁶⁶ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms was signed by Hungary on 4/11/2000, but not ratified.

rules, it also raises issues of legal certainty and foreseeability. In the view of the Venice Commission, existing universities should be exempt from this requirement.

103. Should this requirement nevertheless be maintained, it would be important to introduce flexibility with regard to the timeframe and the practical arrangements required for its implementation. From this perspective, it is positive that, as indicated in the Government Brief⁶⁷ (p. 50), “[t]he framework of operating in the state of accreditation - including circumstances and conditions of education - is not regulated in the modification. It follows that there can be other courses offered in that state with different staffing and resources”.

3. Not to use identical names

104. A further requirement in the Law - see amended Article 9, new para (2)(a) - relates to confusing or misleading names. “*The name of the institution of tertiary education shall be considered misleading or confusing if the name of the institution in Hungarian or in a foreign language and the name of any other institution of tertiary education registered with the Educational Authority are identical.*”

105. According to the information provided to the Venice Commission, the amendment incorporated legislation already existing regarding the use of names at the level of a Government Decree (No.) 87/2015 (IV. 9) and completed it with the requirement to prevent the interchangeability of the Hungarian and foreign names of institutions of higher education.⁶⁸ Also, it was explained to the Venice Commission delegation that the goal pursued with the new requirement was not to ask for a change of the name, but rather for a better identification of the universities in question and their distinct legal entities, i.e. to ensure that the foreign university has a different name from that of a Hungarian registered university and to avoid confusion and “false impression” (as in the case of the CEU NY/KEE). More generally, in the view of the Hungarian authorities, “[l]egal rules both on the operation and the use of names of foreign higher education institutions serve the protection of the public order”.⁶⁹

106. As a general principle, there is no argument about avoiding misleading or confusing names as a form of consumer protection.⁷⁰ This seems sensible where there are two or more otherwise legitimate separate competing institutions, although the justification with regard to institutions that have already been in operation for a long time is questionable.

107. Once again, out of the 24 foreign universities currently operating in Hungary, CEU NY (and its Hungarian KEE partner) seems to be the only university that will seriously be affected by this requirement. To comply with the Law, either KEE or CEU NY would have to change its name, which is obviously detrimental in terms of the image of the institution, internationally well-known as a “brand” of quality in higher education. At the same time, the arguments put forward to justify this requirement are questionable, as there does not appear to be any risk to anybody being misled or confused about CEU NY and its Hungarian equivalent. It is commonly agreed that, as a matter of fact, there is a fundamental identity between these institutions, albeit registered and accredited separately. One may also note that, while in strict legal terms, CEU was permitted to operate with the name of CEU NY (see Resolution 2123 of 18 April 2005, amending the 1995 resolution with respect to the particular issue of the name), the name of

⁶⁷ See Footnote 5 above.

⁶⁸ Government Brief, p. 52

⁶⁹ Government Brief, p. 51

⁷⁰ In the UK, for example, section 77(3) of the Further and Higher Education Act 1992 specifically refers to avoidance of confusing names, an issue now to be determined by the Office for Students under the Higher Education and Research Act 2017. It arose in practice where two English universities, Thames Valley and Brunel, wished to have ‘West London’ in their title. Eventually Thames Valley University was renamed ‘University of West London’ and Brunel became ‘Brunel University London’.

“CEU” has been and continues to be used to designate the CEU NY, internationally but also domestically: by practically all interlocutors of the Venice Commission in Hungary, in official documents (these include the 2016 Report on foreign universities⁷¹), as well as in relevant public discourse.

108. From a more general perspective, the insertion of a phrase excluding established institutions from this requirement would be advisable. Only new institutions or those wishing to change their names would then be covered. Otherwise, as emphasised by many commentators, this additional requirement contributes to the general impression that the recent amendments are aimed at one specific university.

4. New restrictions on university programmes - cooperation

109. Under Article 77(4) of the 2011 HEA, Hungarian universities were entitled to deliver higher education programmes of foreign universities (including those based in an OECD member state), recognized by the state of their seat, subject to a prior licence-agreement between the two institutions. Students having completed the programme operated for the foreign university by the Hungarian university were awarded the foreign diploma for the concerned programme. With the amendments introduced by the Law, such cooperation will no longer be possible with non-EEA member OECD countries.⁷²

110. When referring to the principles and targets to be achieved with the new regulations, the Hungarian authorities emphasize that “[w]ithout discrimination on any ground, all institutions of tertiary education currently operating in Hungary must fulfil the same requirements if offering study programs resulting in the issuance of certificates in the territory of Hungary”.⁷³ From this perspective, it appears difficult to find objective grounds to deprive universities based in a non-EEA OECD member state, in particular those already engaged in licence-agreements, of this form of academic co-operation.

111. Should this amendment be linked to one of the irregularities found in relation to operating foreign universities, no longer allowing their access to such cooperation seems disproportionate, as other means are undoubtedly available to remedy existing shortcomings. In addition, this amendment not only interferes with the academic freedom and teaching, but will affect students willing to enrol in the concerned programmes.

112. As far as the CEU is concerned, the amendment will affect both the current structure of cooperation between CEU NY and KEE and the students willing to enrol, in the future, in the so-called “licence-programmes” offered by the CEU NY.

113. It is recommended that universities already operating in Hungary from non-EEA OECD member countries be enabled to continue entering into licence-cooperation agreements with Hungarian universities.

5. Work permit requirement

114. Under Article 104(7) clause (ba) of 2011 HEA, third country (non-EEA) academic personnel were entitled to conduct educational, scientific research and artistic activities in a higher education institution maintained by a Hungarian foundation without a work permit. The exemption was applicable to higher education institutions “*the operation of which is ensured by*

⁷¹ See footnote 5 above.

⁷² As indicated by the Hungarian authorities, the possibility of joint training in Hungary by a Hungarian and a foreign university is still available, under Sections 78(3)-(5) HEA.

⁷³ Government Brief, p. 50

*the maintainers referred to in point c) and d) of Article 7(1) of the Act CXXXIX of 2005 on higher education.*⁷⁴ KEE, which has the Central European University Foundation Budapest as its maintainer, since it employs also CEU NY teaching staff, was one of the (two) beneficiaries of the exception⁷⁵, as well as, indirectly, the CEU itself.

115. The 2017 Law repeals this exemption. In fact, this means that, if work permits will not be granted, the operation and academic freedom (including the freedom to select appropriate academic staff) of foreign institutions of higher education which employ non-EEA nationals will seriously be affected.

116. It is important to recall, on the one hand, that the requirement for work permits for non-EEA citizens is a common feature of European immigration and labour laws. In the discussions held by the Venice Commission delegation with the representatives of the Rectors' Conference it was confirmed that publicly-funded universities must obtain work visas for non-EEA citizens.

117. On the other hand, one cannot fail to observe here, too, that the amendment will have a major impact on the CEU NY/KEE, which reportedly is the only higher education institution with a high percentage of international, non-EEA, staff. The input from distinguished international professors contributes significantly to the international standing of this academic community. While it does not appear to respond to an objective need, the amendment will enable the Hungarian authorities to have a decisive role to play in the selection of KEE (but also CEU NY) academic staff in as far as they are non-EEA nationals.

118. Should the amendment be maintained, it would be essential - also from the perspective of the academic freedom as protected in Article X.3 of the Hungarian Fundamental Law - to ensure that all applications would be treated fairly on an individual basis, and not be selected on any discriminatory or arbitrary ground (see anti-discrimination guarantees in Article XV (2) of the Fundamental Law). Furthermore, the new rule should not be applied in a manner which would jeopardise the quality and international character of the education provided by CEU.

IV. Conclusion

119. The Venice Commission has analysed the Hungarian Law – Act XXV of 4 April 2017 - amending the 2011 Act on Higher Education - in the light of European and international fundamental rights standards and rule of law principles. The Law introduces stringent requirements for existing foreign institutions of higher education already operating in Hungary for many years.

120. A more transparent and inclusive legislative procedure, offering appropriate opportunities for consultations with all the parties concerned would have been beneficial to the Law and its democratic legitimacy, and could have contributed to identifying the most suitable ways to address existing concerns regarding the legal status and activities of foreign universities in Hungary.

⁷⁴ The Concerned maintainers are as follows:

“c) by a business organisation with registered seat in the territory of the Republic of Hungary [paragraph c) of Section 685 of Act IV of 1959 on the Civil Code (hereinafter the ‘Civil Code’)],
d) by a foundation or public foundation registered in the Republic of Hungary.”

⁷⁵ According to the information available to the Venice Commission, there is only one further higher education institution having a Hungarian foundation as a maintainer - Andrassy Gyula Deutschesorachige Universitat Budapest, which academic staff can enjoy the freedom of movement under the EU law.

121. The Commission acknowledges that, in the absence of unified European norms or models in the field, it belongs to the Hungarian state to establish, and periodically review, the most appropriate regulatory framework applicable to foreign universities on its territory, and to seek to improve this framework. Also, it is up to the Hungarian authorities to assess when and whether this framework needs to be updated and adapted to new challenges. However, that should remain in line with the democratic standards of the rule of law, with due observance of fundamental rights and freedoms.

122. Overall, the new regulatory framework introduced by the Law may legitimately be applied to foreign universities which are not yet active in the Hungary. The requirements to be fulfilled by those foreign universities seeking to provide education in Hungary are in line with existing practices in other European countries and do not appear to contradict applicable norms. They may be regarded as serving the purpose of ensuring increased clarity and transparency as well as the quality of higher education, in line with the applicable Council of Europe standards.

123. This being said, 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. These universities and their students are protected by domestic and international rules on academic freedom, the freedom of expression and assembly and the right to and freedom of education.

124. Concerning these universities, the new requirements introduced by the Law are problematic and the Commission recommends to the Hungarian authorities:

- to exempt operating universities from the requirement of a prior international agreement with their home state;
- to exempt operating universities from the obligation that the foreign university should provide education in the country of seat;
- to remove the prohibition, which appears unjustified, on the use of identical names in different languages - affecting in practice one particular academic community, where there is no risk of confusion;
- to remove new restrictions (applicable to universities from non-EEA OECD member countries) on programme-cooperation between operating foreign universities and Hungarian partner universities, which appear unjustified if applied to already existing universities from OECD member states;
- to ensure that new rules on work permit requirement do not disproportionately affect academic freedom and are applied in a non-discriminatory and flexible manner, without jeopardising the quality and international character of education already provided by existing universities.

125. The Venice Commission remains at the disposal of the Hungarian authorities for any further assistance they may need.