

**SUMMARY
OF THE LEGAL ANALYSIS OF THE
AMENDMENTS TO HUNGARY'S ACT ON NATIONAL HIGHER EDUCATION**

Bill T/ 14686 (hereinafter referred to as "Bill") aims at amending the national higher education act (Act CCIV of 2011 on National Higher Education, "HEA") was accepted by the Hungarian Parliament on April 4, 2017. CEU is challenging the constitutionality of the amendment to the HEA on the following grounds.

The way the new legislation was adopted is contrary to Section B) (1) of the Basic Law of Hungary, and consequently, the entire law is contrary to the Basic Law. Furthermore, Sections 1., 2. and 7. of the Bill are contrary to Section X (1) of the Basic Law on freedom of academic research, studies and education. They are contrary to Section XI of the Basic Law on the right to culture. They are also contrary to Section XV (2) of the Basic Law on the prohibition of discrimination. Section 4 of the Bill is also contrary to Section B) (1) of the Basic Law of Hungary.

1. Violation of the rules on the legislative process

According to Section B) (1) of the Basic Law of Hungary, Hungary is an independent and democratic State governed by the rule of law. According to the practice of the Hungarian Constitutional Court, violating the procedural rules applicable to decision-making results in the invalidity of the decision.

The law was adopted by Parliament in an exceptional procedure according to Section 61 of the Parliament's Rules of Procedure. This meant that the Parliament adopted the Bill submitted on March 28, 2017 on April 4, 2017 in a way that no more than 24 hours passed between the starting time of the Parliamentary debate of the Bill and its adoption. The Parliament has finally adopted the law without having consulted in advance the organizations entitled to express their opinion (the Hungarian Academy of Sciences and the Hungarian rectors' Conference) on the Bill. Neither prior negotiations nor Parliamentary discussions took place.

The Bill also violated provisions of Act CXXX of 2010 on Law-Making (hereinafter as "LMA") and of the requirements of Act CXXXI of 2010 on social participation in the preparation of legislation (hereinafter as the "PPA"), since no impact assessment was made, and the Bill was not preceded by social consultation.

2. Violation of the freedom of academic research, studies and education

Section X (1) of the Basic Law provides *„Hungary shall protect the freedom of scientific research and artistic expression, as well as the freedom of learning and - within the framework defined by law - teaching so as to attain the highest level of knowledge possible.”* Section XI (1) of the Basic Law guarantees the right to education which is ensured by Hungary *“through the dissemination of and by providing general access to, community culture, by providing free and compulsory primary schooling, free and universally accessible secondary education, and higher education made available to all on the basis of their ability, as well as by providing financial support as laid down in an act of Parliament to those receiving education”,* according to Section XI (2) of the Basic Law.

The independence of higher education institutions is also ensured by the second sentence of paragraph 3 of Section X of the Basic law, as follows: *„As regards the contents and methods of research and teaching, institutions of higher education shall have sovereignty, whereas their organizational structure shall be governed by an act of Parliament.”* This provision of the Basic Law recognizes the scientific and educational

autonomy of higher education institutions and authorizes the Hungarian Parliament to determine uniformly applicable organizational rules that respect the freedom of research and education. These organizational rules may even limit scientific and educational autonomy, however, such limitation may only serve the purpose of protecting another basic right or constitutional value – most importantly, to protect the rights and interests of students – and cannot be disproportionate.

The Basic Law guarantees not only the establishment of independent higher education institutions, but also excludes the possibility of abolishing higher education institutions discretionally or undermining their operation. It is not compatible with the freedom to scientific life and teaching as well as with the freedom to education if the existence or operation of a higher education institution depends on the discretionary decision of the maintainer [Res. Const. Court No. 41/2005. (X. 27.), ABH 2005, 459, 483]. It is possible, of course, that a law regulates the conditions of operation of higher education institutions, however, it cannot give a discretionary right to the Government or to the Minister related to the existence or Hungarian operation of higher education institutions.

3. New requirement to conclude a binding international agreement

Point a) of Section 76 (1) of the HEA determined by Section 2 of the Bill, together with Section 77 (2) determined by Section 3 of the Bill leads to a result where higher education institutions having a seat outside the territory of states of the European Economic Area can operate in Hungary depending on the decision of the Hungarian Government. Based on the cited provisions, in order to operate, it is necessary for higher education institutions to have an international agreement in support of their Hungarian operation. According to Section 5 (1) and (2) of Act L of 2005 on the procedures related to international agreements, the prime minister gives authorization to conclude an international agreement on the basis of the proposal of the minister and the minister for foreign affairs, while authorization to determine the final wording of the international agreement shall be given by the Government – in exceptional cases, between the two sessions of the Government, by the prime minister. Therefore, the Government may, at its own discretion, without any legal or substantive limitations, decide not to enter into an international agreement on the Hungarian operation of the foreign higher education institution, and thus, exclude unilaterally the Hungarian operation of a foreign higher education institution. Therefore, the Hungarian Government may also decide to close an existing institution. To this end, the Government does not need to refer to the protection of any right or constitutional value, moreover, it does not need to justify the proportionality of the measure or the lack of any such measure. According to the above, this is clearly contradictory to Sections X and XI of the Basic Law.

4. New requirement for foreign higher education institutions to provide higher education programs in their country of origin

Point b) of Section 76 (1) of the HEA determined by Section 2 of the Bill disproportionately limits the freedom of academic life and teaching as well as the right to education, by requiring from foreign higher education institutions to actually provide higher education programs in their country of origin. It may not be considered as of particular concern in itself for the legislator to determine quality assurance rules related to the Hungarian operation of foreign higher education institutions for the protection of the students' rights and interests. However, for quality assurance, it is sufficient that the foreign higher education institution fully complies with the accreditation rules of its country of origin, as required by Point c) of Section 76 (1) of the HEA determined by Section 2 of the Bill - and currently by Section 76 (1) of the HEA. If the competent authorities of the country of origin consider, according to their own rules, the program provided on the territory of Hungary as a state recognized program, no aspect of quality

assurance justifies to examine, whether the higher education institution provides this same program in its country of origin.

It is particularly anomalous and disproportionate to apply without distinction Point b) of Section 76 (1) of the HEA determined by Section 2 of the Bill in case of higher education institutions established in the United States. In particular, Central European University was accredited by the same organization that accredited, among others, Columbia University. This accreditation provides sufficient guarantee for the quality of the programs, and therefore, Point b) of Section 76 (1) of the HEA determined by Section 2 of the Bill unnecessarily and disproportionately limits CEU's right to operation ensured by the Basic Law.

5. New provision terminating the current structure of cooperation between the US (CEU) and the Hungarian university (Közép-európai Egyetem)

The modification of Section 77 (4) of the HEA proposed by Section 7 of the Bill also limits the academic freedom and teaching disproportionately and in a discriminative manner. According to this provision, the possibility of the so-called "license-programs" will be terminated for higher education institutions having their seat in an OECD member state. In case of these programs, the foreign higher education institution offers its programs recognized by the foreign state on the basis of an agreement with a Hungarian higher education institution without having a Hungarian establishment, by entrusting the Hungarian institution to organize part of its programs (licensing).

Furthermore, the modification is also obviously discriminative, since it has no other purpose than to make it impossible for Közép-európai Egyetem to take over programs of Central European University in the form of license-education, which it will not be able to provide on the basis of the new Section 76 of the HEA.

6. New provision requiring CEU to change its name

Section 9 (2a) and (2b) of the HEA determined by Section 1 of the Bill infringe non-discrimination guaranteed by Section XV (2) of the Basic Law. The only goal of these provisions is to make the parallel operation of the Hungary-based Közép-európai Egyetem and the New York-based Central European University impossible. Obviously, it is a discriminatory provision tailored to specific institutions which therefore, breaches Section XV (2) of the Basic Law.

7. Insufficient time ensured by the law to prepare for compliance with its new provisions

The law does not ensure sufficient time for higher education institutions to comply with the newly adopted provisions. In general, the new provisions has to be complied with before January 1, 2018, with the following two exceptions: the deadline for concluding a binding international agreement between the Government of the US and the Hungarian Government is six months calculated from the day following its publication. The agreement between the State of New York and the Hungarian Government has to be concluded until 1 January, 2018.

A further legal uncertainty is caused by the fact that the new conditions for operation have to be complied with before January 1, 2018 or the Educational Authority shall withdraw the operational license of the university.