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Amicus curiae brief on academic freedom

Your Excellency,

I take the liberty to submit an *amicus curiae* brief in the case concerning the amendment of the 2011 Higher Education Act concerning the status of foreign private universities, and the Central European University in particular (II/01036/2017).

The *amicus curiae* brief focusses on the constitutional framework of freedom of science, research and teaching under the German Basic Law (*Grundgesetz*) concretized by the jurisprudence of the Federal Constitutional Court. The aim of this brief is to possibly assist the Hungarian Constitutional Court in its difficult task of interpreting the Hungarian Fundamental Law by providing comparative insight, knowing that the Hungarian Constitutional Court carefully and critically considers the law of other jurisdictions – as it has rightly become standard for most of the important courts of the world.

I am holding the Chair of Philosophy and Theory of Law, Legal Sociology and International Public Law at the Faculty of Law, University of Zurich, Switzerland. I have received my legal training in Germany. An important object of my research is comparative constitutional law. Since 2005 I have the great pleasure to serve as a Recurrent Visiting Professor for the Central European University. I teach at the Central European University comparative constitutional law, international law and legal philosophy. I feel therefore well acquainted with the academic work of the Central European University and the political context in which this case is situated.

As a member of the Executive Committee of the *International Association of Philosophy of Law and Social Philosophy*, the largest in the field, I and colleague of mine, Prof. Taekema, hosted this year a panel on Academic Freedom during the World Congress of the association in Lisbon. It received very much attention. There is worldwide concern that academic freedom is currently under very substantial political pressure. The treatment of the Central European University is for scholars around the world a paradigm example. That such concerns have arisen even in Europe is particularly worrisome because European states have been strongholds of democratic constitutional principles in the past. It is my firm belief that any attack on academic freedom dangerously undermines democracy and the rule of law based on fundamental rights and – ultimately – the respect for the dignity of human beings.

Academic freedom has been won after very long and difficult struggles against powerful forces over the last few centuries. It is a hallmark of enlightened modernity. An attack on academic freedom

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anywhere is felt around the world given the densely interwoven field of scientific exchange and cooperation. I therefore write in the hope to contribute with the brief – if only modestly – to the analysis of the complex legal questions the Constitutional Court has to answer in this case.

I. Freedom to science, research and teaching under the Basic Law – the general framework

a) Freedom of science, research and teaching and its constitutional context

Art. 5 Sec. 3 sentence 1 of the German Basic Law establishes freedom of science, research and teaching in the framework of other communicative freedoms, namely every person's freedom of opinion and freedom to inform himself, freedom of press and broadcasting, the prohibition of censorship and freedom of art.

Art. 5 Basic Law reads:

Article 5 [Freedom of expression, arts and sciences]

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

Freedom of science, research and teaching is thus regulated in the context of some of the most fundamental freedoms at the core of the modern constitutional project.

b) Freedom of science, research and teaching – individual right and objective foundational constitutional principle

Freedom of science, research and teaching is regarded as a fundamental right the elements of which are intrinsically linked. Research is the precondition of teaching if teaching is to meet the standards of science.¹ Teaching and the scientific communication that is characteristic and constitutive of scientific learning in turn informs and inspires research.²

The case-law of the German Federal Constitutional Court has determined the scope of the right to freedom of science in a in its essential contours uncontested outline.³ The scope encompasses (1) an individual right of natural and public or private legal persons involved in science and (2) a guarantee of a certain kind of system of institutions serving the "idea of free science".⁴ The German Federal Constitutional court has based the latter dimension on the constitutional concept of an "objective

¹ BVerfGE 35, 79 (113).

² BVerfGE 35, 79 (113).

³ Cf. Britz in: Dreier (ed.), Grundgesetz Kommentar, 3. ed., Art. 5 para 11ff.; Bethge in: Sachs (ed.), Grundgesetz Kommentar, 7. ed., Art. 5 200ff.; Wendt in: v. Münch/Kunig, Grundgesetz Kommentar, 6. ed., para 89ff; Löwer, Freiheit wissenschaftlicher Forschung und Lehre, in: Merten/Papier, Handbuch der Grundrechte, Bd. IV, 2011, § 99. Questions concern the application of this general framework, cf. e.g. Ruffert, Grund und Grenzen der Wissenschaftsfreiheit, VVDStRL 65 (2006), p. 146ff

⁴ BVerfGE 35, 79 (114), initially left open, cf. BVerfGE 15, 256 (264).

order of values" (*objektive Wertordnung*) constituted by fundamental rights that permeates the whole of the legal order of Germany.⁵ The objective order of values serves the purpose to increase the protective effects of individual rights. In particular, even in areas where the legislator enjoys wider constitutional freedoms, the values embodied in fundamental rights prohibit legislative action that runs counter to these principles.⁶

It is standing case law to protect freedom of science not only as an individual right but to underline the central importance of this second dimension of freedom of science, research and teaching. Freedom of science, research and teaching forms an "objective value-determining basic norm regulating the relationship of the state and science, research and teaching".⁷ This central decision about foundational constitutional principles and values includes that a "state that understands itself as a state constituted by culture (*Kulturstaat*) guarantees the idea of free science and its contribution to its realization".⁸ Freedom of science is regarded as a normatively decisive precondition for a social order aspiring to protect a decent level of political and cultural civilisation.

c) Science and society – the purpose of protecting freedom of science

According to standing case law of the Federal Constitutional Court the protection of freedom of science, research and teaching is based on the "key role" of this freedom both for the self-fulfilment of individuals and for the general social development.⁹

As an individual right, it allows persons the unimpeded pursuit of scientific knowledge which is an essential freedom of humans as intrinsically reflective beings. This freedom is linked to their dignity as persons, Art. 1 Basic Law, because it is constitutive of human personhood to research for and gain insight about the world in which human existence is placed.

A well-functioning, creative science is of great importance for contemporary societies. Economic success, the well-being and social stability of human communities depend on successful scientific enquiry. Only a free science can, the Federal Constitutional Court argues, fulfil its crucial social functions.¹⁰ Only this freedom ensures that science is determined by nothing else but the pursuit of truth. The Federal Constitutional Court underlines the inherent rules of scientific enquiry (*Eigengesetzlichkeit der Wissenschaft*) that serve no other end than the pursuit of truth.¹¹ Only under the condition of a freedom of science well-protected against the impact of other influences in the view of the Federal Constitutional Court detrimental to the purposes of science, like considerations of

⁵ BVerfGE 7, 198.

⁶ BVerfGE 35, 79 (114).

⁷ BVerfGE 111, 333, (353): „Art. 5 Abs. 3 Satz 1 GG enthält neben einem individuellen Freiheitsrecht eine objektive, das Verhältnis von Wissenschaft, Forschung und Lehre zum Staat regelnde wertentscheidende Grundsatznorm“, confirming consistent case law and BVerfGE 35, 79 (112).

⁸ BVerfGE 111, 333, (353): „Diese Wertentscheidung schließt das Entstehen des Staates, der sich als Kulturstaat versteht, für die Idee einer freien Wissenschaft und seine Mitwirkung an ihrer Verwirklichung ein“, confirming consistent case law and BVerfGE 35, 79. The importance of this institutional dimension, the role of the state and the role of freedom as constitutive normative principle was underlined in a central text of modern thought about university, science and teaching, W. v. Humboldt, Über die innere und äussere Organisation der höheren wissenschaftlichen Anstalten in Berlin, in: *ibid.*, Werke IV, 2002, p. 255ff, 259.

⁹ BVerfGE 34, 79 (114).

¹⁰ BVerfGE 35, 79 (115f); BVerfGE 111, 333 (354).

¹¹ BVerfGE 35, 79 (112); BVerfGE 111, 333 (354). The term stems from R. Smend, Das Recht der freien Meinungsäußerung, VVDStRL 4 (1928), p. 44ff, 61.

social utility or political expediency, can science contribute to the well-being of a society as it is supposed to do.¹²

A well-functioning scientific system presupposes under the Basic Law in the view of the Federal Constitutional Court the freedom of unimpeded research and in particular the freedom of individual scientists to pursue this research.¹³ Individual liberty and the regulatory and institutional structure of scientific enquiry are interdependent: The framework of institutionalised academic freedom buttresses the individual freedom of scientists; the individual freedom of scientists is the basis of a free science that can achieve the social ends science is intended to serve.

d) The historical background

Freedom of science is a centrepiece of the intellectual emancipation that characterises modernity. It would be wrong, given the complexities of human history, especially if one avoids Eurocentric perspectives, to identify one single point in history as its time of birth. In the European context, however, the intellectual movements of the 16th and 17th century in philosophy, political and legal theory together with the revolution of the outlook of the natural sciences liberated profoundly the human mind. Spinoza formulated famously a thought that had started to permeate the European civilisation and transformed it profoundly: He postulated the right to free enquiry, the *libertas philosophandi*.¹⁴ The central element was the liberation of science from political and religious influences and domination, the protection of the pursuit of truth with no other guidance than reasons and arguments as an individual right. To “answer for the truth of the teachings it is to adopt or even allow”, scientific enquiry “must be conceived as free and subject only to laws given by reason, not by the government”, as Kant succinctly formulated.¹⁵

This right found only slowly its way into law of Germany. It was formulated as a constitutional right in the Constitution of the democratic revolution of 1848 (*Paulskirchenverfassung*), that, however, became the victim of the political restoration.¹⁶

The Constitution of Weimar contained in Art. 142 the freedom of art, science and teaching. This article gained only slowly in the constitutional understanding of the Republic of Weimar its full meaning of a right securing the freedom of scientific enquiry.¹⁷ During the drafting process of the Basic Law the freedom of science was not controversial and readily accepted as a centrepiece of

¹² BVerfGE 47, 327 (370), BVerfGE 111, 333 (354).

¹³ BVerfGE 35, 79 (115f).

¹⁴ Spinoza, *Tractatus Theologico-Politicus* (1670), XX.

¹⁵ I. Kant, *Der Streit der Fakultäten*, Akademie Ausgabe VII, p. 27; translation by M. J. Gregor and R. Anchor, *The Cambridge Edition of the works of Immanuel Kant, Religion and Rational Theology*, A. W. Wood and G. di Giovanni (eds.), 2001, p. 255 (on the philosophical faculty as embodiment of science).

¹⁶ The right was first enacted as part of the law on constitutional rights (1848) and then incorporated in the Constitution as Art. 152: “Die Wissenschaft und Lehre ist frei.” This formulation is the basis of the formulation Art. 5 Sec. 3 sentence 1 Basic Law. Cf. e.g. on the historical development H. Zwirner, *Zum Grundrecht der Gewissensfreiheit*, *Archiv des öffentlichen Rechts* 98 (1973), p. 313ff. The right was also incorporated in the (imposed) Prussian Constitution of 5 December 1948.

¹⁷ A watershed in the debate in 1928 of the Vereinigung der deutschen Staatsrechtslehrer, cf. in particular R. Smend, *Das Recht der freien Meinungsäußerung*, *VVDStRL* 4 (1928), S. 44ff. On the background and the development H. Zwirner, *Zum Grundrecht der Gewissensfreiheit*, *Archiv des öffentlichen Rechts* 98 (1973), p. 313ff, 327ff.



freedom of expression and thought that constitute an autonomous reflective human being and a democratic society.¹⁸

e) The concept of science

The Federal Constitutional Court defines science as follows: Science encompasses all processes, actions and decisions based on intrinsic rules of scientific enquiry in the context of the discovery, interpretation and dissemination of scientific results.¹⁹

According to its case law, any form of scientific work, that can be considered – given its content and form – as a serious, systematic attempt to discover the truth falls within the scope of the freedom of science. This formula has become the standard definition of science in consistent case law of the Federal Constitutional Court.²⁰

f) Limitations

There is no particular limitation clause applicable to the freedom of science, research and teaching. In particular, the limitation clause of Art. 5 Section 2 Basic Law is not applicable to the freedom of science, research and teaching. As a consequence, only limitations derived from other constitutionally protected rights of others and other principles based on constitutional norms are suitable to limit the freedom of science, research and teaching.²¹ According to the Federal German Constitutional Court, the core area of the conduct of science is guaranteed without limitations.²²

II. Elements of protection

a) Individual right

The freedom of science, research and teaching provides protection against any form of interference by the state with the process of the discovery and dissemination of scientific insight.²³ The fundamental right creates a sphere of personal and autonomous responsibility.²⁴ It does not protect any specific form of science.²⁵ The protection does not depend on the correctness of the result of the scientific work, the plausibility of the argumentation or the evidence or the comprehensiveness of the research.²⁶ Only science itself can decide about the quality of science, the Court argues.²⁷ This implies the protection of minority views and outsider or unorthodox scientific opinions.²⁸ This view does not imply, however, that science depends on subjective standards of those people engaged in a particular activity. On the contrary, public bodies and courts have to assess if this activity enjoys the

¹⁸ The proposal not to include an explicit norm on freedom of science because the matter was already sufficiently regulated by freedom of speech met the counter-argument (by v. Mangold), that freedom of science is central to prevent the reoccurrence of a „servitude of science“ (*Knechtung der Wissenschaft*) as under Nazi-rule, Der Parlamentarische Rat 1948 – 1949, Akten und Protokolle, Band 5/I, Ausschluß für Grundsatzfragen, Dritte Sitzung, 21. September 1948, p. 55.

¹⁹ BVerGE 35, 79 (112).

²⁰ BVerGE 35, 79 (113): “[A]lles, was nach Inhalt und Form als ernsthafter, planmäßiger Versuch zur Ermittlung der Wahrheit anzusehen ist.”

²¹ BVerGE 122, 89 (107).

²² BVerGE 35, 79 (112).

²³ BVerGE 35, 79 (113).

²⁴ BVerGE 35, 79 (113), BVerGE 90, 1 (12), BVerGE 111 (354).

²⁵ BVerGE 35, 79 (113).

²⁶ BVerGE 90, 1 (12).

²⁷ BVerGE 90, 1 (12).

²⁸ BVerGE 90, 1 (12).



character of science according to the standards outlined.²⁹ The freedom of science encompasses the choice of research objects, the methods of investigation, the evaluation of results and their communication.³⁰ The freedom of teaching includes, related to scientific conduct as it is, content, methods and the discussion of other scientific opinions.³¹

b) Institutional aspects

The basic commitment of the state to the freedom of science provided by Art. 5 sec. 3 sentence 1 Basic Law to the “idea of free science” has – in the view of Federal German Constitutional Court – distinct institutional consequences. The state has, first, to provide for sufficient infrastructure that enables the conduct of meaningful science.³² In public scientific institutions, the state has a duty to create organisational rules that respect and protect “as much as possible” the freedom of science.³³ Freedom of science thus entitles persons engaged in science to organisational protection³⁴, including a right to participation in resources and organisation.³⁵

Concerning the concrete content of organisational matters, the legislator enjoys considerable discretion.³⁶ Its discretion is limited, however, by the principles protected by the freedom of science to assure that measures are “adequate for science” (*Wissenschaftsadäquanz*).³⁷ The decisive criterion for the constitutionality of organisational rules for universities is that they enable and protect free science.³⁸

These principles were developed and in the case law mainly applied in the context of debates about the regulation of the inner organisation of universities. They generalise, however, to any organisational measures concerning universities.

As far as private universities are concerned, the state has a duty to ensure such standards as far as the public recognition of such institutions is concerned.³⁹ The state is prevented by these standards from creating rules that actually diminish or threaten the academic freedom of such institutions.

c) Personal scope

The freedom of science, research and teaching applies to natural persons. According to Art. 19 sec. 3 Basic Law, the fundamental rights apply to domestic legal persons as well. Precondition is that the situation of such legal persons is comparable to the dangers to this freedom faced by natural persons.⁴⁰

In general, under German constitutional law, legal persons of public law do not enjoy the protection of fundamental rights. There are, however, certain exceptions in particular cases where the purpose of fundamental rights demands the protection of such legal persons as well. Standard examples are

²⁹ BVerGE 90, 1 (12f).

³⁰ BVerGE 35, 79 (113).

³¹ BVerGE 35, 79 (113f).

³² BVerGE 35, 79 (114f), BVerGE 111 (353f).

³³ BVerGE 35, 79 (124), BVerGE 111 (353).

³⁴ BVerGE 35, 79 (116).

³⁵ BVerGE 35, 79 (115), BVerGE 111 (354).

³⁶ BVerGE 35, 79 (120), BVerGE 111 (355).

³⁷ BVerGE 35, 79 (133).

³⁸ BVerGE 35, 79 (117).

³⁹ cf. Britz, in: Dreier (ed.), Grundgesetz-Kommentar, Art. 5 Abs. 3, para 60, 62.

⁴⁰ cf. BVerGE 45, 63 (79): “Grundrechtstypische Gefährdungslage”.

public universities and their academic freedom. This does not imply the guarantee of continued existence for bodies created by public law,⁴¹ but a protection against constitutionally unjustified interference. The Federal Constitutional Court had no occasion yet to clarify whether closure of universities on political grounds would demand scrutiny on grounds of constitutional law even in the case of public universities despite its case law that a public body cannot derive a right to existence from freedom of science.⁴² This seems entirely possible given the sensitivity with which it protects freedom of science. Domestic legal persons of private law are undoubtedly protected in this respect. Acts endangering their existence would form a particularly grave interference with their freedom of science.

III. Concretizing the scope of freedom of science, research and teaching

a) Constitutional heuristics and the case of the CEU

The recent amendment of the Hungarian higher education law and its impact on CEU raises complicated questions of Hungarian, European and International law. As indicated above, the remarks of this *amicus curiae* brief are limited in scope. They concern as a matter of comparative constitutional law the particular legal framework of German constitutional law. The remarks of this brief can therefore obviously not contribute anything to answer the questions arising in these other legal spheres. Nevertheless, it may be useful for concretising the scope of freedom of science, research and teaching under the Basic Law to look at regulations such as are the object of constitutional scrutiny in the case at hand. The purpose of doing this is, to underline it, purely heuristic and in this sense limited. It may still be helpful to illuminate the content of German law considering such concrete examples.

b) Constitutional yardsticks under the Basic Law

The legal regulations discussed include time limits, the requirement of a prior international agreement with a home state of an academic institution, of operation of the institution in the country of seat, regulations of permissible names, the provision that programme-cooperation agreements are not possible for foreign universities based in non-EEA OECD Countries and a revision of exceptions for work permits of academic staff.⁴³ It seems uncontested that these measures concern not only organisational details but put the continuing operation of CEU in Hungary in general into question.

Such measures, taken individually and cumulatively, would infringe upon the scope of freedom of science both in its individual and institutional sense. The measures are directed at or affecting a legal person (or more precisely, directly or indirectly the two legal entities that together make up the CEU), not individual scholars. Not every regulation affecting an academic institution is at the same time engaging individual scientific freedom, e.g. a tax regulation reducing the revenue of a private academic institution without putting into question its existence is not an infringement of the individual freedom of science of a scholar. If the institution as such, however, is severely limited or even endangered in its operation, the individual dimension of freedom of science would be engaged because the existence of the institution is the very precondition of meaningful scientific work of the

⁴¹ BVerfGE 85, 360 (384).

⁴² BVerfGE 85, 360 (384).

⁴³ Venice Commission, Preliminary Opinion on Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education, Opinion No. 891/2017; from hereon in: Venice Commission, Opinion N. 17 – 20.



individual scholar.⁴⁴ If an individual scientist would be the target of restrictions because of her affiliation with the CEU, this would be a clear case of an infringement with freedom of science. The same must hold, if the whole institution is forced to end its operations, thus depriving the affiliated scholar of the possibility to conduct meaningful scientific enquiry.

As indicated, under German constitutional law, domestic legal persons are protected by fundamental rights, if the right is applicable because of its nature to legal persons. This is uncontroversially the case for private academic institutions and freedom of science, research and teaching.⁴⁵ A domestic legal person may be affected by such measures, either directly or indirectly, e.g. through its organisational connection with a foreign legal person.

In addition, and for an abstract review of the constitutionality of the measures of some importance, such rules infringe upon the institutional dimension of freedom of science. As outlined, freedom of science creates in the interpretation of Federal Constitutional Court the duty of the state to establish, maintain and organise a system of science that is based on the idea of its freedom. In the jurisdiction of the Federal Constitutional Court this was of importance in particular for question of the inner organisation of public universities, e.g. as to the decision making competencies of members of the university.⁴⁶ It is, however, a constitutional standard applicable to any kind of legislative or administrative measure of the state affecting the conditions and possibility of scientific research.

Under the German Basic Law, the legislator enjoys substantial discretion – and correctly so – how to regulate and organise scientific research. It has to respect, however, – apart from the individual rights of scholars and institutions – the general duty to keep an institutional and regulatory framework intact that serves free science. The case law on the inner organisation of universities indicates that the demands stemming from the institutional dimension of freedom of science, research and teaching are exacting. The Federal Constitutional Court investigates in these cases in some detail whether a particular rule is reconcilable with the standards of free science or not, even though the cases concern issues that entail only limited effects for individual free research.

Evidently, the scrutiny would be much stricter, if not only matters like the voting rights of professors or the organisational structure of faculties, or the methods of evaluation of professors would be at issue,⁴⁷ or the right to supervise doctoral degrees⁴⁸ or the parameters of grading systems.⁴⁹ To take an extreme example: A regulation of scientific enquiry that prevented certain scientific theories, viewpoints or methods to be pursued or targeted particular institutions because their academic work is unwelcome from a certain ideological or political perspective would violate not only individual rights but the fundamental duty imposed on the state to institutionalise a system of free science that respects the intrinsic rules of scientific enquiry. Given the international interconnectedness of science

⁴⁴ The Federal Constitutional Court, BVerfGE 85, 360, reviewed the impact of the closure of an academic institution in the framework of the reorganisation of German scientific institutions after the reunification as an aspect of its assessment of the constitutionality of the measure under Art. 12 German Basic Law (freedom of profession). It acknowledged in this context that the closure of an academic institution interferes with the freedom of science of the individual, BVerfGE 85, 360 (381).

⁴⁵ Bethge in: Sachs (ed.), Grundgesetz Kommentar, 7th ed., Art. 5 para 213; Britz, in: Dreier (ed.), Grundgesetz-Kommentar, Art. 5 Abs. 3, para 65.

⁴⁶ This was the issue of the still foundational issue of BVerfGE 35, 79 as of many of the subsequent decisions, cf. e.g. BVerfGE 111, 333.

⁴⁷ cf. BVerfGE 51, 369, BVerfGE 55, 37, BVerfGE 88, 129, BVerfGE 111, 333, BVerfGE 93, 85.

⁴⁸ BVerfGE 88, 129.

⁴⁹ BVerfGE 93, 85.



this may include questions concerning the possibility and conditions of international cooperation as a crucial aspect of such a system.

Consequently, any such measures would be in need of constitutional justification, be it because they already infringe upon the individual right of freedom of science of natural or legal persons or be it because they run contrary to the duty derived from freedom of science to create, for the benefit of individuals and the good of society, a system of science the core of which is the guaranteed freedom of enquiry.

IV. Constitutional justification

Because of the limited purpose and scope of this brief, it will discuss only some fundamental questions of proportionality and the rule of law in relation to the possible constitutional limitation of the freedom of science in its individual and institutional dimensions. Other norms, e.g. other fundamental rights are not considered.

Proportionality presupposes under the German Basic Law a legitimate aim of the measure at issue, its suitability to reach its aim, the necessity of the measure because of the lack of less intrusive alternative means to achieve the same end and the appropriateness of this measure. The latter element demands that the measure does not impose burdens on the rights holder of the freedom of science that are out of proportions with the gains achieved by the measure. The rule of law includes, in particular, apart from procedural issues and other important standards, legal certainty and the prohibition of arbitrariness.⁵⁰

a) The purpose of the measures

The aims of the legislation at issue encompass in particular "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".⁵¹ These objectives formulate as such legitimate aims. A question to be asked in framework of the assessment of the legitimacy of the aims is of whether the professed aims are in fact the true aims of the legislation. If there were sufficient evidence to assume that the legislation is in fact a politically motivated act against an institution or a particular person this would not form a legitimate aim.

b) Time limits

The amendments impose new conditions which have to be complied with by strict deadlines. These strict deadlines are in the view of foreign observers, among others, impossible to meet.⁵² Any time limits or deadlines set for organisational adaptations that are not possible to meet would be irreconcilable with freedom of science under the German Basic Law, violating principles of the rule of

⁵⁰ Venice Commission, Opinion raises similar issues as discussed in III a) from the point of view of international law.

⁵¹ cf. Venice Commission Opinion, N. 12. In N. 70 the following aims are listed: 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 operation in Hungary. Irregularities that were mentioned were of a technical nature and have been clarified, Venice Commission Opinion N 34.

⁵² Venice Commission, Opinion N. 35.



law like legal certainty and foreseeability. Under the rule of law, conditions that cannot be fulfilled cannot be imposed on a rights holder.

c) Prior international agreement with home state

A provision like Art. 76 (1) (a) Act XXV of 2017 amending the 2011 Higher Education Act that requires that there is an international agreement concluded between the government of Hungary and the government of the university's country of seat and that "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"⁵³ would raise various questions under German constitutional law. This includes questions of legal certainty, as it may be unclear what kinds of agreements are exactly meant by this formulation. Another issue is the imposition of a requirement that cannot be met, given that a constitutional order of a foreign state may not foresee the competences of the federation or member states to fulfil such a condition.

Further questions arising concern the suitability and necessity of the provision, namely to which degree such agreements would promote the aims of the regulation. One would need to show which purposes of higher education are fostered, which foreign policy aims are served by such a regulation, or why such rule improves international cooperation in the field or security. The legislator would be under a duty to identify its aims sufficiently clear to show that.⁵⁴ An important question would be whether less intrusive aims are not at hand, e.g. quality checks for educational institutions or measures below the level of agreements between states to ensure cooperation. The latter is a very exacting and highly unusual demand. International cooperation in the field of universities lies usually in the hands of academic institutions, not governments. Another example is security screening of students or faculty personnel to answer security concerns.

There is a question of the appropriateness of such measures that would need to be raised as well because the autonomy of the individual researchers and institutions of science would be disproportionately limited if they are made dependent on political decisions that are not bound by clear and legally certain standards. This would be the case for the international agreements concluded by the government, which it is free to do or not to do. This creates the danger of arbitrary decisions based on the content of the research of individuals or institutions and is not reconcilable with an institutionalised system of free science. In addition, the dependence on the good will of a government may have a chilling effect on the research of scholars and institutions. Such regulations are not adequate to the purposes of science, to use the terminology of the Federal Constitutional Court.

d) Operation in country of seat

Another example is a regulation like the new article 76 (1) (b) of the said act that introduces the requirement that a scientific institution has a campus in the state of origin that is, "operating in the country of its seat and actually performing tertiary education there".⁵⁵ Again, questions of suitability and necessity need to be asked. It is unclear, what the operation in the country of seat would

⁵³ As quoted in Venice Commission, Opinion, N. 17.

⁵⁴ Venice Commission, Opinion N. 74 observes the vague character of the identified legislative intent.

⁵⁵ Venice Commission, Opinion N 17.



contribute 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. Other, less intrusive means to maintain the quality of education like accreditation systems and other means of supervision by the state are readily at hand. To repeat, security screening of students and faculty serves the purpose of security well whereas activity in the country of seat does not improve security at all.

e) Name

A regulation like the new article 9 (2a) and (2b) of the said act that provides for the requirement that the name of the institution is not misleading or confusing and clearly different from the names of any state-recognised higher education institution would raise questions of necessity as well. The purpose of such a regulation to prevent misleading or confusing names is legitimate in the case of distinct competing institutions.⁵⁶ In the case of a university like the CEU that operates as a unity though, because of technical reasons, in the form of different legal entities, the danger of confusion and misleading information of students or other members of the public does not arise.

f) Programme-cooperation agreement not possible for foreign university based in non-EEA OECD Countries

It is unclear, why the exception of the institutions based in non-EEA OECD countries would be suitable for the aims of 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. In addition, as indicated, there are other means to reach these aims.

g) Work permit

Such requirement as such would not raise any issues under freedom of science under the German Basic Law. Should work permits be granted, however, selectively and in ways that target a particular institution because of the content of the research conducted there, it would be irreconcilable with academic freedom. Questions would arise as well if a regulatory system of work permits for the academic sphere were erected that makes international cooperation, essential for any scientific work, impossible.

h) Cumulative effects of formal regulations as direct, content based interference with freedom of science

These examples indicate that such formal organisational rules would be problematic, given the standards erected by freedom of science, research and teaching under the Basic Law. They create a dysfunctional web of restrictions, not a regulatory framework adequate for the needs of modern, internationalised, interdependent science and its necessary freedom.

There is a further and decisive problem. The amendment of the 2011 Higher Education Act appear as legal rules of general application, they apply to institutions other than the CEU.⁵⁷ The cumulative effect of these measures, however, appears to be excessively heavy on only one university, namely the CEU. The cumulative effect of this set of formal rules may change their quality and turn them into an

⁵⁶ Venice Commission, Opinion N 7.

⁵⁷ According to the Venice Commission, Opinion, N. 21, p. 7, 24 such universities are affected.



interference based on the content of the research, the real or assumed direction of the scholarship conducted at a university or even into measure against the founder of such a university.

Such analysis may be buttressed by the reference of government officials in the process of law enactment referring to certain aspects of the research or a particular person, e.g. the founder of a university like the CEU, George Soros, and the a highly visible public campaign against this particular person by the governing party, the parliamentarian majority and government. A constitutional analysis that does not take into account such factors risks missing the very meaning of particular forms of state action to the detriment of the protection of fundamental rights.

The German Basic Law provides in Art. 19 Sec. 1 restrictions of fundamental rights: "Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case." This provision does not exclude the possibility of an act that regulates just one case, if this case is singular and there are objective reasons for the regulation.⁵⁸ It is irrelevant too; if a single case has been the reason for the regulation.⁵⁹ The reason of this norm is to prevent abuse of the form of general and abstract norms in order to target a particular case or person. General-abstract regulations must not be used to cover up such aims, the Federal Constitutional Court held.⁶⁰ This regulation embodies an important constitutional principle: It safeguards fundamental rights by protecting individuals against unjustified unequal treatment by legislation, selectively targeting them without objective reason, buttressing the equality guarantees of the Basic Law.⁶¹ This principle is an important part of any convincing understanding of the regime of limitations of fundamental rights under the rule of law. It forms a reminder that the abuse of legislative forms may be a means to violate fundamental rights and that a constitutional system needs safeguards against such abuse.

As indicated, the very core and historic root of the protection of the scientific freedom under the Basic Law is the protection of scientific research against any kind of interference by the state in the autonomously determined content of research. The only question that arises is whether a certain conduct is in fact science. If an activity masters this test, no interference can be justified based on the content of the research of an individual or an institution, be it public or private, if not weighty other constitutional norms are engaged, e.g. as in research violating human dignity that are not at issue here. There is no justification at all for politically motivated interferences with freedom of science. This of course is even more so if the interference is related to the affiliation of the institution with a particular person, if the interference is thus even pursuing personalised aims. If the cumulative effects of such measures have the consequence of selectively singling out individual institutions or persons, they would therefore form an exceptionally clear violation of freedom of science under the Basic Law, in its individual dimension, but in its institutional dimension, too: Regulations, that have such effects or purposes, are not regulations adequate for a system of free science, they are steps towards its destruction.

⁵⁸ BVerfGE 85, 360 (374) on research institutes of the German Democratic Republic.

⁵⁹ BVerfGE 13, 225 (229).

⁶⁰ BVerfGE 99, 367 (400).

⁶¹ Cf. Krebs in: v. Münch/Kunig, Grundgesetzkommentar, 6 ed., Art. 19 I, Rn 10. This problem resonates in other jurisdictions, cf. the prohibition of bills of attainder, US Constitution, Article I, Section 9 and its interpretation, *United States v. Brown*, 381 U.S. 437 (1965); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), among other case law.



Yours sincerely,

University of Zürich, Faculty of Law

A handwritten signature in blue ink, appearing to read 'M. Mahlmann', with a long, sweeping flourish at the end.

Prof. Dr. Matthias Mahlmann