

Rule of Law Report – targeted stakeholder consultation

General information: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-report_en#general

Questionnaire:

<https://ec.europa.eu/eusurvey/runner/RuleofLawReportStakeholderConsultation2020>

IV. Other institutional issues related to checks and balances

A. The process for preparing and enacting laws

37. Stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms), transparency of the legislative process, rules and use of fast-track procedures and emergency procedures (for example, the percentage of decisions adopted through emergency/urgent procedure compared to the total number of adopted decisions)

The law on legislation prescribes for bills submitted by the government to be preceded by social consultation and impact studies.

Impact studies are either not prepared, or if at all, they are not accessible to the public. The obligatory consultation is notoriously evaded by legislators in different ways:

1. The obligation for preparatory consultation is simply ignored, the actual stakeholders are first informed in the press about the plans of the government after submission. An example is the bill of March 31, 2020 to change the Act on Higher Education. The bill incorporates all agrarian higher education institutions in Hungary into the largest agrarian university without any previous consultation of the annexed colleges whatsoever. The bill contains numerous other measures as well, significantly changing the structure of state education without any previous consultations with any of the concerned parties.

Yet another issue: At private universities the bill shifts the making of organizational and operational rules from the senate to the foundation (i.e., practically to the managing board).

The precedent for this is Corvinus University of Budapest (see topic 43) where the senate found out only afterwards about having lost one of their most important functions.

2. The presumably controversial bills are submitted in emergency procedures without any real emergency simply to sabotage any protest and their one-sided announcement is presented as consultation. This is what happened in the case of Lex CEU, the internationally widely opposed law to disable the functioning of Central European University in Hungary: only the university was notified, the Hungarian Rectors' Conference was not.

As mentioned in the report Hungary Turns its Back on Europe (p. 34), the unilateral governmental approach is also reflected in the destruction of post-1990 forums established to provide a framework for social dialogue, and government members are increasingly outspoken against the need for any dialogue about education. The implications for higher education are the following: In 2012, the 1993 parliament-founded, largely independent Higher Education and Research Council ceased to exist, and with it the trilateral preparatory and strategic consultation (government, higher education professionals, users). It was replaced by the practically invisible Higher Education Planning Board subordinated to the governmental Educational Authority. As a result of the students' protests against the measures in 2012–13, the Higher Education Round Table was formed to discuss strategic matters of higher education politics (2013), which became inoperational from 2014. As of today, there is no active forum for stakeholders to discuss strategic views or plans. The Higher Education Interest Reconciliation Council mainly responsible for labor issues is rarely convened.

38. Regime for constitutional review of laws

The Power of the Constitutional Court of Hungary was brutally restricted after 2010, which practically meant shifting its purpose from constraining the power of the executive to serving it. The Court, therefore, does not always take a position on matters uncomfortable for the government, which, in turn, frequently brings forward legislation that has no regard to the rule of law, and ignores the constitutional requirements of legal certainty.

In cases like that of the above-mentioned Lex CEU, and the law of reorganization and separation of the research institutes of the Hungarian Academy of Sciences, as well as of many others, the strategy of the Court is to delay taking up the case with various pretexts (or with the simple explanation that it is free to establish its own work schedules) for so long that the initiative of constitutional review loses relevance.

Lex CEU was considered unconstitutional by acknowledged jurists. Based on this, legal proceedings have been initiated by opposition MPs. However, thus far, the Court has still not been willing to put this question on its agenda, arguing that the European Commission has already launched an infringement procedure against the CEU legislation (just as in the case of the Anti-NGO Law, see topic 42) – a circumstance that should not pose any obstacle for the Court to make a decision. (See Hungary Turns its Back on Europe, p. 44.) A recent development in this case is that pursuant to the Advocate General's opinion, the Court of Justice of the EU might condemn Hungary.

The nonobservance of constitutional requirements and earlier Constitutional Court decisions during legislative proceedings has been criticized on several occasions by the Commissioners of Fundamental and Educational Rights, respectively (see topic 39).

B. Independent authorities

39. independence, capacity and powers of national human rights institutions, ombudsman institutions and equality bodies

In Hungary, there are two ombudsmen dealing with higher education issues. The Parliamentary Commissioner of Fundamental Rights launched several extensive investigations in this field, while the Commissioner of Educational Rights, subjected to the Ministry of Education, reviews mainly individual complaints, and carries out ex officio inquiries only in exceptional cases. Both Ombudsmen criticized measures concerning higher education on several occasions, but usually without result or obtaining only partial solution at best. A Constitutional Court proceeding, however, has never been initiated by them in this field; there has been even a case where, according to press reports, the general Ombudsman affirmed support for a constitutionally founded complaint in a letter, but did not do so publicly.

Two important examples are to be mentioned here:

1. Resolution by the Commissioner of Fundamental Rights on the government decree on creation of university consistories in 2016. These are bodies included in the university decision-making process, with members appointed mostly by the responsible ministry and with the right of veto in matters that fall under the scope of university autonomy guaranteed by the Fundamental Law of

Hungary (Section Freedom and Responsibility, Article X:3). The complaints that this violation of the Fundamental Law provoked were found by the Ombudsman to be substantiated. However, the resolution did not have any consequence.

2. A government decree issued in 2014, prescribed that only students who have passed a foreign language exam and an advanced level secondary school certificate can have access to higher education from 2020. The Commissioner of Educational Rights found the decree worrying both for equality and on constitutional grounds (see his report from 2018, pp. 128–129; for more details as well as the opinion of the general Ombudsman see Hungary Turns its Back on Europe, p. 33 and 40). In this case, ombudsman institutions have proved partially effective, given a government decree issued on 07.11.2019 (i.e. not long before the deadline for application for admission to university study programs), revoked the language exam precondition, but reconfirmed the advanced level certificate obligation. It is against this background that in 2020, the number of applicants to higher education has decreased by 20% in Hungary, compared to past years.

C. Accessibility and judicial review of administrative decisions

D. The enabling framework for civil society

42. Measures regarding the framework for civil society organisations

The legal status of civil society organisations (NGOs) is regulated by a law passed in 2011. Given they are critical of the government, attempts to weaken them have persisted since 2010, to make their functioning more difficult or impossible. These organizations cannot access any financial support from funds allocated to the non-governmental sector, not even for their non-political and non-profit activities. The Anti-NGO Law of 2017 (following Putin's example) forced many organizations to make public any foreign source of funding. As a result, the critical civil organizations, including the Hungarian Network of Academics, have become discredited as foreign agents, whether or not they receive any foreign help. The names of critical individuals have at several occasions been listed in government-friendly media in a scapegoatig process. A leading politician of the ruling party in 2017 went as far as suggesting to “cleanse the country” (“ki kell takarítani az országból”) of NGOs branded as “Sorosist”. (He even specified two teachers' organizations.)

Following the recently published report, Hungary Turns its Back on Europe, the Hungarian Network of Academics also became subject to the now standard remarks, both from government-friendly press and from politicians: “Soros-agent”, “migrant lover”, “they hate their country” etc. A recurring motive in these labels is that these “hostile” organizations “do politics”. This accusation takes for granted that only those in power can rightfully do so.

Such expressions have the function to humiliate, delegitimize, excommunicate those critical towards the government. The specific criticism is never responded to so it becomes the norm that there is no dialogue possible between those in power and their critics.

43. Other - please specify

Anomalies of the privatization of state universities

As of July 2019, the operational model of Corvinus University of Budapest was modified. The Hungarian State in its role as maintainer of the university was replaced by a State Foundation, the

Maecenas Universitatis Corvini. The foundation received a significant amount of government shares; from these revenues and its own income it has to run the university and fund former state tuition stipends. The managing board of the foundation was nominated by the responsible Minister, who also transferred the founding rights from the ministry to the foundation. This made the board practically indisplaceable. The professors and lecturers lost their civil servant status and any prospect of tenure. The board is not accountable and has unlimited power – no decree or rule obliges it to cooperate with the senate of the university in any way. Furthermore, its activities are not at all transparent, and the rules of conduct as well as the decisions are not made public.

In the past few months, the board re-organized the entire structure and running of the university, introduced new organizational and operational rules, which reduced the competence of the senate to the narrowest interpretation of academic tasks, excluding it from all organizational, operational and financial decisions. Some of these measures are subject to legal debate, since according to the current Act on Higher Education the “maintainer” has the right to approve, but not make, the organizational and operational rules (94.§ (6), while according to the amendment bill submitted on March 31, 2020, they can also issue it themselves (23.§ 14.).

As a result, Corvinus University of Budapest was changed from a state university into a private university, no longer controllable by present and future governments, but without private investment into higher education. The state-founded university has become in essence the property of individuals chosen by the present government. Due to the competencies assigned to the board, it lost the rest of its autonomy.

The Minister of Higher Education stressed from the outset that the privatization of Corvinus University of Budapest can be the path followed by other universities. Accordingly, the above-mentioned amendment further lists six formerly state universities facing the same change of “maintainer”, among other private universities (see topic 37 above). At least one of the six had subscribed to this, but at least one was taken by surprise. These “maintainer” foundations are not yet in existence, and according to press releases, unlike Corvinus, they will continue to be state funded in a new form but will face a similar outcome concerning autonomy.