**RESPONSE**

of the Government of Hungary

concerning the amendments of Act CCIV of 2011 on National Higher Education

In response to the letter dated 11 April 2017 of the Secretary General of the United Nations, the Government of Hungary hereby submits the following observations as regards the queries concerning the amendments of Act CCIV of 2011 on National Higher Education posed by David Kaye, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

**I.**

**Concerns raised in the letter of the UN Special Rapporteur**

The letter makes references to the following alleged interferences that are of concern for the UN Special Rapporteur:

1. **Legislation forbids institutions from having the same or similar names**

The Bill allegedly forbids institutions from having the same or similar names.

1. **Legislation a) prescribes for the conclusion of a binding international agreement between the Hungarian government and the national government of the foreign universities in a short period of time and b) obliges foreign-accredited universities to provide higher education services in their country of origin**

The Bill does not allow CEU to operate in Budapest unless it finances a costly campus in New York State, and an international agreement is concluded which is less likely to happen given the discretion of the Hungarian Government and the short period of time defined to pursue such an agreement.

1. **Legislation specifically targets CEU and forces to end its relationship with KKE**

Bill T/14686 (hereinafter referred to as the ‘Bill’ or “Amendments”) amending Act CCIV of 2011 on National Higher Education (hereinafter referred to as ‘the Nftv.’) appears to specifically target the Central European University and it makes impossible for the New York based higher education institution operating only in Hungary to cooperate with the Hungarian institution of higher education with a seat in Budapest, Hungary known as Közép-európai Egyetem which translates to Central European University.

1. **Alleged lack of consultations during the legislative process**

The Bill was allegedly adopted in a swift legislative process where there were no civil society consultations and obligatory impact assessment carried out.

1. **Legislation allegedly violates Article 19 of ICCPR**

The requirements in the Amendments while infringing upon the right to seek, receive and impart information of all kinds, represent undue interference with academic freedom and independence (freedom of speech) enshrined in Article 19 § of the International Covenant on Civil and Political Rights (hereinafter referred to as ‘the ICCPR’).

**II.**

**Observations of the Government**

**As to concern no. 1**

**Legislation allegedly forbids institutions from having the same or similar names**

1. The Amendments are intended to secure high level higher education by placing institutions on the same footing, and to achieve that aim, it modifies the law on the following points:

* provisions concerning the names and designations of institutions of higher education,
* general legal rules on the operation of foreign institutions of higher education in Hungary,
* legal rules on the higher education accreditation body regarding the license for starting operation of the foreign institution of higher education,
* entitlement to offer study programmes through a Hungarian higher education institution in accordance with paragraph 4 of Section 77 of Nftv*.,*
* necessity of a work permit of third country nationals pursuant to Act II of 2007 on the Enter and Residence of Third Country Nationals.

1. Before elaborating more on the amended provisions concerning the names of institutions of higher education, the Government wishes to clarify that **CEU New York** is a US-based organization established upon a joint declaration between the Hungarian Prime Minister and the governor of the State of New York in 2004, maintained by a New York-based non-profit company (organization). The CEU operates in Hungary as a foreign institute of higher education with a non-definite operating licence.
2. The **Közép-európai Egyetem** (CEU Budapest) is a Hungarian legal entity and forms part of the Hungarian higher education system; its founder is the Central European University Foundation Budapest. The CEU Budapest is – according to Appendix 1 of the Act on national higher education – a „Non-state university” among the „Hungarian institutes of higher education recognised by the state”. The two institutes greatly intertwine with regard to the educational activities.
3. With regard to the provision in particular that forbids institutions from having the same or similar names, first, it is important to note, that the Amendments did nothing else but incorporated an already existing legislation being prescribed for in Section 2 § (6) of Government Decree (No.) 87/2015 (IV. 9.) on the implementation of certain provisions of Act on National Higher Education regarding the use of names, and also supplemented it with the requirement to prevent the interchangeability of the Hungarian and foreign names of institutions of higher education.
4. Section 1 § of the Bill reads as follows:

“*Section 9 § of Act CCIV of 2011 on National Higher Education (hereinafter: Nftv.) shall be supplemented with the following paragraphs (2a) and (2b):*

*“(2a) The name of the institution of higher education shall be clearly different from the names of other institutions of higher education. The name of the institution of higher education shall not be misleading, it shall not create a false appearance concerning the institution or the activity thereof. The name of the institution of higher 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 higher education registered with the Educational Authority are identical.*

*(2b) The name of the institution of higher education in a foreign language shall be substantially identical with the name in Hungarian. In the case of two or more institutions of higher education with the same name, that institution of higher education shall be entitled to bear the name, the upholder of which first submitted the petition for registration.”*

1. It goes without saying that in case of companies pursuing economic activity, the name of the entity has a market value and therefore the relevant procedural rules offer great importance for the adequate protection of company names for the sake of preventing interchangeability of the entities.
2. The Government is of the view that the protection of the name of institutions of higher education pursues a public interest as significant as the protection of the names of private companies as it is purported at eliminating interchangeability and misleading or confusing names of these institutions which is of utmost importance for the public be it students, faculty, academic community etc..
3. As concerns Közép-Európai Egyetem and the Central European University in particular, it must be noted that as there are two different legal entities as explained above, the names of which are identical if translated to English, it is without any doubt that there is a real risk of interchangeability. Such risk is definitely capable of justifying the aim pursued by the impugned provisions.
4. In this respect, Hungary is of the position that the alleged interference prescribed for by the Bill is necessary in a democratic society, pursues a legitimate aim and the interference is proportionate to the employed means.

**As to concern no. 2**

**Legislation a) prescribes for the conclusion of a binding international agreement between the Hungarian government and the national government of the foreign universities in a short period of time and b) obliges foreign-accredited universities to provide higher education services in their country of origin**

*Conclusion of a binding international agreement*

1. The general legal rules on the operation of foreign institutions of higher education in Hungary are regulated in Section 2 § of the Bill which reads as follows:

*“(1) Section 76. paragraph (1) of Nftv. shall be replaced with the following provision:*

*“(1) Foreign institutions of higher education may offer study programmes resulting in the issuance of certificates in the territory of Hungary, if*

*a) if 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 higher 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,*

*b) it is qualified as an institution of higher education recognized by the state, operating in the country of its seat and actually performing higher education there,*

*c) the education intended to be provided by it in the territory of Hungary and the certificate issued with regard to that are considered education recognized by the state and giving a degree in higher education, and*

*d) the operation thereof has been permitted by the Educational Authority.”*

1. The Nftv. defines a 6-month-long period within which the international agreement between the Hungarian government and the Government of the country of seat of the foreign institution of higher education shall be concluded. Notwithstanding that, in our views, in case of foreign institutions of higher education already existing and operating in Hungary, the mutual commitment to sign such an agreement within the required period may be presumed. **We can state in good faith that the Hungarian Government has already taken all the necessary measures in this respect:**
2. The new law on higher education concerns mainly six higher educational institutions outside of the European Economic Area (1 Chinese, 1 Malaysian, 1 Thai and 3 American), in cases of which an intergovernmental, state-to-state agreement is needed as of 01.01.2018 in order to guarantee their unchanged operation in Hungary. Five of these institutions consider the legislation a technical issue and constructively seek to find solutions to comply with the existing law. The negotiations already carried out show that **CEU is the single institution maintaining the communication on the political level**.
3. **An opportunity for consultation was provided** for all higher educational institutions concerned within the framework of a working group, with the participation of experts from all relevant ministries (Ministry of Human Capacities, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of National Economy) and authorities.
4. The special envoy of the Hungarian Prime Minister negotiates with the representatives of all governments concerned and, in the case of the US, with the Governors of Maryland, Massachusetts and New York. The first drafts of the agreements have already been sent to the Governments of China, Malaysia, Thailand and the State of Maryland and the State of New York. The Hungarian Government is looking forward to receiving their feedback in order to find a common and mutually acceptable solution.
5. At the end of June, Special Envoy Kristóf Altusz had negotiations on the operation of two US universities concerned by the amendment of the higher educational law.

On 22 June, the Special Envoy met Lieutenant Governor Boyd Rutherford and Secretary of State John C. Wobensmith of Maryland, who raised no objections at all in relation to the new regulations, and showed willingness to further cooperate on the matter. Finally Minister of Foreign Affairs and Trade Péter Szijjártó signed the agreement on the continued operation in Budapest of McDaniel College in Annapolis, in the United States, on 14th July.

1. The Special Envoy has also held productive negotiations with the representatives of the governmental office of the State of New York, on the status of Central European University. The first draft of a possible agreement had been given to the governor’s chief counsel just a few hours before the official meeting. After all, the Hungarian Government has good intention to cooperate in a good faith, and has made good progress in the course of negotiations with Lieutenant Governor Kathy Hochul and her staff.
2. At this juncture we also submit that Hungary has no choice but to accept if the central government of the USA refuses to negotiate on issues concerning higher education, however, we must note that Washington has concluded several agreements with Hungary on educational issues in the past years. **Nevertheless, we submit that Hungary is willing to be flexible with regard to this requirement, meaning that we are ready to accept a written confirmation given at federal level on the support of those agreements to be concluded with the concerned U.S. state**s. Hungary wishes to inform you that in the meantime this has already happened therefore we deem this requirement to be met.
3. It shall be also mentioned that the requirement of the conclusion of an international agreement **does not apply to foreign higher education institutions having a seat in an EEA member-state**. This is so because the European Union law contains several rules and principles on education that would make such an agreement within the EU redundant.
4. We also submit that as concerns the infringement procedure launched by the European Commission, Hungary has already submitted its observations. It might be telling, however, that **the Commission only raised concerns of commercial policy nature**. Nevertheless, should the ECJ come to the conclusion that Hungary has infringed EU law, we are willing to comply with the judgment and amend the law, if necessary.
5. In connection with the **timing of adopting the Amendments and the deadline for its implementation**, it may also be of great relevance that the Bill took into consideration the idea of the length of Master’s programmes in general of at least 2 years but not exceeding 4 years. Courses can start in the study year of 2017/2018 and would be ideally completed in the study year of 2018/2019, nevertheless, the Bill takes the possible suspension of studies into consideration and for this reason, it requires the programmes running/ongoing to finish at the latest in the study year of 2020/2021.

*Providing higher education services in the country of origin and other conditions prescribed for the issuance of certificates in the territory of Hungary*

1. It is to emphasise that from a practical perspective the provision of Section 76 § (1) b) again shows a great similarity to the law of Section 76 § (1)-(2) applicable prior to the entry into force of the Amendments. This legal rule left room for subsuming the activity of offering study programmes of higher education in a foreign state in context of the license for starting operation. What is more, the actual performance of higher education in the country of origin and seat of the higher education institution along with the meaningful difference between the foreign and the Hungarian criteria for the educational service planned have certainly constituted factors with decisive influence on granting license for starting operation**.** Indeed, due to the characteristic features of higher education and the nature of the license for starting operation, this examination could not focus on anything else than the quality of performing higher education in the country of origin of the controlled institution necessitating the examination of the educational core services of performing higher education, training programmes, the certificates issued and last but not least the qualification and examination of the teaching staff. **The Hungarian legislator unified the aspects of examination by transforming the above mentioned possibility into an obligation, in order for the supervising authority to ensure that the service provider institution in fact operates legitimately in its country of seat.**
2. In this regard, we also submit that the amendment requiring higher education institutions to actually perform higher education does not impose the burden of operating a costly campus on the foreign higher education institutions in their country of origin. Moreover, **the framework of operation in the state of accreditation including circumstances and conditions of providing educational services in the country of origin has not been regulated** in the modifications meaning that these can be any courses offered in the place of seat of the foreign institution with staffing and resources different present at its Hungarian campus. The best solution to comply with the provision of the law is to be developed by the concerned institution.
3. Regarding the aim of this requirement we submit that **the legislator intended to rule out virtual education programs** as the requirement of accreditation in the country of origin allows only for a formal examination as detailed above in the process of licensing. Therefore the need to pursue actual educational activity is a necessary means to achieve that legitimate aim.
4. As far as the amendment of the legal rules on the higher education accreditation body is concerned, the modification of the provision **allows rejection or application of license for starting operation based on an expert opinion issued by any accreditation body compliant with** t**he Standards and Guidelines in the European Higher Education Area** (hereinafter referred to as ‘the ESG’).

Section 2 § of the Bill has replaced paragraphs (2) and (3) of Section 76 § of Nftv. by the following provisions coming into force as of 1st September 2017:

‘*(2) The license for starting operation may be rejected based on an expert opinion issued in the country of origin or any other accreditation body compliant with the Standards and Guidelines in the European Higher Education Area (hereinafter referred to as ‘the ESG’.) The expert opinion shall cover the personal and material requirements of education, the quality of the education.*

*(3) The license for starting operation may be denied if the degree or the qualification certified by the diploma cannot be recognised in Hungary. If the degree or the qualification certified by the diploma issued by an institution of higher education cannot be recognised in Hungary, the institution shall inform the applicants accordingly in a clear and certifiable manner, the fulfilment of which shall be verified by the Educational Authority.*

1. Given the fact that ESG has been adopted by the Ministers of Higher Education on the basis of the recommendation of the European Quality Assurance Alliance (ENQA), the European Students’ Union (ESU), the European Association of Institutions in Higher Education (EURASHE) and the European University Association (EUA), it is guaranteed that the expert opinion issued by the accreditation body will be accepted in the whole European Higher Education Area (EHEA). In this way it also stays in conformity with the process launched to grant a license for starting operation of the Hungarian institutions of higher education as an expert opinion of the Hungarian Higher Education Accreditation Committee with full membership in ENQA is required for licensing for offering study programmes by the Hungarian higher education institutions even in case of vocational higher education training not providing a degree. This opinion must be based on ESG pursuant to 4 a) of Section 67 of Nftv. yet Hungarian institutions of higher education can also contact a foreign accreditation body who is a full member of ENQA. **The ENQA membership and thus the ESG ensure unified standards of quality assurance and aspects in the territory of Hungary regarding higher education provided either by Hungarian or foreign institutions.**
2. Furthermore, we submit that there is also a kind of cooperation between foreign institutions of higher education and the Hungarian educational institutions which differs from the way of operation CEU is engaged in, nevertheless we find it necessary to present it shortly:
3. As of the entry into force of Nftv., only institutions of higher education with a seat in an EEA member state may be parties to the agreements between a Hungarian and a foreign higher education institutionon the basis of which the latter one issues a foreign diploma with respect to the study programmes exclusively offered by a Hungarian higher education institution. It must be stressed though that on one hand, this amendment is well reasoned by Hungary’s obligations in connection with the creation and operation of the European Higher Education Area, on the other hand, **the subject of this cooperation differs from offering study programmes by the foreign institutions of higher education in Hungary which thus falls outside the scope of activities where a license for starting operation is needed such as the one CEU is engaged in.** It should not be left out of consideration that the so called joint programmes offered in the framework of cooperation between foreign and Hungarian institutions of higher education regulated in the Nftv. have not been touched upon by the amendment.

**As to concern no. 3**

**Legislation specifically targets CEU and forces to end its relationship with KKE**

First of all, it is of utmost importance that the proposed Bill is **based on the review procedure of the Hungarian Education Authority starting in 2016, which has discovered many irregularities relating to the operations of 27 foreign institutions of higher education in Hungar**y, and established that several universities are operating unlawfully. As a result of the procedure in six cases the operation license of the institutions had been withdrawn either with an immediate effect or in one case the sanction is going to take effect on 31 December 2017. This result signals that the need for revising the legislation on educational activities offered by institutions with foreign seat has become inevitable and pursues a number of legitimate aims as detailed below.

1. We also submit that the conditions for granting a license for starting operation in Hungary, as presented above, cannot be considered CEU-specific. All institutions of higher education currently operating in Hungary must fulfil the same requirements if they offer study programmes resulting in the issuance of certificates in the territory of Hungary. Besides, it is **very telling that a political debate has evolved only with regard to the future of CEU/KKE despite the fact that** **the modifications concern five other higher education institutions with foreign seats** in cases of which an international agreement must be concluded and all the other requirements, of course, must be met.
2. CEU has been operating under special rules since its establishment on the basis of which rules the institution enjoyed a number of privileges in comparison to other universities (e.g. in connection with the employment of foreign professors, tax matters, etc.). Having the university established, CEU was operating on the basis of a ministerial authorization (at that time the responsible minister was entitled to recognize some educational institutions as universities). In 2004, the Parliament passed a new legislation on the state recognition of CEU. Although this has been rescinded from 30 June 2010, György Soros was lobbying successfully for keeping the university’s privileges. Establishing KKE was induced by Hungary’s near accession to the EU in the interest of being eligible for EU fundings as the American entity could not have applied for these at all, or only with substantial difficulties. We submit that legally speaking, CEU does not qualify as a legal person until today, and does not a possess a tax number either.
3. In sum, the Government is of the view that the aim of the amendment was in no way to target CEU, but it only introduced provisions which are to be applied to each and every institution in identical situation. **The legislation does not concern either KKE’s operation or CEU’s American operation but only the form of cooperation present between the two entities.** Should the requirements not be met, CEU remains entitled to issue American diplomas in Budapest.
4. Consequently, if CEU considers that it has been discriminated against by the new law, the Government argues that **it must be a misperception arising from losing its privileges securing for the institution competitive advantages in legal and tax matters** as the Amendments do nothing else but **creates a level playing field and equal terms for all institutions, both domestic and foreign**.

**As to concern no. 4**

**Alleged lack of consultations during the legislative process**

1. The preparation of the legislative initiative has been preceded by the proceedings of the Hungarian supervising authority, the Educational Authority. These proceedings concerned all foreign educational institutions in Hungary. Besides, as the Bill has been submitted by the Government, social consultations could not be avoided. Thus both the assessment of the functioning of the institutions of higher education and the impact assessment of the legal rules drafted have been carried out.

1. We submit though that it is true that the legislation has been passed in an accelerated legislative process, which, however, does not violate the relevant laws of Hungary and constitutional guarantees have been respected. The need for the accelerated process can be reasoned by the legislator’s aim to make the changes adjust to the new academic year.

**As to concern no. 5**

**Legislation allegedly violates Article 19 of the ICCPR**

1. Article 19 § of ICCPR guarantees fundamental rights which may be subject to limitations if necessary in order to protect the rights of others and the public order. The name of a higher education institution constitutes a special feature which can be connected to the service it provides. Consequently, **the restrictive amending provisions in respect of the use of names serve the public order as well as the right of other higher education institutions to use their name.**
2. Moreover, **institutions of higher education are not merely economic actors but issue certificates which are an authentic documen**ts having various legal effects on their owner: e.g. enable him/her to obtain a degree/higher degree, a professional qualification, enable him/her him to be hired in a specific vacancy and to receive a higher classification in recruitment or a wage supplement, last but not least providing him with the opportunity to study at an institution or programme where his admission is conditioned by the certificate or the specific knowledge ascertained in it.
3. Accreditation confers jurisdiction on a foreign state over a diploma issued by a Hungarian higher education institution likewise it gives rise to exercising Hungary’s jurisdiction on a diploma of a foreign institution of higher education which is an authentic public document. Hence it is fundamental for protecting the public order to ensure that **such a document is issued by an organisation qualified as a higher education institution recognised by the state of its origin and that its study programmes in fact offer a degree in higher education.**
4. Besides, we recall the Hungarian Education Authority’s review procedure revealing a number of inconsistencies and **the legitimate aim of getting rid of virtual education programs**. We also submit that as neither CEU nor KKE is prevented from pursuing educational activity, academic freedom is in no way restricted by the new law.
5. Moreover, the operation of foreign seated universities is regulated similarly in a number of other countries. The mere fact that the **Hungarian legislation has been too lenient until today cannot deter a sovereign country from revising its laws and provide up-to-date regulation corresponding to the challenges, dangers of the current era in the interest of fair competition on the side of the educational institutions, of actual educational programs in the interest of students, and of genuine public documents on the side of public including future employers.**
6. Given **all the above reasons the Government is of the position that the amended law does not undermine or jeopardize the essence of the right granted under 19 ICCPR.**
7. Finally, let me express my regrets that a clearly educational matter has been so overly politicized. Hungary has always been recognized for its high quality higher educational programs luring thousands of students from all over the world every academic year - be it national or foreign seated universities. Therefore, we found insulting the mere allegation in itself that Hungarian Government would ever purport to undermine the operation of any universities regardless of the founder’s political views. The Government of Hungary appreciates and recognizes the high quality of academic work presented in particular by CEU/KKE and its contribution to the academic life, which, however, cannot lead to immunity from clarifying the institutions’ legal status in the legitimate interest of public order.

Should you have further questions related to the above information the Government of Hungary remains to be at your disposal.

Please accept, Excellency, the assurances of my highest consideration.

Budapest, 18 July 2017