

Decision 21/2021 (VI. 22.) AB

on the establishment of a constitutional requirement for the application of Section 22 (4) of Act IX of 2021 on Public Benefit Trust Foundation Performing Public Functions and Section 94 (6) of Act CCIV of 2011 on National Higher Education, and the dismissal of the petition seeking a finding of Section 94 (6) of Act CCIV of 2011 on National Higher Education being in conflict with the Fundamental Law, the annulment and prohibition of application thereof

In the matter of a judicial initiative seeking a finding of a legal regulation being in conflict with the Fundamental Law, with the concurring reasonings by *Dr. Imre Juhász*, *Dr. Mária Szívós* and *Dr. Balázs Schanda*, Justices of the Constitutional Court, and the dissenting opinion by *Dr. Béla Pokol*, Justice of the Constitutional Court, the Constitutional Court, sitting as the Full Court, has adopted the following

decision:

1. In the case of the application of Section 22 (4) of Act IX of 2021 on Public Benefit Trust Foundation Performing Public Functions and Section 94 (6) of Act CCIV of 2011 on National Higher Education, the provisions resulting from Article X (3) and Article XI (2) of the Fundamental Law, the maintaining entity is obliged to ensure that the Senate of the higher education institution, as the custodian of the higher education institution's autonomy in education and research, has sufficient time to exercise its right to express its opinion and that it has the opportunity to make substantive proposals, which the maintaining entity must take into account in its decision-making in a traceable manner.
2. The Constitutional Court hereby dismisses the petition seeking a finding of Section 94 (6) of Act CCIV of 2011 on National Higher Education being contrary to the Fundamental Law, its annulment and prohibition of its application.
3. The Constitutional Court rejects the petition seeking a finding of Act LXXII of 2020 on Theatre and Film Arts Foundation, the Transfer of Assets for the Theatre and Film Arts Foundation and the University of Theatre and Film Arts being contrary to the Fundamental Law and annulment thereof.

The Constitutional Court orders the publication of its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] Budapest-Capital Regional Court, in the public administrative legal dispute pending before it

under litigation No. 105.K.707.375/2020/4, on the basis of Section 25 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), filed an initiative of 18 February 2021 with the Constitutional Court against Act LXXII of 2020 on Theatre and Film Arts Foundation, the Transfer of Assets for the Theatre and Film Arts Foundation and the University of Theatre and Film Arts (hereinafter referred to as the "Theatre and Film Arts Act"), Section 94 (6) of Act CCIV of 2011 on National Higher Education (hereinafter referred to as the "Higher Education Act"), seeking a finding that they are contrary to the Fundamental Law and also a finding of their annulment, as well as a finding that the contested laws to be disapplied in the proceedings.

[2] The petitioner judicial panel submitted that the background to the case before it is that on 19 March 2019, the National Assembly adopted Act XIX of 2019 on the Amendment to the Higher Education Act, which amended Section 94 (6) of the Higher Education Act to the effect that the deed of foundation of a private higher education institution may provide, by way of derogation from the general rules of the Higher Education Act, that the maintaining entity shall approve the budget of the higher education institution, its annual accounts prepared in accordance with the accounting provisions, its organisational and operational regulations, its institutional development plan, its asset management plan, the establishment of a business entity, the acquisition of shares in a business entity, and that the maintaining entity shall announce the call for applications for the position of the rector. Subsequently, Act XXXIII of 2020 on the Amendment to the Higher Education Act and certain related Acts also amended the same Section of the Higher Education Act and the words "approved by the maintaining entity" were replaced by the words "adopted by the maintaining entity", and then, pursuant to Act CXLVIII of 2020 on the Amendment to the Act on the Regulation of Higher Education and Certain Related Acts, the words "institutional development" plan in Section 94 (6) of the Higher Education Act were repealed.

[3] On 3 July 2020, the National Assembly adopted the Theatre and Film Arts Act, which entered into force on 9 July 2020. On the basis of the Theatre and Film Arts Act, the National Assembly calls upon the Government to take the necessary measures on behalf of the State to establish the Theatre and Film Arts Foundation (hereinafter referred to as the "Foundation") in the form of a public benefit trust foundation. The Foundation's statutes shall provide that the Minister of Innovation and Technology (hereinafter referred to as the "Minister") shall be designated to exercise the full range of the Foundation's founding powers; the chairman and members of the board of trustees of the Foundation shall be appointed by the Minister (Section 1 of the Theatre and Film Arts Act). The mission of the Foundation is to exercise the founding and maintenance rights of educational institutions, especially the University of Theatre and Film Arts (hereinafter referred to as "Theatre and Film Arts University"), to ensure the conditions of its operation and to achieve its institutional development objectives, for which purpose it manages the assets assigned by the founder and those provided by the members of the Foundation within the framework of its economic activities. Section 3 (1) of the Theatre and Film Arts Act, which entered into force on 1 September 2020, granted to the Foundation, as a founder's contribution, the right to maintain the Theatre and Film Arts University. With regard to the exercise of the founder's rights, Section 8 of the Theatre and Film Arts Act designates the Minister of Innovation and Technology, who shall exercise this right until 31 December 2021 and, following 1 January 2022,

the board of trustees of the Foundation may also exercise the full range of the founder's rights (Section 8 of the Theatre and Film Arts Act).

[4] On 24 August 2020, the Foundation adopted the Statutes of the Theatre and Film Arts University, and on the same day, its Organisational and Operational Rules (hereinafter referred to as the "Operational Rules"), which entered into force on 1 September 2020, and which were subsequently amended several times. The Student Council of the Theatre and Film Arts University challenged the Operational Rules before the initiating court and requested that the court initiate proceedings before the Constitutional Court to find the Theatre and Film Arts Act and Section 94 (6) of the Higher Education Act to be contrary to the Fundamental Law and to annul such legal acts on account of violation of Article B (1) and Article X (3) of the Fundamental Law.

[5] The referring court is of the opinion that the provisions of the Fundamental Law and the Constitution concerning the autonomy of universities have not changed in substance; therefore, it considers the findings of Decision 41/2005 (X. 27.) AB to be primarily relevant with respect to the initiative.

[6] It is essential for the realisation of university autonomy that the institution of higher education has autonomy vis-a-vis the executive power in matters directly related to academic activity. The fundamental condition for this autonomy is that the institution must have an independent representative body, and the autonomy of the institution must not be compromised by the representative of the maintaining entity, since the subjects of university autonomy are the institution, the lecturer, the researcher and the student, as well as their community. Due to the autonomy of the university, the representative body should be empowered to make norms and rules, and the right of appeal of the parties concerned should also be guaranteed. Organisational independence means the exercise of decision-making powers and organisational powers in their entirety. The autonomy of financial management is part of the institution's autonomy. The right holders, that is, the scientific community, can only carry on their activities free from undue influence if this is duly ensured by the organisation of the higher education institution and the system of making decisions affecting education and science. Legislation that leads to the elimination of the right of self-government cannot be considered constitutional: giving the maintaining entity powers that directly affect autonomous operation, and overly broad powers, entails the loss of institutional autonomy. The initiating court also referred to the principles of the Magna Charta Universitatum, which declares the autonomy and independence of universities from all political, economic and ideological powers.

[7] In the opinion of the referring court, despite the requirement of institutional independence and autonomy that may be derived from the Fundamental Law, the Statutes and the Operational Rules adopted on the basis of the Theatre and Film Arts Act and Section 94 (6) of the Higher Education Act provide the maintaining entity with the power of complete economic and organisational control. It is the maintaining entity that adopts the institutional development plan and as part of it the research & development and innovation strategy, the budget of the Theatre and Film Arts University, the annual accounts prepared in accordance with the accounting provisions, the public benefit report and the asset management plan of the Theatre and Film Arts University, and the Operational Rules of the

Theatre and Film Arts University. The maintaining entity shall decide on the establishment of a business entity by the Theatre and Film Arts University and on the acquisition of shares in such an entity. In addition, the call for application for the rector's position shall be published by the maintaining entity, following obtaining the opinion of the Senate, and it shall issue the job descriptions of the rector and the chancellor; in the event of the vacancy of the rector's position, resignation of the rector, termination of the rector's senior management mandate or incapacity of the rector, the maintaining entity shall directly appoint the vice-rector for general affairs and the vice-rector for education without a competitive tendering procedure, and without receiving the opinion of the Senate in the event of an emergency or the resignation or incapacity of the Senate, and the maintaining entity shall revoke their appointment and exercise the employer's rights over them. The head of class tutor is appointed by the rector on the basis of an international application approved by the maintaining entity, and the head of the institute leading an education-research unit is appointed by the rector with the agreement of the maintaining entity. In the view of the referring court, the tasks that had been previously placed within the independent decision-making competence of the Theatre and Film Arts University were transferred to the competence of the maintaining entity. In the opinion of the referring court, the maintaining entity exercised the option provided by Section 94 (6) of the Higher Education Act and allocated all the rights listed therein into its own competence. According to the court, referring to the case law of the Constitutional Court, the board of trustees of the Theatre and Film Arts University is not a body of self-government of the higher education institution, and therefore it cannot be empowered to make fundamental decisions concerning the scientific, educational and research activities protected by the autonomy of the higher education institution. Such a concentration of the higher education institution's decision-making powers in the hands of the maintaining entity means a withdrawal of the higher education institution's autonomy, which violates the higher education institution's existence, the fundamental constitutional requirement of its organisational, operational and financial independence arising from its institutional autonomy. According to the court's view, therefore, the Theatre and Film Arts Act and Section 94 (6) of the Higher Education Act allow the maintaining entity to withdraw institutional autonomy to an extent that is contrary to Article X (3) of the Fundamental Law.

[8] The referring court holds that the entry into force of the Theatre and Film Arts Act on the day following its promulgation on 8 July 2020, and the entry into force of the provisions on the transfer of assets on 1 September 2020 cannot be considered as a sufficient preparation period, because the provisions of Act provided for a complete institutional change in the model and maintenance of the Theatre and Film Arts University's operation, which cannot be achieved in such a short period of time without prejudice to legal certainty. Therefore, in the court's view, the Theatre and Film Arts Act is also contrary to Article B (1) of the Fundamental Law.

[9] The Minister of Justice and the Minister responsible for higher education informed the Constitutional Court of their position on the matter, as provided for in Section 57 (1b) of the Constitutional Court Act, and they explained the reasons behind the change of model and pointed out that the reason for the contested regulation was to increase the obligation to maintain the institution, which is a consequence of ownership responsibility. They also pointed out that the

autonomy of higher education does not even arise in the context of the contested Theatre and Film Arts Act, because it does not affect the higher education institution, only in the sense that the maintainer has changed, and this autonomy is further increased by the fact that the maintaining entity is an independent legal entity.

II

[10] 1 The provisions of the Fundamental Law relevant to the judicial initiative read as follows:

"Article B (1) Hungary shall be an independent and democratic State governed by the rule of law."

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

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

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

"Article XI (1) Every Hungarian citizen shall have the right to education.

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

[11] 2 The relevant provision of the Higher Education Act invoked in the judicial initiative reads as follows:

"Section 94 (6) Notwithstanding the provisions of Section 12 (3) and Section 73 (3), the founding charter of a private higher education institution may also provide that the maintaining entity shall adopt the budget of the higher education institution, its annual report prepared in accordance with the accounting provisions, its organisational and operational regulations, its asset management plan, the establishment of a business entity, the acquisition of shares in a business entity, and the maintaining entity shall announce the call for applications for the position of the rector."

[12] 3 The provision of Act IX of 2021 on Public Benefit Trust Foundation Performing Public Functions (hereinafter referred to as the "Public Benefit Trust Act") relevant to the judicial initiative reads as follows:

"Section 22 (4) The founding charter of the higher education institution listed in Annex 1 maintained by the foundation may provide that the maintaining entity shall adopt the budget of the higher education institution, its annual report prepared in accordance with the accounting provisions, its organisational and operational regulations, its asset management plan, the establishment of a business entity, the acquisition of shares in a business entity, and that the maintaining entity shall announce the call for applications for the rector's position, but the Senate shall be granted the right to give its opinion or consent in the founding charter."

III

[13] First of all, the Constitutional Court considered whether the judicial initiative complied with the formal and substantive requirements of Section 25 and Section 52 of the Constitutional Court Act {Decision 3058/2015 (III. 31.) AB, Reasoning [15] to [24]; Decision 3242/2017 (X. 10.) AB, Reasoning [7]; Decision 3102/2018 (IV. 9.) AB, Reasoning [18]}.

[14] Pursuant to Section 25 of the Constitutional Court Act, on the basis of Article 24 (2) (b) of the Fundamental Law, a judge may, in addition to suspending court proceedings, initiate with the Constitutional Court to declare a law or the provision thereof to be contrary to the Fundamental Law or to disapply a law being contrary to the Fundamental Law, if in the course of the adjudication of an individual case pending before the judge, he or she has to apply a law which he or she finds to be contrary to the Fundamental Law or about which the Constitutional Court has already found to be contrary to the Fundamental Law.

[15] In line with the case law of the Constitutional Court, "the petition shall comply with the requirement of being explicit as specified in Section 52 (1) of the Constitutional Court Act (*applicatio certa*), if it meets the conditions listed in Subsection (1b), that is, it clearly and exactly specifies the reasons of the petition, the law or provision of the law challenged by the petition, the violated provision of the Fundamental Law or of the international treaty. Moreover, the petition should provide a reasoning why the contested law or the provision thereof is contrary to the specified provision of the Fundamental Law or the international treaty and it shall also contain an express request for a declaration that the contested act or provision is contrary to the Fundamental Law and for establishing a prohibition on its application. The petition is unsuitable to be judged on the merits if it is ambiguous in indicating the provision of the Fundamental Law that it alleges to be violated {Decision 3175/2014 (VI. 18.) AB, Reasoning [5]}, or merely indicates it without providing a reasoning, in the form of detailed arguments, why the challenged law or provision of the law is in conflict with the indicated provision of the Fundamental Law. [Order 3136/2013 (VII. 2.) AB, Order 3193/2014 (VII. 15.) AB; Order 3226/2013 (XII. 12.) AB]. Inadequate reasoning also precludes a decision on the merits if no connection can be established between the challenged law or provision of law and the invoked provision of the Fundamental Law [Decision 3269/2012 (X. 4.) AB, Decision 12/2014. (IV. 10.) AB, Decision 3025/2014 (II. 17.) AB, Decision 37/2013 (XII. 5.) AB, Decision 3074/2013 (III. 14.) AB] or the connection is irrelevant in constitutional terms [Decision 3009/2012 (VI. 21.) AB]." {Decision 3058/2015 (III. 31.) AB, Reasoning

[19]].

[16] The Constitutional Court found that the initiative mentions in connection with Section 94 (6) of the Higher Education Act several maintenance competences, the transfer of which competences to the maintaining entity is not authorised by the challenged Section 94 (6) of the Higher Education Act. The Constitutional Court ruled that the requirement of being explicit is not fulfilled in the context of reviewing the provisions of the founding charter not based on Section 94 (6) of the Higher Education Act, because the initiative merely alleges a violation of the autonomy of the higher education institution, but does not contain any substantive reasoning in this regard. The Constitutional Court notes that deciding as to what the maintaining entity has the power to do under the Higher Education Act is not a question of constitutionality, but falls within the competence of the general court to interpret the law.

[17] The Constitutional Court refers to the fact that pursuant to Section 52 (2) of the Constitutional Court Act, it is established case law that the requirement of being explicit must be met separately in relation to each impugned law or provision of law and each provision of the Fundamental Law invoked {Decision 3136/2013 (VII. 2.) AB, Reasoning [7]}.

[18] The Constitutional Court held that the judicial initiative partially fulfils the conditions provided for in Section 25 and Section 52 (1) and (1b) of the Constitutional Court Act, as interpreted by the Constitutional Court in its Order 3058/2015 (III.31.) AB, since the creation of the founding charter that is the subject of the pending lawsuit before the initiator is based on Section 94 (6) of the Higher Education Act, the claimant in the action is an organisation with statutory representation in the Senate, while the Theatre and Film Arts Act designated the defendant board of trustees to exercise the maintenance rights. The Constitutional Court has held that "the »specific or particular« nature of the judicial initiative as norm control is narrower than the abstract *ex post* norm control in that the petitioning judge may only challenge the law applied in the case and must give detailed reasons for the need to apply it in the case. This is the only way to ensure the specific, or particular, norm control character of the initiative." {Decision 3193/2014 (VII. 15.) AB, Reasoning [7]}. The Constitutional Court found that, based on the petition, the Theatre and Film Arts Act does not qualify as the applicable norm in the case, because the contested maintenance competences are not based on the Theatre and Film Arts Act, but on the challenged provision of the Higher Education Act {Order 3058/2015 (III. 31.) AB, Reasoning [22]}.

[19] In addition, the referring judicial panel took measures to order a stay in proceedings, and the petition contains an explicit request, and in relation to the argument based on Article X (3) of the Fundamental Law, it clearly and precisely indicates the reasons for the petition, the contested provision of the law, and the violated provisions of the Fundamental Law. In relation to Article X (3), the petition gives reasons why the contested provisions of the law are contrary to the Fundamental Law, and also contains an express request to establish that the impugned provision of the law is contrary to the Fundamental Law and to declare a prohibition of its application.

[20] The judicial initiative is unfounded.

[21] The subject matter of the initiative is the relationship between the UTFE as a higher education institution and the public benefit trust foundation performing a public task and exercising the maintainer's rights (hereinafter referred to as the "maintaining entity").

[22] 1. Pursuant to Article XI (1) of the Fundamental Law, every Hungarian citizen shall have the right to education.

Hungary shall ensure this right by extending and generalising community culture, by providing free and compulsory primary education, free and generally accessible secondary education, and higher education accessible to everyone according to his or her abilities, and by providing financial support as provided for by an Act to those receiving education [Article X (2) of the Fundamental Law]. In its Decision 32/2012 (VII.4.) AB, the Constitutional Court held that certain rules on higher education constitute an essential guarantee of the right to education. Access to higher education for all on the basis of ability is provided by the State, primarily through higher education institutions. The rules on higher education institutions as a whole represent the institutional aspect of the right to higher education, which is part of the right to education, where the right holders have the opportunity to benefit from higher education.

[23] Article X of the Fundamental Law also applies to higher education. Pursuant to Article X (1) of the Fundamental Law, Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge and, within the framework laid down in an Act, the freedom of teaching. Article X (3) of the Fundamental Law guarantees the academic autonomy of higher education institutions when it states that higher education institutions shall be autonomous in terms of the content and the methods of research and teaching; their organisation shall be regulated by an Act of Parliament. The independence and autonomy of higher education institutions is enshrined in the Fundamental Law with regard to the content of research (science) and teaching (education). This autonomy is complemented by Article X (2) of the Fundamental Law, which states that the State is not entitled to decide on scientific truth, and that only those who are engaged in scientific research are entitled to evaluate scientific research. This part of the Fundamental Law imposes a general obligation on the State to abstain from evaluating scientific research, which by analogy also applies to the research activities of higher education institutions.

[24] The autonomy of research and teaching can only be asserted if it is accompanied by an appropriate system of guarantees. The guarantee system applies primarily to the higher education institution, and the institution itself must ensure this in its internal functioning, therefore the autonomy of higher education institutions in research and teaching necessarily presupposes the existence of rules that can guarantee this. Respect by the State for the research-teaching autonomy of higher education institutions thus not only requires that research-teaching autonomy be

implemented at the individual level, but also imposes a positive obligation on the State; it shall build an institutional system that ensures the exercise of autonomy vis-a-vis and within higher education institutions. The State has a duty to protect institutions, which is reflected in the regulation of higher education institutions in a way that ensures research and teaching autonomy free from external influence.

[25] The establishment of an institutional, organisational guarantee system is not only a framework for ensuring research-teaching autonomy.

The institutional system necessary for the enforcement of research-teaching autonomy is the institutional guarantee of access to higher education for the subjects of Article XI (2) of the Fundamental Law, that is, for the users of higher education, as the State provides the opportunity of higher education through higher education institutions.

[26] The autonomy of research and teaching free from external influence and the guarantee of the right to higher education is realised through higher education institutions. Higher education institutions can only guarantee that research and teaching activities are free from external influence if they are accompanied by appropriate guarantees. The organisational system and the organisational structure are inherently capable of ensuring that the system of guarantees within higher education institutions is effective. Higher education autonomy is not for its own sake, it can only work within an appropriate institutional framework. Within the institutional framework, organisational regulations must be established which ensure that the holder of autonomy can express and articulate its views and, as an exerciser of research and teaching autonomy, participate in the formulation of the rules governing its operation.. The organisational framework must therefore be capable of giving the holders of the autonomy granted to higher education institutions by the Fundamental Law a meaningful influence in the formulation of the rules governing their operation, as a guarantee of autonomy.

[27] The autonomy of higher education institutions in research and teaching provided for in the Fundamental Law is exercised by the teachers and researchers of the higher education institution; and, by virtue of the close connection with the right to education, it is exercised by the students who follow the courses provided by higher education. Article X (3) of the Fundamental Law requires that the organisational structure of higher education institutions shall ensure that the subjects of higher education autonomy have influence on the operation of the higher education institution, can express their views on research and teaching autonomy, can clash their opinions with each other and have decision-making rights in matters related to research and teaching autonomy. To exercise this right, the institution must have an organisational structure in which those exercising autonomy have influence in decisions concerning the higher education institution. If it is organised on a representative basis, the composition of the institutional body, which is representative (e.g. by election), must be representative of those who exercise autonomy, that is, the mandate of such a body must come from the persons exercising the autonomy. The current sectoral legislation on higher education institutions, the Higher Education Act, fulfils this requirement when it states that the Senate has the rights of the higher education institution as laid down in the Fundamental Law [Section 12 (2) of the Higher

Education Act].

[28] Article X (3) of the Fundamental Law imposes the requirement of statutory regulation in terms of the organisational order.

Consequently, the State has a regulatory obligation to create statutory provisions that ensure the research and teaching autonomy of higher education institutions. [cf. Section 1 (1) of the Higher Education Act]. Article X of the Fundamental Law does not distinguish between higher education institutions from the point of view of the maintainer, except with regard to management, when it states that the Government shall, within the framework of Acts, lay down the rules governing the management of public higher education institutions and shall supervise their management.

[29] Pursuant to Article X (3) of the Fundamental Law, the essential content of higher education autonomy is the autonomy of research and educational activity, which necessarily includes organisational regulations that enforce and guarantee this autonomy, to provide the custodian of autonomy, the students, lecturers and researchers of the higher education institution, with the right to make decisions and influence on issues related to research and educational activity. In other words, autonomy in research and education cannot be exercised without organisational structure and organisational rights.

[30] To sum up, as a guarantee of the right to education in higher education, it is the task of the State to build a regulatory environment that provides higher education institutions with research and educational autonomy free from external influence; and the statutory regulation of the organisational structure provides the organisational guarantee for this.

V

[31] The Constitutional Court subsequently reviewed the organisational rules relating to the judicial initiative.

[32] 1 The basic requirements for the system of higher education institutions are laid down in the Higher Education Act [cf. Section 1 (1) of the Higher Education Act]. The defendant in the proceedings underlying the initiative is the board of trustees of the Foundation for the University of Theatre and Film Arts (hereinafter referred to as the "board of trustees"). The board of trustees is the maintaining entity of the Theatre and Film Arts University (Section 2 of the Theatre and Film Arts Act).

Under the Higher Education Act, a higher education institution may be founded by the Hungarian State, a national-level nationality self-government, a religious legal entity, a business company with its registered office in Hungary, a foundation registered in Hungary, a trust foundation, a public foundation or a religious association, either alone or jointly with other eligible persons. [Section 4 (1) of the Higher Education Act]. The Higher Education Act declares that the exercise of founders' rights must not infringe the autonomy of higher education institutions guaranteed by the Fundamental Law and the Higher Education Act. [Section 4 (5) of the Higher Education Act].

[33] The Higher Education Act allows the founder of a higher education institution to transfer the founder's rights.

The Higher Education Act makes a distinction between founder's rights and maintenance rights, and higher education institutions have the possibility to divide such rights, with the proviso that the State keeps an authentic, public and transparent record of these rights. The purpose of the management of the higher education institution by the maintaining entity is to ensure the conditions necessary for the operation of the institution [Section 73 (1) of the Higher Education Act]. The continuous operation of a higher education institution requires, among other things, operation by the maintaining entity, the absence of which means the termination of the higher education institution. According to the Higher Education Act, maintenance rights are, in general, the same regardless of who carries them out.

[34] Pursuant to Section 73 (3) of the Higher Education Act, the maintaining entity shall (a) issue or amend the founding charter of the higher education institution on its own authority, in the case of a state higher education institution by a measure not subject to consent as provided for in Act CXCV of 2011 on Public Finances; (b) disclose the budget limits (sum-totals) of the higher education institution and evaluate its annual report prepared in accordance with the accounting provisions; (c) review (ca) the organisational and operational regulations of the higher education institution, (cb) the institutional development plan of the higher education institution, (cc) the budget of the higher education institution; (d) monitor (da) the financial management of the higher education institution, the legality and efficiency of its operation, (db) the effectiveness of professional work; (e) initiate the appointment and dismissal of the rector, and exercise the employer's rights over the rector; (f) in non-State higher education institutions, appoint the president and the chancellor, in the absence of the latter, the head of the business administration employed as a senior manager (senior employee), and revoke their appointment; (g) ensure the audit of the annual budget accounts of the higher education institution operating as a budgetary body; (h) give its consent is required for (ha) the establishment of a title or recognition with a regular cash benefit or for the payment of a regular cash benefit on the basis of a recognition or title within the scope of competence of the higher education institution, (hb) the development of its annual training activities, in particular the courses of study to be offered, the methods of organising training, the planned capacity of students with a specialisation; (i) for the purpose of monitoring the operation and management of the higher education institution, it may have a right to access the institution's academic, management and other registration data; (j) the higher education institution determines with its approval the costs of the training carried out in the institution; (k) exercise decision-making competences in relation to the delegation, appointment, recall and termination of the appointment of members of the consistory of the state higher education institution; and obtains the opinion of the National Council of Nationalities for decisions taken by the maintaining entity with regard to nationality training.

[35] The maintaining entity has a duty of control over the operation of the higher education institution and has a special duty of control to ensure the lawful operation of the higher education institution [Section 73 (4) to (5) of the Higher Education Act]. In addition to the general provisions, the

Higher Education Act lays down additional obligations for the specific individual maintaining bodies. This means that maintaining bodies of higher education institutions are responsible for contributing to the strategic management, overseeing the legality of operations and financing the operation. Management by the maintaining entity, as a power of governance, means management outside the higher education institution. The autonomy granted by the Fundamental Law is the right of the higher education institution, therefore management by the maintaining entity may not include exclusive decision-making in areas where the higher education institution has independence. This requirement is reflected in the Higher Education Act, which states that the autonomy of the higher education institution with regard to the academic subject and content of training and research may not be infringed by the management by the maintaining entity. The custodian of the autonomy of higher education institutions (the Senate) has the right to bring a lawsuit if the autonomy of the higher education institution granted in the Higher Education Act is infringed by the measure taken by the maintaining entity [Section 75 (1) of the Higher Education Act].

[36] 2. It follows from the provision of the Fundamental Law protecting the autonomy of higher education institutions and from the fact that the operation of higher education institutions is one of the means of realising the right to education under the Fundamental Law that the holders of the rights guaranteed by the Fundamental Law exercise the rights conferred on higher education institutions by the Fundamental Law. A body of the higher education institution may be considered to exercise these rights where decisions are taken by the holders of higher education autonomy or where the decisions can be traced back to the holders of higher education autonomy. The Higher Education Act considers the Senate to be such body, which, according to the Higher Education Act, is the body within the institution of higher education exercising the rights that arise under the Fundamental Law. [Section 12 (2) of the Higher Education Act]. The members of the Senate obtain their mandate by way of election, and the provisions of the Higher Education Act concerning the composition of the Senate ensure that members of the Senate represent the custodians of higher education autonomy.

[37] Pursuant to the Higher Education Act, the Senate shall (a) define the higher education institution's training and research tasks and monitors their implementation; (b) establish its own operating rules; (c) adopt the institutional development plan and, as part of it, the research and development innovation strategy, specifying the tasks of implementation for a medium-term period of at least four years, broken down by year; (d) propose the content of the call for applications for the rector's position, evaluates applications for the rector's position and elects the rector-candidate, and evaluates the rector's management activities; (e) adopt the (ea) training programme, (eb) organisational and operational regulations, doctoral regulations, (ed) the budget of the institution within the limits set by the maintaining entity, (ee) the annual accounts prepared in accordance with the accounting provisions; (f) determine at the institution (fa) the system of student counselling, (fb) the system of student review of the teaching work; (g) decide with the consent of the maintaining entity on (gb) the institution's asset management plan, (gc) the establishment of a business entity, the acquisition of shares in a business entity; (h) the Senate shall also decide on (hb) the establishment of the scientific council, the election of its members and its president, (hc) the ranking of applications for teaching, research and management positions, the awarding of titles and honours, (hd) the

establishment and termination of doctoral schools and the launching of doctoral training, (he) the initiation of the awarding of national higher education scholarships, (hf) the initiation of the launching and termination of training.

[38] 3 The subject matter of the judicial initiative is the rule of the Higher Education Act which prescribes special provisions for the specific the maintaining bodies. According to Section 96 (6) of the Higher Education Act, "notwithstanding the provisions of Section 12 (3) and Section 73 (3) (of the Higher Education Act), the founding charter of a private higher education institution may also provide that the maintaining entity shall adopt the budget of the higher education institution, its annual report prepared in accordance with the accounting provisions, its organisational and operational regulations, its asset management plan, the establishment of a business entity, the acquisition of shares in a business entity, and the maintaining entity shall announce the call for applications for the position of the rector". With regard to a specific form of higher education institutions, the Higher Education Act provides the founder (the maintaining entity) with the possibility of making decisions, based on the authorisation of the founding charter, on matters which, according to the general rule of the Higher Education Act, fall in the competence of the Senate. In the view of the referring court, the relevant decision-making competences are those that guarantee the autonomy of higher education, and therefore a decision in which the custodian of autonomy does not participate violates the autonomy of the higher education institution.

[39] The Constitutional Court observed in the course of the substantive examination that in connection with the initiative, the National Assembly adopted the Public Benefit Trust Act, Section 22 (4) of which provides that the decision-making competences of the maintaining entity under Section 94 (6) of the Higher Education Act may be exercised by the maintaining entity by "granting the Senate the right to give an opinion or consent in the founding charter" [Section 22 (4) of the Public Benefit Trust Act]. The new rule also applies to public benefit trust foundations performing a public task covered by the initiative, based on line 27 of Annex 1 to the Public Benefit Trust Act. The founding deed of the maintaining legal person shall be amended within 6 months following the entry into force of Act at the latest [Section 31 (1) of the Public Benefit Trust Act].

[40] The legislative environment giving rise to the constitutional problem raised by the petitioner was changed by the legislator with the relevant provision of the Public Benefit Trust Act adopted meanwhile. The Constitutional Court notes that under the amended Act, the custodian of higher education autonomy exercises the right of opinion or consent in relation to the competences previously vested in the board of trustees, as provided for in the founding deed. The court considered the impugned provision to be contrary to the Fundamental Law because the challenged rule empowered the board of trustees to exercise competences that affect higher education institutions scientific, educational and research activities, which are protected by the institutional autonomy of higher education. As the depositories of the educational-research autonomy of the higher education institution do not have representation in the decision-making body, the rule in the Higher Education Act on the exercising of competences violates the autonomy of the higher education institution protected by the Fundamental Law.

[41] 4 The Constitutional Court finds that the Higher Education Act follows a regulation concerning the exercise of the competences of the maintaining entity and the decision-making competences of the Senate of the higher education institution, which requires an independent decision of the maintaining entity (board of trustees) in some cases, an independent decision of the Senate in other cases, and finally a joint decision of the maintaining entity with the participation of the Senate. The institutional autonomy guaranteed by Article X (3) of the Fundamental Law and the obligation to maintain the system of higher education institutions pursue a common objective: to guarantee the right to higher education. Consequently, it is the responsibility of the State to develop an institutional system that ensures both the functioning of higher education and the exercise of autonomy. As a consequence of Article X (3) of the Fundamental Law, several types of institutional solutions can be derived, provided that the autonomy of higher education in education and research guaranteed by Article X (3) of the Fundamental Law is not violated. However, the Constitutional Court points out here that the system of higher education institutions is not only run by higher education institutions. The quality of the higher education institutional system and the freedom of education and research are ensured through the involvement of a number of institutions inside and outside higher education institutions. The administrative functions of higher education are performed by an external body outside the system of higher education institutions (the Education Office), the Hungarian Accreditation Commission is an independent body that performs quality control, and finally, the National Assembly, whose decision is necessary for the State recognition or termination of a higher education institution, is also an external institution, as is the President of the Republic, who appoints university teachers and rectors. Requirements on the internal institutional side of the higher education system (e.g. permanent teaching staff, permanent seat) are the basis for a higher education institution to obtain an operating licence, without which it cannot carry out higher education activities. The board of trustees exercising the maintainer's rights and the higher education institution have a common task and a common responsibility to ensure the operational efficiency and the quality of teaching and research of the higher education institution. The board of trustees and the Senate of the higher education institution concerned by the judicial initiative can be considered to have the same interests in this respect. There cannot be a maintaining entity in the absence of an autonomous higher education institution, nor an autonomous higher education institution whose operation cannot be ensured by the maintaining entity.

[42] The protection of the autonomy of higher education guaranteed by Article X (3) of the Fundamental Law is ensured by an organisational regulation which gives the custodian of autonomy a substantial influence on the decisions affected by the autonomy. Only a regulation that ensures the autonomy of higher education can be in line with Article X (3) of the Fundamental Law, but this does not mean that all decisions concerning higher education institutions should necessarily only be taken by the representatives of the subjects of higher education autonomy. As the decisions can affect the autonomy of higher education in different ways, the competence of the Senate also needs to be considered on a competence-by-competence basis.

[43] 5. The Constitutional Court subsequently considered the relationship between certain competences covered by the contested legislation and the autonomy of higher education institutions.

[44] The adoption of the budget is the final decision taken on the budget. In accordance with the general rules of the Higher Education Act, the maintaining entity communicates the limitations (sum-totals) of the higher education institution's budget [Section 73 (3) (a) of the Higher Education Act]. The Senate will use them to set the budget of the higher education institution. This means that, under the general rules, the Senate has decision-making competences at most within the limits of the budget. In comparison to this, the contested provision of the Higher Education Act provides that the budget of the higher education institution shall be adopted by the maintaining entity. The educational and research side of higher education autonomy necessarily involves the influence of the depositories of autonomy in the budgeting of higher education institutions. The Senate must have a meaningful influence in the creation of the budget items assigned to the educational-research tasks of the institution of higher education through its competences of access to information, making proposals and engage in consultation, and its participation in the creation of the budget cannot be excluded. The responsibility for the operation of a higher education institution rests with the maintaining entity, and operation necessarily presupposes that it is carried out in a reasonable manner within the actual management framework at all times. The Constitutional Court states that the final adoption of the budget by the board of trustees does not violate the autonomy of the higher education institution, provided that the Senate had the opportunity to obtain information, make proposals and express its opinion in the detailed drafting of the budget, and if this is ensured, the Senate has influence on the budget, because its content may change based on the Senate's proposals and opinion. For the same reasons, the Constitutional Court finds that the adoption by the maintenance body of the annual accounts prepared on the basis of the accounting provisions, does not infringe Article X (3) of the Fundamental Law either.

[45] The Organizational and Operational Regulations is a key document, but not the only one defining the operational order of a higher education institution. The autonomy of a higher education institution necessarily presupposes an organisational framework capable of guaranteeing autonomy. Although the establishment of the organisational framework is a competence exercised by the Senate according to the general rules of the Higher Education Act, the maintaining entity examines the consistency, completeness, legality and efficiency of the organisational and operational rules. [Section 73 (4) of the Higher Education Act]. Pursuant to Articles X (3) and XI (2) of the Fundamental Law, it is a constitutional requirement that the custodian of higher education autonomy shall participate in a meaningful way in the drafting of the organisational and operational regulations. The development of organisational and operational rules is not a regulatory competence in itself, but ensures the internal structure and functioning of the higher education institution, coordinating the different interests within the institution. At the same time, the organisational and operational rules must be suitable for operating the higher education institution. The operation of higher education institutions is the responsibility of the maintaining entity, however it may not exercise this right by making the organisational framework ensuring the autonomy of the higher education impossible or inoperable. The board of trustees and the Senate have a common interest in the successful and efficient operation of the institution. This necessarily implies that conflicts along the common interest must be resolved through mutual cooperation between the two bodies in order to ensure the operability of the

institution. Regardless of which body has the exclusive right to decide on the adoption of the organisational and operational rules, the constitutional requirement of ensuring the sustainability of the higher education institutional system and guaranteeing the autonomy of higher education institutions, which derive from Articles XI and X (3) of the Fundamental Law, is that the two bodies should ensure this by cooperating with each other, preparing the merits of the decision and giving room for the expression of opposing opinions by discussing them. The Constitutional Court establishes that guaranteeing all these is a constitutional requirement, by the enforcement of which the reviewed text of the challenged rule is not deemed to be in conflict with the Fundamental Law.

[46] The rector is the head of the higher education institution, its legal representative and the chairman of the Senate. According to the contested regulation, the call for applications for the rector's position is announced by the board of trustees. The selection of the rector's person consists of several procedural steps. The rector is the person primarily responsible for the operation of the higher education institution, and his/her election and appointment is a guarantee of the operability of higher education institutions. The legislation in force imposes strict requirements on the person of the rector (e.g. holding a university professor's degree) and rectors are appointed by the President of the Republic. The announcement of a call for applications for the rector's position as a procedural step necessarily presupposes the preparation of a proposal for the call for application, which is in the competence of the Senate under the Higher Education Act. The Constitutional Court concludes that, in the legislative context in which the Senate has a substantive influence, the challenged regulation is not contrary to the Fundamental Law.

[47] The adoption of an asset management plan, the participation in a company and the establishment of a company are all competences which are closely linked to the running of an institution. Of all the elements of higher education autonomy protected by the Fundamental Law, it is most closely linked to research autonomy. The usability and utilisation of research results as intellectual works are linked to the asset management plan, but the Constitutional Court notes that the link between the autonomy of higher education institutions and the contested regulation is indirect, the operation and maintenance of the institution as a task and responsibility is vested on the maintaining entity, and the Senate's right to give its opinion in the exercise of these competences ensures that the autonomy of higher education institutions is not infringed. The Constitutional Court therefore concludes that this aspect of the legislation is not unconstitutional.

[48] The Constitutional Court, on the basis of Section 46 (3) of the Constitutional Court Act, attached a constitutional requirement pursuant to clause 1 of the operative part to Section 94 (6) of the Higher Education Act and to Section 22 (4) of the Public Benefit Trust Act in order to ensure that Article X (3) of the Fundamental Law and the right to higher education under Article XI (2) of the Fundamental Law are to be enforced in the decision-making competences of the maintaining bodies that affect the autonomy of higher education institutions. Under this constitutional requirement, the Senate's reasoned proposal must be considered by the maintaining entity in its decision-making process.

[49] Although the founding charter of the higher education institution concerned in the case already contains the right of the Senate to give its opinion on the challenged regulation, the Constitutional

Court finds that the means of enforcing the constitutional requirement is that the institution exercising the rights of the maintainer must comply with the obligation to amend the founding charter as soon as possible within the period of time open for the entry into force of the regulation.

VI

[50] The publication of the Decision of the Constitutional Court in the Hungarian Official Gazette is based upon the second sentence of Section 44 (1) of the Constitutional Court Act.

Budapest, 08 June 2021

Dr. Tamás Sulyok,
Chief Justice of the Constitutional Court

Justice-Rapporteur, delivering the opinion of the Court

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of Justice
dr. Egon Dienes-Oehm prevented from
signing

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of Justice
dr. Attila Horváth prevented from signing

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of Justice
dr. Miklós Juhász prevented from signing

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of Justice
dr. László Salamon prevented from
signing

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of Justice
dr. Péter Szalay prevented from signing

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of Justice
dr. Tünde Handó prevented from signing

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of Justice
dr. Imre Juhász prevented from signing

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of Justice
dr. Béla Pokol prevented from signing

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of
Justice *dr. Balázs Schanda* prevented
from signing

Dr. Tamás Sulyok, Chief Justice of the
Constitutional Court on behalf of
Justice *dr. Mária Szívós* prevented from
signing