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University Autonomy in the European Multi-Level Governance System – More or Less?[**]

Abstract

Although the need to increase the autonomy of institutes of higher education is generally recognised, there is a growing tendency for governments to interfere with university autonomy and academic freedom in certain European states in the last decade. The article is about these changing trends from a comparative, cross-country perspective focusing on certain striking examples. Our analysis shows that it is possible to find some 'common denominators' but there is no uniform trend towards university autonomy in Europe. Though higher education is a key matter for Europe, national interests and competences remain decisive in this area and the role EU governance instruments in safeguarding university autonomy still remain questionable.

Keywords: university autonomy, autonomy indicators, higher education governance, European Union, spillover effect, Hungary

I. Introduction

University autonomy is under challenge for several reasons nowadays. Recent years have witnessed many factors influencing the level of institutes of higher education's (IHE) autonomy[1] and governance system, including demographic trends, the effect of the financial and economic crisis or new missions that universities and research institutions are expected to fulfil. Although the need to increase university autonomy is generally

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[**] This work was supported by the Hungarian Academy of Sciences under Grant No. 05216, in the framework of the project "Reassessment of State Roles in Regulation of Services" implemented by the MTA–DE Public Service Research Group.

[1] The terms 'university' and 'IHE' are used interchangeably in this paper as in other literatures on the subject: A. Gideon, *Higher Education Institutions in the EU: Between Competition and Public Service* (T. M. C. Asser Press, The Hague, 2017); S. Garben, Case C-73/08, Nicolas Bressol and Others, Céline Chaverot and Others v. Gouvernement de la Communauté française, Judgment of the Court (Grand Chamber) of 13 April 2010, (2010) 47 (5) *Common Market Law Review,* 1493–1510, https://doi.org/10.54648/COLA2010062

DOI: 10.56749/annales.elteajk.2017.lvi.5.61

recognised, there is a growing tendency over the last decade for governments in certain European states to interfere with university autonomy and academic freedom.

The article seeks to explore these changing trends from a comparative, cross-country perspective, focusing on certain striking examples. We argue that, beyond formal indicators (independent decision of universities, free admission etc.), the level of de facto university autonomy is intensively affected by other 'secondary' or even indirect factors. These may be general policy priorities of the central government, competition between universities, non HE-related sector-political measures or other administrative, political and societal factors.

Though the study primarily focuses on public universities, the position of private institutes of higher education will also be examined where necessary. The analysis extends to those relations and interactions between different levels in the EU multi-level governance system that are relevant to explain and understand the tendencies in the four dimensions of university autonomy. In this context, we also ask whether the relevant European institutions have appropriate instruments to enforce Member State's compliance with the requirements of academic freedom and university autonomy.

II. Why university autonomy?

'Higher education without academic freedom – the ability of staff to pursue research and teach without fear of being censored or disciplined – is not higher education at all.' – an expert argues.[2] The principles of academic freedom and institutional autonomy were first declared (in written form) by the Magna Charta Universitatum of 1988 as a guideline for good governance and self-understanding of universities in the future. Based on the century-long traditions on the interpretation of European universities' identity, it has been confirmed that

> The university is an autonomous institution at the heart of societies differently organised because of geography and historical heritage; it produces, examines, appraises and hands down culture by research and teaching. To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power.

[2] M. Andrews, *University autonomy: not the only principle we should defend.* 23 July 2015, https://www.timeshighereducation.com/opinion/university-autonomy-not-the-only-principle-we-should-defend (Last accessed: 8 June 2017).

Though the importance of university autonomy is still beyond doubt, the narrative of its several dimensions are much more differentiated than at the time when it was declared by the Magna Charta. The role of higher education institutions has transformed into a more complex set of functions over the last few decades; current understanding of university autonomy has therefore also changed. The impact of recent economic, political and societal factors – such as the development of international trade and political relations, impact of the global financial crises, social tensions etc. – is remarkable in this regard. All these factors made expectations towards modern institutes of higher education more heterogeneous today than thirty years earlier. Therefore, a proper understanding of university autonomy can only be obtained through a holistic view of the complex inter-relationships between stakeholders and policies. As emphasised by the vice-chair of the Association of University Administrators, 'Self-governance is a must for the sector, but we must use it to engage with wider society's concerns [...]'.[3]

III. Dimensions and indicators of university autonomy

in the following section the state of play of university autonomy in Europe will be explored, as well as recent trends of changes and developments in this regard. Our analysis mainly based on data published in the third Autonomy Scorecard of the European University Association (EUA) of April 2017 comparing the higher education system of 29 European countries.[4,5] The Scorecard is based on 30 different core indicators in four key dimensions of autonomy, i.e. organisational autonomy;[6] financial autonomy;[7] staffing autonomy[8] and academic autonomy.[9]

[3] Ibid.
[4] E. B. Pruvot and T. Estermann, *University Autonomy in Europe III. The Scorecard 2017* (European University Association, 2017), http://www.eua.be/Libraries/publications/University-Autonomy-in-Europe-2017 (Last accessed: 8 June 2017), in the following 'Scorecard' or 'EUA report'.
[5] The first study 'University Autonomy I' released in 2009 and compared 34 European countries in the four key areas of autonomy.
[6] Pruvot and Estermann, *University Autonomy in Europe III.* 14–20., 41–43., 53–59.
[7] Ibid, 21–27., 44–46., 53–59.
[8] Ibid, 28–32., 47–49., 53–59.
[9] Ibid, 33–39., 50–52., 53–59.

Table 1. Autonomy indicators and their weighting factors

Indicator		Weighting factor
Organisational autonomy	Selection procedure for the executive head	14%
	Selection criteria for the executive head	14%
	Dismissal of the executive head	12%
	Term of office of the executive head	9%
	Inclusion of external members in university governing bodies	12%
	Selection of external members in university governing bodies	12%
	Capacity to decide on academic structures	15%
	Capacity to create legal entities	12%
Financial autonomy	Length of public funding	14%
	Type of public funding	13%
	Ability to keep surplus	14%
	Ability to borrow money	9%
	Ability to own buildings	12%
	Ability to charge tuition fees for national/EU students	17%
	Ability to charge tuition fees for non-EU students	21%
Staffing autonomy	Capacity to decide on recruitment procedures (senior academic staff)	13%
	Capacity to decide on recruitment procedures (senior administrative staff)	13%
	Capacity to decide on salaries (senior academic staff)	12%
	Capacity to decide on salaries (senior administrative staff)	12%
	Capacity to decide on dismissals (senior academic staff)	12%
	Capacity to decide on dismissals (senior administrative staff)	12%
	Capacity to decide on promotions (senior academic staff)	13%
	Capacity to decide on promotions (senior administrative staff)	12%
Academic autonomy	Capacity to decide on overall student numbers	14%
	Capacity to select students	14%
	Capacity to introduce and terminate programmes	16%
	Capacity to choose the language of instruction	13%
	Capacity to select QA mechanisms	15%
	Capacity to select QA providers	11%
	Capacity to design content of degree programmes	16%

Source: Pruvot and Estermann, *University Autonomy in Europe III.*

1. Organisational autonomy

Organizational autonomy refers to the ability to decide on university structures and their status, procedures and criteria for selecting the bodies and decision-making factors, as well as the ability to decide on the involvement of outsiders in the work of the university and the ability to create distinct legal bodies.[10]

The Scorecard shows that governance reforms in the last decade changed the status of institutes of higher education in several countries in a positive way, usually towards a greater freedom from the state (see in particular France, Italy, Sweden). In most cases, there is a parallel tendency of increased participation by external members in the university governing bodies (see HE reforms in France in 2013 or in Lithuania in 2016, for instance). Most universities are also free to determine their internal academic structures and can create legal entities.[11] In many countries, institutions gain more autonomy if they carry out certain additional activities through such distinct legal entities.

Though progress in the field of organisational autonomy is noticeable, it is also pointed out in the Scorecard that there is no general positive trend in Europe towards allowing more autonomy for universities. There are also a series of setbacks, with different kinds of meaning for higher education in general. The example of Hungary is mentioned as 'an isolated case',[12] which shows that there can be direct interventions by the state aimed at re-asserting greater control over university activities. This is mainly because of the creation of the 'chancellor' position in Hungarian universities (existing since July 2014), which fundamentally alters the capacity of institutions to organise themselves. The position includes responsibilities for financial and staffing matters, while the rector remains responsible for academic matters. (The rector, for instance, must seek the chancellor's approval for any decision on staff salaries.) The chancellor is directly appointed by the Prime Minister.[13]

[10] A. Cotelnic, A. Niculita, P. Todos, R. Turcan, L. Bugaian and D. Pojar, Looking for (Re)Defining University Autonomy, (2015) 15 (1) *The USV Annals of Economics and Public Administration,* 74–91, 75.

[11] All countries allow universities to create non-profit entities; about two-thirds extend this prerogative (without constraints) to for-profit legal entities.

[12] Pruvot and Estermann, *University Autonomy in Europe III.* 54.

[13] For a detailed analysis on the chancellor's position, see G. Kováts, Recent Developments in the Autonomy and Governance of Higher Education Institutions in Hungary: the Introduction of the "Chancellor System", in J. Berács, J. Iwinska, G. Kováts and L. Matei (eds), *Central European Higher Education Cooperation. Conference Proceedings* (Corvinus University of Budapest, Center for International Higher Education Studies and Central European University, Budapest, 2015, 26–39) 31–37.

2. Financial autonomy

Financial autonomy provides financing means, ability and mechanisms for attracting and allocating funds and the opportunity to borrow money (under normal market conditions). It also provides the right to own buildings and to decide on tuition fees and charges for the provision of other services.[14]

The characteristics of the funding system have an influence on many aspects of university autonomy. In most European countries, universities are largely funded by state resources, with the associated expectation that they fulfil a series of societal missions. There exists a great variety across Europe as to funding models for higher education.

In almost all countries, universities receive their core public funding through block grants.[15] However, internal allocation possibilities across categories (such as salaries, research expenditures, and operational costs) are very often limited by law. Line-item budgets[16] are exceptionally (this funding system exists, in its original form, only in Serbia). Hungary is expressly mentioned in the EUA Report[17] as an extreme case where, in addition to the lack of internal shifting possibilities, any decision with financial implications must receive the approval of the chancellor (who is, as mentioned, directly appointed by the Prime Minister). This post has definitely changed the ability of the university to decide on internal funding allocation since 2014. While governing bodies may include representatives of public authorities in other systems as well (as in Belgium or Luxembourg), with important responsibilities for finances, the degree of control in Hungary's case is not comparable, with a veto right on all decisions with financial implications.[18]

As regards tuition fees (or registration fees), trends differ to a large extent throughout Europe. As compared to previous years, the general rule remains that universities are not able to control tuition fees for Bachelor students (which is the main student population); however, in certain countries (England, Ireland and Portugal), universities get more freedom to set fees at Master level. There are three main models in Europe: 1) fees may be freely determined by the university itself, 2) a public authority may decide on fees, or 3) a public authority and the universities may cooperate in setting fees. In sum, the autonomy of universities to determine tuition fees has not

[14] Cotelnic et al., Looking for (Re)Defining University Autonomy. 75.
[15] Block grants are understood as financial grants that cover several categories of expenditure, such as teaching, operational costs and/or research activities.
[16] In a line-item budget, the ministry or parliament pre-allocate university funding to cost items and activities.
[17] Pruvot and Estermann, *University Autonomy in Europe III.* 54.
[18] Ibid, 58.

been reduced in the last decade. Here again, the case of Hungary is exceptional, as this is the only European country between 2010 and 2016 where the ability of universities to decide on fee levels was curtailed. There is also a general European trend that universities are more autonomous in setting fees for international students than for national ones.

The impact of the financial crisis is visible. In the period of a few years after the crises begun, budget reductions, very often as part of the austerity measures aiming at recovery, was a tendency in most European countries. In a few countries, critical underfunding situations created the formal autonomy of universities to carry over surpluses or even to borrow money Short-term reactions to the crisis often led to drastic public funding cuts, putting strong pressure on universities.

3. Staffing autonomy

Staffing (or human resources) autonomy manages the responsibilities on procedures for staff recruitment, remuneration and promotion.[19] As far as this autonomy dimension is concerned, there is a great variety of rules and restrictions applying to recruitment and salary-setting. There is a general trend of moving away from the civil servant model in most European countries; no or a minority of staff have civil servant status in Northern Europe, in Denmark, Estonia, Finland, Lithuania, Latvia, Sweden, the UK, Austria and Luxembourg. This tendency also leads to developments in university autonomy regarding recruitment and salary-setting. Nevertheless, only in a small minority of European countries (Estonia, Luxembourg, Poland, Sweden and Switzerland) are universities entirely free to set salaries or negotiate salary bands with other parties. In the remaining countries, salaries or salary bands, are regulated externally (i.e. by legislation or other external authorities). There are significant differences in recruitment procedures across Europe, ranging from a large degree of independence in the recruitment of staff to formalised procedures that necessitate the approval of an external authority. In Hungary, the chancellor's authorisation is also needed for recruitment, salaries and promotions.

[19] Cotelnic et al., Looking for (Re)Defining University Autonomy. 75.

4. Academic autonomy

Academic autonomy refers to the educational offer, educational plans and teaching methods, the ability to select admission mechanisms, make decisions in various areas, determine objectives and research methods, and be able to select the institutions for quality assessment.[20] There is a continued transition process in a number of European countries, contributing to enhanced academic autonomy. This is a move away from programme accreditation by national public authorities towards institutional external quality assurance. Changes in this field took place in Hungary. Since 2015 universities are permitted to select accreditation bodies internationally for Bachelor's and Master's programmes. Courses can be accredited either by the Hungarian Accreditation Committee or by any organisation member of ENQA, the European Association for Quality Assurance in Higher Education.

There are three basic models of regulations on the overall number of students. In the first one, the national Higher Education system operates on the basis of free admission for everyone holding the basic qualifications. However, in some of the European countries the number of academic fields where a *numerus clausus* applies, is increasing. In the second (opposite) model, it is the competence of the university to decide on the number of study places. In between these two models, half of the countries apply mixed approaches, where there is a certain degree of negotiation or split in the decision-making competences between universities and the state. Even where universities can freely decide on student numbers, there may be specific limitations, such as nationally set requirements on the staff/student ratio (as in Italy), or ceilings for some fields such as medicine, dentistry or engineering (as in Sweden). Even in free admission systems, such as in France, the Netherlands and Switzerland, these (and similar) fields may have a *numerus clausus.* The question will be discussed, using the examples of Austria and Belgium, in detail below.

5. Interim conclusion

The above analysis led us to conclude that there is no uniform trend towards university autonomy in Europe. Higher education systems which feature rather high in some dimensions are 'weaker' in other areas. The priority given to one or the other dimension of autonomy also depends on the legal, political or economic context, such as the financial situation of the country at issue. It is possible, however, to find some 'common denominators'. One (if not the most important) is that a challenging economic context (the financial and economic crises for all) negatively impacts on university autonomy, at

[20] Ibid.

least on its financial dimension. There is also a trend towards large-scale concentration and 'rationalisation' of the academic offer at regional or national level, often explained as an effort to improve the overall efficiency of the HE system, which also risks to running against the organisational and academic autonomy of universities.[21]

Anyway, it is apparent from the Scorecard that a reliable comparison of university autonomy across borders is highly challenging. The concept of autonomy is understood very differently across Europe; associated perceptions and terminology tend to vary quite significantly. This is due not only to differing legal frameworks but also to the historical and cultural settings that define university autonomy in each country. Therefore, applying the formal indicators for defining the level of university autonomy proved to be very difficult in some cases.[22]

The Scorecard further confirmed that, beyond formal indicators, other elements may also influence university autonomy. The level of de facto university autonomy is intensively affected by indirect factors, as well (sometimes in a more sensitive way than by the 'official' indicators). These may be, for instance, changes in the conditions of competitions between higher educational institutions due to general policy priorities of the central government or the results of other administrative, political and societal factors. Such indirect indicators often seem to be the HE-related 'side-effects' of larger structural reforms in the national legal and political system. Conversely, formal indicators do not always work (or not as expected) in reality. (This is the case, for instance where the quality assurance system of a country grants, by law, quite enough freedoms for IHEs to introduce new programmes, but other provisions prevent these freedoms by granting 'exclusive rights' for certain universities as regards the teaching and research in specific academic fields. Or they are simply exempted from the general accreditation obligations.) Pruvot and Estermann also refer to the difficulties in monitoring as an 'enormous challenge' due to ongoing reforms of legal framework in some countries, since 'small changes in legislation can alter the picture markedly; conversely, large-scale reforms might not significantly affect the Scorecard indicator'.[23]

[21] In our context, 'concentration' must be distinguished from 'centralization'. This is the case for instance in Hungary, where HE courses in public administration have gradually been monopolised, so only one university (University of Public Service) is authorised by law to introduce degree programs in this field. For a proper understanding of the process, it must be seen together with the Hungarian government's recent measures aiming at a systematic change of public administration and public service, as well as with the more general trend from 2010 towards greater public control over public services [for an analysis of the latter, see T. M. Horváth, From Municipalisation to Centralism: Changes in the Hungarian Local Public Service Delivery, in I. Kopric, G. Marcou and H. Wollmann (eds), *Public and Social Services in Europe. From Public and Municipal to Private Sector Provision* (Palgrave Macmillan, Basingstoke, 2016, 185–200) 190–196].

[22] Pruvot and Estermann, *University Autonomy in Europe III.* 11.

[23] Ibid, 11.

Table 2. Autonomy ranking in Europe

Rank	Organisational autonomy		Financial autonomy		Staffing autonomy		Academic autonomy	
	Country	Score	Country	Score	Country	Score	Country	Score
1.	United Kingdom	100%	Luxembourg	91%	Estonia	100%	Estonia	98%
2.	Denmark	94%	Latvia	90%	Sweden	97%	Finland	90%
3.	Finland	93%	United Kingdom	89%	United Kingdom	96%	Ireland	89%
4.	French-speaking community of Be.	90%	Estonia	77%	Switzerland	95%	Luxembourg	89%
5.	Estonia	88%	The Netherlands	77%	Luxembourg	94%	United Kingdom	89%
6.	Lithuania	88%	Flanders (BE)	76%	Finland	92%	Hesse (DE)	88%
7.	Portugal	80%	Italy	70%	Latvia	89%	North Rhine-Westphalia (DE)	88%
8.	Austria	78%	Portugal	70%	Denmark	86%	Brandenburg (DE)	87%
9.	Norway	78%	Slovakia	70%	Poland	84%	Norway	83%
10.	Hesse (DE)	77%	Denmark	69%	Lithuania	83%	Iceland	78%
11.	Ireland	73%	Finland	67%	Flanders (BE)	76%	Denmark	75%
12.	Flanders (BE)	70%	Switzerland	65%	Austria	73%	Austria	72%
13.	The Netherlands	69%	Ireland	63%	The Netherlands	73%	Switzerland	72%
14.	North Rhine-Westphalia (DE)	68%	Lithuania	61%	Iceland	68%	Poland	68%
15.	Poland	67%	Croatia	60%	Hesse (DE)	63%	Sweden	66%
16.	Italy	65%	Iceland	60%	North Rhine-Westphalia (DE)	63%	Hungary	58%
17.	Slovenia	65%	Austria	59%	Norway	63%	Spain	57%
18.	Croatia	62%	Slovenia	57%	Portugal	62%	Italy	56%
19.	Sweden	61%	Sweden	56%	Slovakia	61%	Slovakia	56%
20.	France	59%	Spain	55%	Brandenburg (DE)	58%	Portugal	54%
21.	Brandenburg (DE)	58%	Poland	54%	Serbia	58%	Croatia	50%
22.	Latvia	57%	French-speaking community of Be.	52%	Hungary	50%	The Netherlands	48%
23.	Hungary	56%	Serbia	46%	Spain	48%	Latvia	46%
24.	Spain	55%	France	45%	French-speaking community of Be.	44%	Serbia	46%
25.	Switzerland	55%	Brandenburg (DE)	44%	Italy	44%	Slovenia	44%
26.	Serbia	51%	North Rhine-Westphalia (DE)		Slovenia	44%	Lithuania	42%
27.	Iceland	49%	Norway	43%	France	43%	France	37%
28.	Slovakia	42%	Hungary	39%	Ireland	43%	Flanders (BE)	35%
29.	Luxembourg	34%	Hesse (DE)	35%	Croatia	37%	French-speaking community of Be.	32%

Source: Pruvot and Estermann, *University Autonomy in Europe III.*

IV. Higher education and European integration

By the end of the first half of the 20th century, European universities traditionally served the public (national) interest by teaching and conducting research rather than commercially exploitable aims. They were financed mainly by the state.[24] Most European higher education institutions still remain 'national' today, despite the principle that academic research and education is 'universal', not restricted by national frontiers.[25] The Magna Charta confirms that a 'university is the trustee of the European humanist tradition; its constant care is to attain universal knowledge; to fulfil its vocation it transcends geographical and political frontiers, and affirms the vital need for different cultures to know and influence each other'. It is also emphasised that 'far-reaching co-operation between all European nations and believing that people and States should become more than ever aware of the part that universities will be called upon to play in a changing and increasingly international society'.

The above mission obviously raises the question of what role supranational integrations have in spreading this 'transnational knowledge'. After early (more or less successful) attempts,[26] the first significant step towards international cooperation was the Bologna Declaration in 1999, which officially launched the Bologna process. Its overall aim was to create a system of academic degrees that are easily recognisable and comparable; to promote the mobility of students, teachers and researchers; and to establish a European Higher Education Area by 2010, including the achievement of a common three-cycle study structure (undergraduate, master and doctoral level), the usage of ECTS and the introduction of an international quality assurance system. This policy process is a voluntary undertaking by each signing country to reform its own education system, which does not give rise to legally binding obligations imposed on national governments or universities.

The Bologna Declaration represents a different view to university autonomy as compared to the classical meaning under Magna Charta: instead of declaring it as a guiding principle (itself), the former document's approach is rather instrumental providing that 'Universities' independence and autonomy *ensure* that higher education and research systems continuously adapt to changing needs, society's demands and advances in scientific knowledge' [emphasis added].

[24] Gideon, Higher Education Institutions... 7.
[25] J. Tóth, Nemzetközi mércék az egyetemi autonómiában [International Benchmarks of University Autonomy], (2017) 10 (2) *Közjogi Szemle [Public Law Review],* (21–24) 21.
[26] A. Barblan, Academic Co-operation and Mobility in Europe: How it Was and How it Will Be, (2001) 27 (1–2) *Higher Education in Europe,* 31–58, https://doi.org/10.1080/0379772022000003206

Although the Bologna Process (with 48 participating countries today) was initiated by individual countries, its driving force across the continent is now the European Union.[27] This is the case despite the fact that the 'project' is not the part of EU education policy in a formal way and remained out of the institutional and decision-making framework of the European Union. Currently, all EU Member States and the European Commission are involved in the Process.

In the early stage of EU integration, the EU (EC) did not have any expressly declared competence in the field of education. Initially, the European Economic Community (EEC) was founded as a (pure) regional economic integration, and economic law, at least on the surface, does not have anything to do with higher education which is, by its traditional nature, a non-economic activity.

Nevertheless, a functional spillover from the free movement provisions of EU internal market (common market) law occurred early on.[28,29] This is because the operation of the internal market may definitely be influenced by Member States' IHE regulations if they fall within the application of the fundamental economic freedom(s).

The role of the EU judicial body (Court of Justice of the European Union, CJEU or ECJ) is especially important in supporting this functional spillover. The case-law made clear that internal market provisions and general principles of EU law should not be altered by the exercise of national regulatory power or administrative practice in the field of education. With the extensive interpretation of 'vocational training' as an important instrument to promote free movement of persons throughout the EU,[30] the ECJ already built a bridge between universities and the 'economic pillars' of the European integration. In its *Gravier* judgment, the Court made clear that

[27] S. Moutsios, Academic Autonomy and the Bologna Process, *Working Papers on University Reform,* 2012), http://edu.au.dk/fileadmin/www.dpu.dk/forskningsprogrammer/epoke/WP_19.pdf (Last accessed: 8 June 2017), 3.

[28] Gideon, Higher Education Institutions... 25, 38.

[29] A similar functional spillover can be seen in the field of health services. For a more detailed analysis of the health sector in this sense, see I. Hoffman, National Interest and European Law in the Legislation and Juridical Practice on Health Care Services – In the Light of the Reforms of the Hungarian Health Care System, (2015) 13 (1) *Central European Public Administration Review,* (135–158) 137–147, https://doi.org/10.17573/ipar.2015.1.07; L. Nistor, *Public Services and the European Union: Healthcare, Health Insurance and Education Services* (Springer, The Hague, 2011) 285–325.

[30] 'Access to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the Member State where they intend to work and by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired.' (C-293/83 *Gravier,* ECLI:EU:C:1985:69, para. 24).

> any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education.[31]

The equal treatment rule thus also applies here. Therefore, the imposition of a charge or a registration fee as a condition of access to vocational training on students who are nationals of other Member States where the same fee is not imposed on nationals of the host Member State constitutes discrimination on grounds of nationality contrary to Article 18 TFEU.[32]

The Court also confirmed the requirement of equal treatment arising from the free movement of persons (as a part of the freedom to provide services, freedom of establishment and worker's rights) with regard to the professional recognition of diplomas and other qualifications. Therefore, it was necessary to adopt harmonisation measures at EU level in this field in order to guarantee access to regulated professions.[33]

Higher education activities are considered to be 'services' within the meaning of Article 56 TFEU[34] where they are provided for remuneration.[35] However, it is often difficult to decide if this is really the case or not. Actually, it depends on whether the education activity in question can be qualified as an 'economic activity'.[36] The concept of non-economic services is, however, not clearly defined in EU law,[37] and, due to political choice or economic developments, the classification of a given activity can change over

[31] *Gravier* para. 30; see also the judgments of the ECJ in cases 24/86 *Blaizot v Université de Liège others* ECLI:EU:C: 1988:43 and 242/87 *Commission v Council [ERASMUS]* (ECLI:EU:C: 1989:217).

[32] *Gravier* para. 26. Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN (Last accessed: 8 June 2017).

[33] Gideon, Higher Education Institutions... 25, 38.

[34] Under Article 56 TFEU, '[...] restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'.

[35] Article 57 TFEU.

[36] As the ECJ explains, 'services' include in particular activities of an industrial or commercial character and 'The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.' [Judgment in case 263/86 *Humbel* (ECLI:EU:C: 1988:451) paras 16 and 17].

[37] As regards the application of internal market rules, any service provided under remuneration is to be considered as an economic activity, even if the service is not paid for by those who directly benefit from and independently of the legal statute of the entity providing the service or the nature of the service [see ECJ judgments in cases C-172/98 and C-157/99; P. Bauby and M. Similie, The European Union's State aid rules and the financing of SGEIs' tasks in I. Kopric, G. Marcou and H. Wollmann (eds), *Evaluating Reforms of Local Public and Social Services in Europe: More Evidence for Better Results* (Palgrave Macmillan, 2016, Basingstoke, 191–206), https://doi.org/10.1007/978-3-319-61091-7_12].

time.[38] Thus, a large 'grey area' exists between these two categories (SGEI-NESGI), in particular in the field of health, education, social services and housing.[39] This is also true for higher education, since the scope of 'university mission' has become increasingly complex until today (including the growing number of 'borderline cases' between commercially available education and that provided as a public service).

Early on, the Court did not consider education activities which are part of the national education system to be a service provided for remuneration under Articles 56 and 57 TFEU.[40] However, if education is provided by institutions which are financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit the above provisions.[41] In addition, as a result of the ongoing commercialisation of higher education activities at the national level, the Court declared educational activities provided by universities (even by public universities) to be services in the meaning of Article 56 in a number of cases.[42]

The Maastricht Treaty of 1992 (entered into force in 1993) increased the EU's role in higher education matters by enacting general education, including higher education, as a new policy area into the Treaty structure (now Articles 165 and 166 TFEU). However, this EU competence is still limited and does not enable its institutions to harmonise national education systems.[43] It only extends to carrying out measures to support, coordinate or supplement Member States' actions. Accordingly, current Article 165(1) TFEU on education, vocational training, youth and sport provides that

> The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity (see also Article 6 TFEU in this sense).

[38] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02 para. 12.
[39] Bauby and Similie, The European Union's State aid rules...
[40] First, because 'the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields'. Second, the system in question is, as a general rule, funded from the public purse and not by students. (*Humbel*, para. 18).
[41] C-109/92 *Wirth,* ECLI:EU:C: 1993:916, para. 17; Gideon, Higher Education Institutions... 38–39.
[42] Gideon, Higher Education Institutions... 39.
[43] See Article 166(4) TFEU 'In order to contribute to the achievement of the objectives [of EU education policy] the European Parliament and the Council [...] shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States [...]' and '[...] the Council, on a proposal from the Commission, shall adopt recommendations'.

Despite the limited EU competences, the above mentioned spillover effect of fundamental freedoms and general EU law principles are still operating. This is what gives an impetus for the CJEU to apply Articles 165 and 166 TFEU (combined with the 'overspilling' Treaty provisions) in defining the scope of 'cross-border rights' to access to higher education. The role of Article 18(1) TFEU prohibiting discrimination on grounds of nationality is especially important in this respect. EU-law based rights in the field of education are also supported by laying down the foundations of EU citizenship in the Treaty of Maastricht. Article 21(1) TFEU generally recognises the free movement rights of EU citizens (for non-economic residents, as well), including students who have the ambition to study in another country.

The question of university autonomy in the EU legal and regulatory framework received a large international focus in the light of a recent case concerning the position of the privately-funded Central European University (CEU) in Hungary. The CEU case will be analysed in detail below. Before doing that, through presenting examples in CJEU case-law, we examine the enforcement mechanisms available for higher education issues at EU level.

The CJEU has several times had an occasion to rule on the EU law compatibility of national higher education laws under the above provisions. Three judgments[44] will be discussed here; though not expressly mentioning 'university autonomy' in the reasoning, all of them deliver an important message on EU law's understanding of this concept.

In case C-147/03 *Commission v Belgium,* the Commission initiated an infringement procedure against the Kingdom of Belgium considering that national legislation,[45] applied to courses in medical studies, dental and veterinary science, and agricultural engineering in Belgium, infringed the above-mentioned Treaty articles. The contested provisions prescribed that nationals of other Member States possessing qualifications awarded on successful completion of secondary studies at a home Member State must take and pass an aptitude test. The ECJ, in line with the Commission's argumentation, held that, because of this additional requirement to access to higher education, Belgian nationals and nationals of other Member States were treated differently, which resulted in discrimination on the grounds on nationality. The ECJ therefore concluded that Belgium 'failed to fulfil its obligations under Article 18 TFEU, read in conjunction with Articles 165 and 166 TFEU'.

[44] In details, see: Garben, Case C-73/08...; E. Dagilyte, *The Right to Education and Free Movement of Persons: Whose Right is it and how does the EU Protect it?* (Manuscript, 2011).

[45] 1971 decree governing the academic recognition of qualifications and diplomas awarded on completion of secondary studies and access to higher education and university education in the French Community.

In case C-65/03, *Commission v Austria,* the Law on University Studies (the *Universitäts-Studiengesetz,* where special requirements for foreign EU students were established, was questioned. The contested national law required that '[i]n addition to possession of a general university entrance qualification, students must demonstrate that they meet the specific entrance requirements for the relevant course of study, including entitlement to immediate admission, applicable in the State which issued the general qualification'. The Court held that Austrian law constituted indirect discrimination on the grounds of nationality, since such rules resulted in a higher proportion of Austrian students than EU students in Austrian universities. The fact that these provisions applied to all students did not matter, as the effect of them was discriminatory. The Court concluded that this indirect discrimination could not be justified either on safeguarding the homogeneity of the Austrian higher or university education system, or preventing abuse of EU law, nor because of Austria's obligations under international law.

The above judgments clearly show that, despite the lack of *de facto* legislative competence in higher education matters, on the basis of its fundamental legal values incorporated into Treaty texts, the EU definitely has instruments to give rise to those HE issues which are in line with the aim of European integration. Nevertheless, strong national interests in higher education affairs may prevent the effective enforceability of such far-reaching decisions, as was demonstrated by the afterlife of these infringement procedures. Both Austria and Belgium decided not to comply with the Court's ruling: they passed new legislation in response to the judgments. In June 2006, the French Community (in Belgium) adopted a new decree capping the number of foreign students (mainly French citizens) at 30% in in nine medical or paramedical courses dominated by non-nationals.[46] On the day the judgment in *Commission v Austria* was delivered, Austria ended unlimited access to free medical education, too: 75% of the places in Austrian medical schools would be reserved for students who had finished their secondary education in Austria; 20% of the places were left for EU students; and 5% for third-country-nationals (TCNs).

The Commission opined that these measures were discriminatory and initiated new infringement procedures against Austria and Belgium. Ten months later, however, it suddenly decided to suspend both proceedings.[47] The Commission argued, on the record, that there was prima facie evidence that, without the restrictive measure, a potential shortage of health professionals could lead to problems in the territorial coverage and quality of the Austrian and Belgian health systems. Off the record,

[46] *Le décret régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur* (Decree regulating the number of students in certain programmes in the first two years of undergraduate studies in higher education, 16 June 2006).

[47] Garben, Case C-73/08... 1497.

a bargain[48] behind the Lisbon Treaty negotiations was supposed to be why the Commission altered its stance.[49]

In the third case, *Bressol & Chaverot,* French students, as well as teaching and administrative staff of institutes of higher education in the French Community (more than 60 individuals altogether), challenged the above-mentioned Belgian decree of 2006 before the Belgian Constitutional Court seeking annulment of that measure. The applicants argued that the quota provided by the Belgian provisions infringed the principle of non-discrimination by treating resident and non-resident students differently, for no valid reason.

To 'save' the contested decree, the Belgian Government argued that the legislation at issue was necessary for ensuring the quality and continuing provision of medical and paramedical care within the French Community.[50] The large numbers of non-resident students were likely to bring about a shortage of qualified medical personnel throughout the territory, which would undermine the system of public health within the French Community.

The CJEU confirmed, first, that the national legislation at issue affects, by its very nature, nationals of Member States other than Belgium more than Belgian nationals and such an indirect discrimination is, as a general rule, precluded by Articles 18 and 21 TFEU. However, in line with the argumentation of the Belgian government, the Court found that the protection of health and, for that purpose, maintaining a balanced high-quality medical service open to all could constitute a legitimate objective capable of justifying the contested measure.[51] All in all, the Court came to the final conclusion that the Belgian legislation at issue did not infringe EU Treaty provisions on EU citizens' rights and non-discrimination.

National legislations like those examined in the above cases can obviously influence the freedom of institutes of higher education to decide on their student intake. As decision-making on student number is an integral part of 'academic autonomy', the conclusion can be drawn that fundamental EU law principles and ECJ case-law, on their interpretation in a higher education context, might definitely have an influence on the

[48] The suspension of the infringement procedure alleged to be the reason why Austria gave up (a few days before the Lisbon summit) its demand for a special treaty protocol, which would have allowed it to set a cap on the number of foreign university students to be taken in [Garben, Case C-73/08... 1497–1498; B. Goldirova, EU seeks to close its institutional wrangling, EU Observer (18 Oct. 2007), https://euobserver.com/institutional/24991 (Last accessed:8 June 2017)]

[49] Garben, Case C-73/08... 1497–1498; Goldirova, EU seeks...

[50] First, according to the Belgian Government, the restriction was needed to keep the quality of teaching in the medical and paramedical courses where a certain number of students was exceeded, as the capacity of the higher education establishments, the available staff and the possibilities of practical training were not unlimited. Second, the non-resident students, after their studies, very often return to their country of origin to exercise their profession there and the number of resident graduates remains too low in some specialties.

[51] Garben, Case C-73/08... 1502.

state of play of university autonomy in Europe – even though the collective message of the above three judgments is not optimistic from the perspective of academic freedom. Because of strong national interests in this matter, higher education basically remains in Member States' hands. Articles 165 and 166 TFEU, and EU law obligations in other fields do not seem to prevent Member States from taking measures against university autonomy and the freedom of access to higher education. Although, as Corbett and Gordon argue,

> Many of the major political events in the EU's history have had a spillover effect, enhancing EU involvement in higher education in the process, the bottom line remains: an education system as a whole is an expression of national sovereignty as emphasised in Article 165.[52,53]

V. Is university autonomy enforceable?

The need for academic freedom, for which university autonomy is a precondition, is also expressed (explicitly or implicitly) in the relevant documents of the European Union. Article 13 of the Charter of Fundamental Rights provides that 'The arts and scientific research shall be free of constraint' and 'Academic freedom shall be respected', The content of that provision is rooted in the freedom of expression as a specific form of that freedom in a higher education context,[54] which is also the part of the EU general legal principles.

Despite the express declaration, it remains questionable whether the European Union has the appropriate means to enforce compliance with that general principle. First, it is clear from the above picture that economic (or equal treatment-based) pillars of the EU 'toolkit' are stronger than the 'real' higher education policy instruments which do not impose legally binding obligations on Member States. Conversely, the binding force of fundamental freedoms and the non-discrimination principle, which

[52] In 1971, for instance, a process began whereby education ministers sought Commission support under the Council of Ministers' protection. In 1985–86, the Single Market impetus shaped the political climate and a pilot scheme for university collaboration and mobility was transformed into the Erasmus programme. The Lisbon Agenda of 2000, with its introduction of the open method of coordination, contributed to a further marked increase in educational policy coordination [A. Corbett and C. Gordon, Can Europe stand up for academic freedom? The Bologna Process, Hungary, and the Central European University. Published in *Europablog,* 2017, http://blogs.lse.ac.uk/europpblog/2017/04/18/can-europe-stand-up-for-academic-freedom/ (Last accessed: 8 June 2017)].

[53] Corbett and Gordon, Can Europe stand up...

[54] M. Király, Egyetemek és egyetemi autonómia Európában [Universities and University Autonomy in Europe], (2017) 10 (2) *Közjogi Szemle [Public Law Review],* (4–6) 5.

definitely have an influence on certain aspects of national higher education governance, are beyond doubt. However, their impact on university autonomy was only indirect by now, as was illustrated by the above presented cases (Gravier and the three infringement procedures). Moreover, the potential difficulties in the judicial enforcement mechanism (see below) also have to be taken into consideration when appreciating the effectiveness of EU law instruments. Finally, the EU approach to university autonomy is rather functional (similarly to that of the Bologna Declaration), as it is clearly expressed by the Commission's communication on the role of the universities in the Europe of knowledge:

> After remaining a comparatively isolated universe for a very long period, both in relation to society and to the rest of the world, with funding guaranteed and a status protected by respect for their autonomy, European universities have gone through the second half of the 20th century without really calling into question the role or the nature of what they should be contributing to society.[55]

Nevertheless, the spring of 2017 gave a new opportunity for testing whether a EU response may be effective enough to ensure the protection of EU basic values in the field of higher education. On 10th April, the Hungarian parliament adopted an amendment to the National Higher Education Act which became known as 'Lex CEU' after the university that seems to be most directly targeted. CEU (Central European University) has a dual legal entity – an American entity registered in New York and a Hungarian entity, which has allowed it to award both Hungarian and US-accredited degrees. This private university is one of the most prominent institutes of higher education in Hungary and has been operating in Budapest since 1991.

The new law is particularly troubling from two aspects. First, it makes the operation of any international university in the country subject to an intergovernmental agreement between Hungary and the other country of accreditation (in which both governments give their consent to things such as the curriculum the university teaches and admissions policies). Another problematic point in the 'Lex CEU' is that it requires institutions operating in Hungary to have a campus in their home country.

The announcement of the 'Lex CEU' (combined with the political message of the case and the extremely quick legislation process, avoiding consultation with the actors concerned) gave rise to a loud protest worldwide and also triggered the available mechanisms to enforce adherence to values and legal principles, which seemed to have

[55] European Commission, Communication from the Commission – The role of the universities in the Europe of knowledge, 2003, COM(2003)58 final, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0058&from=EN (Last accessed: 8 June 2017).

been infringed by the Hungarian law. The European Commission decided to use 'all available means under the Treaties to uphold the EU's shared values'.

On the basis of an in-depth legal assessment of the Hungarian Higher Education Act, the European Commission sent on 27 April a letter of formal notice to the Hungarian Government under Article 258 TFEU (infringement procedure, see above).[56] According to this letter, the amendment of Hungarian Higher Education Law is not compatible with the freedom to provide services and the freedom of establishment and also infringes the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the EU, as well as with the Union's legal obligations under international trade law. In its reasoned opinion (this is the second step of the infringement procedure), the Commission repeated these legal concerns. In the six decades of European integration, this is the first time when the law of a Member State is challenged directly due to the infringement of academic freedom.

Despite that, it is still questionable whether an infringement procedure may be effective enough to enforce university autonomy. We don't think that such a 'rank' in the reasoned opinion itself would significantly change the Court's attitude to EU competences and national autonomy in the field of higher education. It nevertheless seems to be promising that the Commission, besides academic freedom, invoked other reasons for incompatibility, such as fundamental internal market freedoms, and that may be fruitful for private universities such as CEU.[57] There are, however, more general concerns regarding infringement procedures. First, such procedures very often terminate even before reaching the judicial level (the CJEU). Or, if they do not, the time by which any decision is made often proved too late for those whose interest was concerned. Second, infringement actions are usually too narrow to address the structural problem posed by persistently non-compliant Member States.[58] Triggering

[56] The letter of formal notice is the first step in the administrative phase of the so-called infringement procedure under Article 258 TFEU. This provision authorises the European Commission to launch such a procedure when it considers that a Member State has failed to fulfil an obligation under the EU Treaties.

[57] The Court of Justice of the EU has consistently held that courses offered by educational establishments essentially financed by private funds constitute economic activities in the meaning of the Treaty. Education activities and courses financed essentially out of private funds are also covered by Directive 2006/123/EC, regardless of whether the establishments offering courses are profit-making or not and irrespective of whether the financing is provided principally by the pupils or their parents.

[58] G. Halmai, Much Ado About Nothing? Legal and Political Schooling for the Hungarian Government, published in *Verfassungsblog,* 2017, http://verfassungsblog.de/much-ado-about-nothing-legal-and-political-schooling-for-the-hungarian-government-on/ (Last accessed: 8 June 2017).

'Article 7 procedure' also arose as a possible solution. Article 7 TEU[59] provides a non-judicial mechanism to enforce EU values. In May 2017, the European Parliament adopted a resolution asking EU Member States to launch Article 7 against Hungary, since the adoption of the contested higher education law amendment (together with other issues such as the regulations against asylum-seekers and NGOs) could lead to 'a serious deterioration of the rule of law'. As a result of applying Article 7, certain rights of a Member State can be suspended, including voting rights in the Council (which is, together with the European Parliament, the main decision-making institution in the EU). Though an EU Member State has never been so close to being sanctioned by 'the EU's nuclear bomb', in reality, there is very little chance of Article 7 actually coming into effect. Suspending rights is only the final step of the procedure and requires a unanimous decision of the Council, which does not seem to be realistic considering the political cooperation between specific Member States (see Hungary's veto in the rule of law procedure against Poland and the same can be expected vice versa).

VI. Conclusions

University autonomy is widely considered as an important prerequisite for modern universities to be able to deliver their public service missions efficiently. This is very complex nowadays, since beyond the classical education and research tasks it also involves new functions that universities and research institutions are expected to fulfil.

Our analysis shows that there is no uniform trend towards university autonomy in Europe. Due to differing legal frameworks, historical, and cultural settings, the concept itself is understood very differently across Europe, which did not make easier to carry out a reliable comparison between the European countries. It was also proved that, beyond formal autonomy indicators, other 'secondary' or indirect factors also have a decisive role in determining the level of de facto university autonomy in a country. Despite all that, it is possible to find some 'common denominators'. It can generally be established that the challenging economic context (the impact of the financial and

[59] Under Article 7(1), the Council may determine that there is a clear risk of a serious breach of EU values by a Member State and is intended to prevent an actual breach by addressing specific recommendations to the Member State in question. This can be triggered by one third of Member States, by Parliament or by the Commission. The Council has to adopt a decision by a four-fifths majority after having received Parliament's consent, which also requires a two-thirds majority of the votes cast and an absolute majority of MEPs.
The next phase is Article 7(2), by which an actual breach of EU values can be determined by the Council on a proposal by a third of Member States or the Commission. The Council needs to decide by unanimity and the Parliament needs to give its consent. Article 7(3) launches sanctions, such as the suspension of voting rights in the Council.

economic crises for all) negatively affects university autonomy, at least its financial dimension. There is also a trend towards large-scale concentration and 'rationalisation' of the academic offer at regional or national level, often explained as an effort to improve the overall efficiency of the HE system, which also risks running against the organisational and academic autonomy of universities.

As regards general trends covering all dimensions of university autonomy, two main groups of European states can be distinguished: a 'regulatory' model and an 'interventional' ('authoritarian') model. In the former group, more 'indirect' steering mechanisms or less restrictive regulatory instruments prevail over direct state intervention (typically in Western European countries). In the second case, various means of direct state influence and a high level of government control play a central role (see for instance the case of Hungary).

In this paper, we also examined the role of EU governance instruments in safeguarding academic freedom and university autonomy. Because of strong national interests in this matter, higher education basically remains in Member States' hands. Soft law measures of EU education policy are not able to prevent the countries from taking measures against academic freedom and university autonomy. Although EU law instruments in other fields, such as fundamental freedoms and the non-discrimination principle, due to their spillover effect, definitely have an influence on certain aspects of national higher education governance, their impact on university autonomy was only indirect until now. Even if this is not the case (as above in the 'lex CEU' infringement procedure), it still remains a question whether the available enforcement mechanisms are effective enough to save these common European values.