

NON-PAPER

OF THE HUNGARIAN GOVERNMENT CONCERNING THE OPINION OF THE VENICE COMMISSION ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY

Background

Over the past three years, the Venice Commission of the Council of Europe has adopted 12 opinions regarding the Hungarian constitutional reform: the first one on the Fundamental Law itself, another one on its Transitional Provisions, subsequently eight other cardinal laws were also submitted for an opinion to the Venice Commission. The latest opinion was adopted on 14 June 2013 by the Venice Commission and it concerned the Fourth Amendment to the Fundamental Law, with regard to the international commitments that derive from Hungary's membership of the Council of Europe.

Hungary has been fully committed to cooperate with the Venice Commission throughout this period. This has been also demonstrated by the fact that the opinion on the Fourth Amendment was prepared upon the request of Mr János Martonyi, Minister of Foreign Affairs of Hungary who has also personally participated at the session of the Venice Commission on 14 June 2013, which - amongst others - discussed the opinion.

The position of the Hungarian Government

As in the case of the previous opinions, Hungary has had continuous and good cooperation with the Venice Commission providing a number of useful documents on the Fourth Amendment, including explanations and also an independent expert opinion prepared thereof¹. As a result of all this, the Venice Commission had changed its draft opinion² on a number of points before and even during its session on 14 June. The text was modified - amongst others - as regards to the issue of *protection of marriage and family, the freedom of speech, homelessness* or the issue of *previous case-law*. In addition the Venice Commission in its opinion warmly welcomed the recent decision of the Hungarian Government to amend the Fundamental Law and thereby eliminating as from 1 July 2013 the institution of *the transfer of court cases* from the Hungarian legal system. The opinion had similarly changed - compared to its draft version - in welcoming the recent decision of the Hungarian Government to delete the relevant Article of the Fundamental Law concerning the issue of *special tax in case of court judgments leading to payment obligations*. As a consequence, the Venice Commission had dropped its previous negative assessment on a number of important issues.

Despite of all this, there remains a difference of view concerning some issues, where the opinion - based on its risk based approach - identified risks that might negatively affect some areas. In this context, it is important to note, that the majority of the points raised in the opinion concern enabling clauses of the Fundamental Law, therefore, their proper impact cannot be

¹ Detailed information provided by the Hungarian Government to the Venice Commission can be found on the official website of the Ministry of Foreign Affairs (www.kormany.hu/en/ministry-of-foreign-affairs).

² It has to be noted, that - unlike the standard practice - the draft opinion had unfortunately been uploaded and, therefore, was available for some time at the official website of the Venice Commission.

determined without an adequate analysis of the provisions of the accompanying Hungarian legislation. Regrettably, the opinion failed in most cases to take into account the relevant implementing legislation and, it is even more striking, that it very often gave its own, predominantly unfavourable (a priori) interpretation of the provisions of the Fourth Amendment.

Furthermore, a recurring criticism of the opinion regarding the contested provisions was that they unduly regulate subject matters that require statutory regulation on the level of the Fundamental Law, preventing thereby constitutional review by the Constitutional Court. The opinion failed to take note however, that – apart from the fact that in every country the constituent power has a wide margin of discretion in deciding whether certain questions need to be raised on a constitutional level - the majority of the points raised in the opinion concern enabling clauses of the Fundamental Law. Consequently, a number of implementing legislation has been or will be adopted and these are all subject to review by the Constitutional Court.

Finally, the conclusions are disproportionately severe compared to the finding of the analytical part - in particular - as regards the constitutional review or the use of cardinal laws, which has been in practice for more than two decades in Hungary. As a consequence of all this, it is the view of the Hungarian Government that the Venice Commission has regrettably not arrived at an incontestable and balanced assessment accurately describing the legal effects of the provisions of the Fourth Amendment.

Conclusion

Hungary has had continuous and good cooperation with the Venice Commission as a result of which it had changed its draft opinion on a number of points. There remains a difference of view concerning some issues, where the opinion – based on its risk based approach – identified risks that might negatively affect some areas. Nevertheless, the Hungarian Government will carefully examine the opinion adopted by the Venice Commission in the coming days and remain open for cooperation and dialogue.
