

MINISTRY OF FOREIGN AFFAIRS OF HUNGARY

MINISTER

Ministers for Foreign Affairs
of the Member States of the European Union

Budapest, “8” March 2013

Dear Colleague,

I am writing to inform you of the position of my Government on an issue that has recently commanded the interest of the media and, subsequently, that of some European institutions. It regards an important piece of Hungarian legislation, namely the current Draft Amendment to the Fundamental Law (i. e. Constitution) of Hungary. Some have voiced concern that this legislative proposal might be in breach of EU law and of commitments we took towards the Council of Europe.

Let me be clear on one point. We are still in the process of consolidating the results of a major and long overdue constitutional reform. As in the past, we remain open to criticism if based on facts and arguments. However, this time around much of the controversy is being fuelled by misunderstandings and inadequate information. Allow me to try to rectify some of them.

Critics are suggesting that the Hungarian Government is abusing its two-thirds majority in Parliament to circumvent some recent, unwelcome rulings of the Constitutional Court by incorporating legislation annulled by the Court into the Fundamental Law itself. The opposite is true. Let me further explain.

The Constitutional Court examined a number of provisions of the so-called Transitional Provisions, adopted by the Parliament in December 2011 with the purpose of making the entry into force of the new Fundamental Law smoother and facilitating the transition between the new and the old Constitution. The Court, in its ruling of December 2012 annulled some of these norms on the grounds that they carried permanent, substantive constitutional requirements and are therefore out of place in the Transitional Provisions. The Constitutional Court regards the Fundamental Law as one single act and decreed that all substantive elements should be moved to the Fundamental Law itself. The Court's decision thus addressed shortcomings of formal and not of substantive nature, with only one exception: it declared the introduction of an extra electoral register unconstitutional, an idea the Government abandoned definitively afterwards. The purpose of the current Amendment of the

Fundamental Law is therefore to implement the aforementioned decision of the Constitutional Court¹.

Furthermore, there are concerns that the Amendment would limit the powers of the Constitutional Court. However, in reality, the new provisions would explicitly enable the Court to check the constitutionality of the Fundamental Law itself and also of any future amendments to it from a procedural point of view (i.e. in order to check their compliance with procedural law requirements). This has been the practice established and applied consistently by the Court itself over the last two decades. Therefore, the Amendment would merely transpose its current case-law into the Fundamental Law. In addition, the Amendment also builds some principles of the Constitutional Court procedure into the Fundamental Law which again is fully in line with the present practice of the Court (e.g. the other party should also be heard; Court decisions cannot go beyond what is included in the complaint, etc.), thus leaving the competence of the Court unchanged. It is important in this context to underline that the Constitutional Court would continue to have no power to review any provision of the Constitution on substance.

We have heard worries about an eventual discontinuity between the case-law of the Court developed under the old and the new Constitution. The relationship between the two is complex indeed. As set out in the Amendment, the decisions of the Constitutional Court adopted under the previous Constitution would be repealed but at the same time, their legal effect would remain intact. The Constitutional Court would hence be free to choose between taking its own previous decisions into consideration, referring to them or simply ignoring them. This is further to strengthen the freedom and autonomy of the Court and to enhance the coherence of its jurisdiction.

It is along the same lines, that the Draft Amendment also revisits the question of the right to initiate the constitutionality review of laws. In addition to the one quarter of the deputies and the Ombudsman, the Amendment would also allow the President of the Curia (Supreme Court) and the Chief Prosecutor to turn to the Constitutional Court.

With regard to the recognition and operation of churches the guiding principles remain the same as before. Notably, the exercise of religion and confession of faith is not restricted by law. However, the State only recognizes, by a decision of Parliament, religious communities as churches subject to certain conditions. A new element under the Amendment is that an individual review of such decision can be sought before the Constitutional Court. This solution should guarantee that the procedure is governed by the rule of law.

New legislation about the homeless has been cited as a source of concern as well. An important novelty of the Fundamental Law was the obligation imposed on the State to seek to provide appropriate accommodation for all. The Amendment at issue complements this requirement on two aspects. First, the State and the municipalities must cooperate to ensure that all homeless people are indeed offered accommodation. Second, Parliament or local

¹ It is perhaps useful to recall in this regard the decision of the Constitutional Court, which explicitly set out that "Following the decision of the Constitutional Court, it is the task and the responsibility of the constituent power to clear up the situation after the partial annulment. The Parliament shall make an evident and clear legal situation. The Parliament shall revise the subject matters of the annulled non-transitional provisions and decide on which matters should be re-regulated and on which level of legal sources. That is also for the Parliament to decide on which provisions to be re-regulated should be incorporated into the Fundamental Law and which should be laid down on level of [ordinary or cardinal] Acts." [Part V of the reasoning of the Constitutional Court decision of 45/2012. (XII. 29.)]

governments may impose some restrictions in the use of certain public areas in view of public order, public safety or public health considerations. Solidarity from the State thus should go hand-in-hand with the legitimate expectation to maintain public order. Needless to say this legislative change falls short of “criminalization” of the homeless. Even if restrictions may be introduced locally with regard to certain public areas, no criminal sanctions can be imposed on any homeless person, only fines.

The Fundamental Law calls on the State to provide access to higher education and to financial support for students. What the Amendment does is the introduction of the possibility to make student support conditional on a commitment by the beneficiary to stay employed or self-employed in Hungary for a certain period of time. This should not be seen as a limitation on the access to higher education. First, students would remain free to pay for their tuition. Or, students may choose to finance their studies through a preferential student loan, guaranteed by the State. However, it is clear that a balance between benefits and obligations has to be found. If the tuition is, under the second option, completely financed by the State, the State should be able to see that some of that investment is returned to the benefit of the country. However, nothing is final about this scheme as yet. We keenly respect the freedom of movement of workers. In order to guarantee the proportionality of the proposed measure, we are in consultation with the European Commission.

This leads me to my conclusion. You will agree with me that my government has given ample evidence of its spirit of cooperation whenever the competent European institutions and fora, such as the European Commission, the European Court of Justice, the Council of Europe or the Venice Commission have scrutinized or even challenged Hungarian legislation. On a number of occasions, we changed our laws to comply.

There is no reason to put our continuous commitment to the Treaties and the *acquis* as well as the norms and values represented by the Council of Europe into question this time, either. It is impossible to address all legal details, with this letter. My purpose is a different one. I would like to reassure you of our readiness to keep engaged in dialogue. Consultations with the European Commission and the Council of Europe are ongoing. (Please, find attached a copy of the letter Deputy Prime Minister Navracsics wrote to Secretary General Jagland of the Council of Europe).

Visits to Hungary at political or experts level are welcome. We will also follow any invitation to provide more information and explanation you may deem necessary to accommodate any remaining concern.

I hope the above serves the better understanding of the situation and I am looking forward to meeting you at the Foreign Affairs Council next Monday.

Sincerely yours,



János Martonyi