POSITION OF THE GOVERNMENT OF HUNGARY ON THE DRAFT REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS: STANDARDS AND PRACTICES IN HUNGARY

14 May 2013

This document contains the position of the Government of Hungary of the draft report presented by Mr Rui Tavares (rapporteur) on 2 May 2013 on the situation concerning fundamental rights in Hungary (hereafter: the report). This position follows the structure of the report. Annexed to this document are all comments, integrated into the text of the report, that have been made by Hungary.

OVERALL EVALUATION

The Hungarian Government welcomed the resolution of the European Parliament to address the recent reforms in Hungary hoping that a fair process would provide Hungary with the opportunity to dispel the misunderstandings, false perceptions and also to correct the factual errors arising in the past three years. The Government has, from the outset, participated in the investigation of the LIBE committee in the most open and cooperative fashion.

Against that context it is disappointing to note that the draft report fails to live up to the level of diligence that is expected from a responsible political decision-making body such as the European Parliament.

First of all, a large number of the findings of the report are based on factually incorrect information or omissions. It is a matter of priority that the account of facts – often packaged in semi-political statements or commentaries – be corrected in full.

Secondly, it is a surprising evolution that report formulates conclusions and promotes recommendations that go beyond not only the powers of the European Parliament, but also those of the European Union as a whole. Basically, the draft report calls upon Hungary to undo the most important constitutional changes that took place over the past three years in areas where the EU holds no competence whatsoever. Moreover, the report presents unclear and general recommendations – a broad political wish-list (e.g. "restore rule of law") – that carry no particular content or direction. Yet, as the report concludes, if Hungary fails to implement its recommendations Article 7 of the Treaty on the European Union must be applied.

As a consequence, the report is seen by the Hungarian government as an unfortunate experiment that may upset the legally defined balance between the Member States and the Union, on the one hand, and between the various institutions of the EU, on the other. A re-design of the European power-structure like this cannot take place in such a stealth fashion and be applied vis-à-vis only one Member State. Intervention into matters falling within national competence can only carry legitimacy, if they are based on an exhaustive comparative survey covering all Member States and undertaken on the basis of pre-determined benchmarks applicable to all Member States.

These are issues that can only be addressed in full compliance with the basic principles and rules established by the Treaties and with full respect of the legal order the Union.

EVALUATION OF THE REPORT BY CHAPTER

I-BACKGROUND AND MAIN ISSUES AT STAKE

European common values

While the sub-chapter is entitled "European common values", instead of giving a fair and balanced account of the founding principles of the EU, it builds up a legalistic, yet *legally unfounded pretext for an institutional intervention* into a Member State's constitutional order to an extent that goes way beyond what is foreseen by the Treaties.

The *underlying narrative* of the sub-chapter is twofold. First, while the EU is based on a number of principles, these *principles are not equal*. If the values of Article 2 TEU are under attack, all other governing principles of the Treaties (conferral of powers, respect for national constitutional order, etc.) can be set aside. This is expressed both verbatim (para H, L) as well as by the consistent ignorance as to the principles that protect the identity of Member States (Art. 4 TEU) or that limit the powers of the EU (Art. 5 TEU) or those of the institutions (Art. 13(2) TEU). *Second*, once *the report* has thus justified unfettered EU intervention, it creates a *list* that – in its own view – constitutes an authoritative *catalogue of mandatory constitutional requirements* (para P). However, contrary to the report's presentation, *that list is not supported by the Treaty, the Charter or the ECHR* (or indeed any legal text).The reason for that is that the political/constitutional criteria selected by the report are not human rights or fundamental freedoms that form the subject matter of the quoted documents. Mixing the two categories is a dangerously expansive legal experiment that amounts to a clear violation of Article 2 TEU itself (rule of law) and undermines the authority of the report.

It flows from the arbitrary nature of that selection that it contains a number of elements that would be hard to identify as commonly European, i.e. the presence of checks and balances as used in US political literature or *the existence of constitutional courts*. A consistent application of these criteria should lead to the expulsion of a great number of Member States from the EU.

Reforms in Hungary

The sub-chapter entitled "Reforms in Hungary" begins with a number of general statements concerning the necessity of evaluating Member States' constitutional reforms. Most strikingly, the report overtly introduces *double standards against Hungary* in paragraph Z when it makes clear that *other Member States* – if the necessity to do so arises – *should be monitored "through different patterns"*. This gives the impression that the whole process is tailor-made against Hungary. It also amounts to an admission that the rapporteur operates in a legally undefined space, using Hungary as a political test-case.

In para V the report recalls that the reforms have been carried out "in *an exceptionally short timeframe*", a claim that is made throughout the entire report. The report however fails to take account of the fact that *all the legislation* at issue have been *passed in* full *compliance with* applicable *procedural requirements* (that also define the necessary timeframe). The qualification "exceptionally short" thus must be seen as a *subjective evaluation*.

The Fundamental Law and its transitional provisions

In para X the report describes the adoption of the new Fundamental Law in a *factually erroneous way* using the language of political journalism. It *incorrectly* states that the whole legislative process was rushed through Parliament just *over one month*, giving the *impression* that the new constitution was adopted by way a stealth, over-night *constitutional coup*.

In reality, the *process took over a year* with a sophisticated timetable, consultative arrangements and a lengthy parliamentary debate. It is an unfortunate fact that during the preparation of the Fundamental Law two opposition parties, based on their own political decisions, chose to stay away from the discussions at the parliamentary sessions, and remained reluctant to formulate proposals. This however does not equal to "restricting the possibilities for a thorough and substantial debate with the opposition parties and civil society on the draft text" (para X). A detailed account of the process is given in relation to para X in the Annex.

The report recalls in para Z that the Constitutional Court annulled in December 2012 the so-called Transitional Provisions of the Fundamental Law (a separate legal act containing transitional and permanent provisions relating to the Fundamental Law). It then goes on (para AA) to criticise the adoption of the Fourth Amendment to the Fundamental Law in March 2013 as an act designed to overrule the decision of the Constitutional Court.

In reality the opposite is true. Contrary to the evaluation of the report, *the Fourth Amendment has not been adopted "despite" but,* precisely *because of the decision of the Constitutional Court*. Importantly, the decision was based on *formal reasons* (permanent constitutional requirements can only be laid down in the Fundamental Law itself not in transitional provisions) and did not address substantial issues. In fact, it was the Constitutional Court itself that called upon the legislator to create an unambiguous legal situation by way of revisiting the annulled provisions.

The report is also critical of the fact that the Fourth Amendment contains *provisions that have been previously annulled* by the Constitutional Court. It must be pointed out that this is not an exceptional – let alone unconstitutional – political practice. As the Venice Commission points out "[t]here is [...] *no general standard saying that a constitutional revision cannot go against a decision of a constitutional court*. This would make the Constitution as interpreted by the Constitutional Court intangible" (Opinion No. 679/2012 on the Revision of the Constitution of Belgium).

Extensive use of cardinal laws

The report notes that under the new Fundamental Law *a very large number* of subject matters are to be regulated by *cardinal laws* (i.e. laws to be adopted by two-third majority in Parliament), including areas (family, tax, pension) that usually fall under simple majority vote in other countries. It also notes that Parliament had already enacted such laws in a number almost twice exceeding the list contained in the Fundamental Law (26 v. 49.).

In response to the above the following must be underlined. The existence of cardinal laws in the Hungarian constitutional system is nothing new. Cardinal laws are a product of the agreement between the opposition parties in 1989. The previous constitution contained more or less the same number and the same range of subject matters to be regulated by two-thirds

majority. Thus, the presence of these laws is not a token of the arrogance of the ruling coalition, but a steady feature of the Hungarian constitutional order. Only in a few areas does the Fundamental Law introduce new requirements for cardinal laws, mainly in relation to the prudent management of the state budget and state assets. It must also be pointed out that Parliament has not adopted 49 full cardinal laws. Instead it enacted 49 laws that contain provisions of cardinal law value. In many cases these were simple majority acts that contain amendments to cardinal laws (hence the two-thirds requirement).

Practice of individual members' bills and accelerated procedures

The report criticises Hungary for the *extensive use of individual MP's bills* as a process aimed to circumvent opposition rights (para AE). In Hungary's view it is difficult to see how MPs' rights to initiate legislation can be curtailed without seriously impairing the democratic legitimacy of the elected Parliament. Opposition rights are fully ensured in the parliamentary process, irrespective of the origin of a given bill.

Weakening of checks and balances: Constitutional Court, Parliament, Data Protection Authority

The report extensively criticises the curtailing of the powers of the *Constitutional Court* under the new Fundamental Law (para AG-AJ). In particular, it condemns the limitation:

- to review budget measures;
- to review constitutional amendments on a substantive ground;
- on the case-law of the Court developed before the entry into force of the Fundamental Law.

In relation to the above the following must be underlined:

- the restrictions on budget review are temporary in nature and limited in scope (for full account see comments on para AG in the Annex);
- the Constitutional Court never held powers to review constitutional amendments on a substantive ground. Such powers are truly exceptional and "cannot be considered as a requirement of the rule of law" (Venice Commission);
- the Constitutional Court may (and actually does) use its previous decisions as a part of Hungarian constitutional tradition, a recognised source of interpretation of the Fundamental Law.

The report, in para AK, criticises the introduction of a non-elected *Budget Council* that may – as a measure of last resort – veto the budget to be adopted by Parliament. In must be pointed out that Budget Council has been introduced under the terms of the 2008 IMF/EU balance of payments assistance agreement and its very purpose is to limit the powers of Parliament to adopt fiscally unsustainable budget measures. The European Council called upon Hungary, in the 2012 country-specific recommendations, to further strengthen the status of the Budget Council.

Para AL-AM makes reference to the replacement of the previous *data protection ombudsman* by the new data protection authority as an instance of the breach of EU law. Importantly, the matter is currently before the European Court of Justice. Hence, the legality of the termination of the office of the data protection ombudsman will be decided by the ECJ. Any legal evaluation at this stage is premature.

Independence of the judiciary

The opinion raises a number of points suggesting that the independence of the judiciary is not guaranteed sufficiently in Hungary (early termination of the tenure of the previous President of the Supreme Court, the lack of certain declarative statements in the Fundamental Law, etc. – para AN-AQ).

As regards the *premature termination of the office of the President of the Supreme Court* the following must be emphasised. The tenure of the President of the Supreme Court was terminated as *this position also ceased to exist* in its original form. The previously two indivisible roles of the President (chief justice on the one hand, chief judicial administrator on the other) have been allocated to two different institutions (to the Kúria-Supreme Court and to the National Judicial Office). The Hungarian Constitutional Court held that such an institutional restructuring was a sufficient ground for the early termination of the office of the President. The European Commission has opted not to initiate an infringement procedure on this issue.

The report also criticises the system of the *transfer of cases between courts* (an exceptional measure of judicial administration) for the lack of objective criteria for the selection of cases and courts (para AR).

With regard to the transfer of cases a new, revised scheme is submitted to Parliament that will create an automatic procedure for the reallocation of cases. The details of this new mechanisms are being finalised in consultation with the European Commission.

Also, as regards the implementation of the ECJ judgement of November 2012 on the *early retirement of judges* (para AT-AU) the final legislative framework has been drawn up in close consultation with the Commission.

Electoral reform

The description of the *electoral media rules* (para AY) fails to mention that political advertising is not altogether banned in commercial media. Indeed, *internet, billboard, cinema, newspaper etc. advertisements will be unconstrained*. Audio-visual (*TV, radio) advertising* can only take place through the *national media* under pre-established, proportionate conditions, free of charge. In addition, consultations concerning the application of these rules are in progress with the European Commission.

Respect of the rights of persons belonging to minorities

Paragraphs BU-BW, highlighting certain phenomena in Hungary, are dangerous examples of a selective political narrative that create a picture that Hungary is country where racial tension is mainstream political condition and racial crime is rife. Paragraph BU mentions a recent series of racially motivated crimes. It fails to mention however that these crimes ("the Roma-killings") were committed in 2008-2009, i.e. during the previous government whose activities are generously spared from criticism by the report. The current government has acted against all these (and similar) crimes in a most determined fashion. Lack of reaction by law enforcement authorities thus was characteristic up to 2010.

Paragraph BW suggests that anti-Roma ad anti-Semitic political talk is a mainstream political phenomenon in Hungary. This is an incorrect presentation of the situation. While such negative and unfortunate incidents do emerge in Hungary, they have been tackled by the Government and Parliament with zero tolerance. The Government introduced a range of legislative measures tackling hate speech and racial incitement in public (providing legal remedies under the Fourth Amendment against hate speech, criminalising Holocaust-denial, banning paramilitary groups), to promote Jewish and Roma culture and identity (introduction of the Remembrance Day, 50% increase in Holocaust pension, dedicating 2014 as the Hungarian Holocaust Memorial Year, compulsory education of Holocaust and Roma history in public schools, etc.). President Áder, Prime Minister Orbán and all members of the Government speak up in public condemning each and every incident of a racist motive.

Freedom of religion and recognition of churches

The report mentions (para CA, CB) that the Constitutional Court annulled in February the regime on the recognition of churches, which was then quickly re-introduced by the Fourth Amendment.

In reality, the provision included in the Fourth Amendment is not identical to which had been annulled by the Constitutional Court and also takes into account the assessments of the Court's decision. Moreover, *the specific concerns* raised by the *Constitutional Court* are being addressed by Parliament under *a new bill* (No. T/10750) amending the Act on Churches. The proposed new legislation sets out clear conditions for recognition as a church, contains an obligation for detailed reasoning of a decision which refuses church status, specifies deadlines for the procedure of recognition and ensures the possibility of legal remedy in cases of refusal or lack of a decision. Any religious community can freely use the denomination "church".

II- ASSESSMENT

The Fundamental Law of Hungary and its implementation

The *report strongly criticises the Fourth Amendment* to the Fundamental Law (para 5), which in its view "undermines the supremacy of the Fundamental Law by reintroducing in its text a number of rules previously declared unconstitutional – i.e. incompatible on procedural or substantive grounds with the Fundamental Law – by the Constitutional Court".

This statement has no factual foundation whatsoever. First, the very reason of the Fourth Amendment was the reinstatement of the supremacy of the Fundamental Law (by way of integrating all permanently applicable provisions therein, as required by the Constitutional Court). Second, none of the re-introduced provisions had been annulled on a substantive ground. Third, as confirmed by the Venice Commission it is not against the rule of law to integrate legal norms into the constitution that had been previously quashed by the Constitutional Court. The strong wording on the Fourth Amendment is thus unjustified.

The report (para 8) deplores – what it calls – *the extensive use of cardinal laws* to regulate areas that are covered by ordinary laws in most Member States. Such practice undermines the principles of democracy and the rule of law.

This statement is completely subjective and excessive. The number of areas subject to cardinal laws has more or less remained steady since 1989 in Hungary. This has never been a

source of criticism (see comments on paragraphs AB-AC). It must also be recalled that the current government is not the first one enjoying two-third majority in Hungary. The socialist-liberal coalition between 1994-1998 governed with two-third majority amending a great number of cardinal acts at will. Challenging solely the current Hungarian government is politically biased. Moreover, in countries with a tradition of grand-coalitions cardinal laws are not at all exceptional legislative products. E.g. in Austria two-third majority acts are often adopted to avoid constitutional review.

Para 9 considers that use of the *individual members' bills* to implement the constitution (through cardinal laws) does not constitute a transparent, accountable and democratic legislative process as in practice it restricts public debate and consultation.

There is nobody more accountable than a Member of Parliament who may be dismissed by the electors at the next elections. Their right to initiate bills is also enshrined in the Fundamental Law, similarly to that of the Government. Denying this right of the members of Parliament with reference to the democratic values common to EU Member States would lead us to an absurd conclusion that democratically elected MPs cannot exercise their representative roles.

Democratic system of checks and balances

In para 11 the report concludes that having a *constitutional court with very broad powers* is a requirement of democracy and the rule of law.

As outlined on several occasions before, the effective control of the conformity of legislation with the constitution cannot be seen as a common European democratic requirement. If it were so, a large number of EU Member States should leave the EU for lack of a Constitutional Court.

Consequently, the claim (para 12) that the limitation of the powers of the Constitutional Court to review budget measures in full is in contradiction with the requirements of democracy, the rule of law and the principle of judicial review must be rejected.

Also, as regards to the *statutory repeal of 20 years of the jurisprudence of the Constitutional Court* (para 16) it must be pointed out that all effects of the jurisprudence are still valid, there is no objection to arrive by the Court to the same conclusion. In fact, the Constitutional Court already uses its previous decisions as a source of interpretation (see e.g. Decision on the case III/3152/2012 issued on 13 May 2013).

As regards the *special tax following European court judgements* (para 17) it must be underlined that there is an on-going dialogue between Hungary and the European Commission on this issue and it is too early to formulate any judgement on the conformity of this provision with EU law.

Independence of the judiciary

Hungary rejects the conclusion of para 26 that Hungarian law does not provide sufficient assurances of constitutional safeguards as to *the independence of the judiciary* and the independence of the Constitutional Court of Hungary. Indeed, the main feature of the restructuring was the establishment of an independent administrative branch within the

judiciary (that is supervised by a college of judges: the National Judicial Council). These may neither be construed as a violation of human rights, nor as a violation of the principle of the separation of powers. Second, as the report also acknowledges below the Hungarian justice system has been revised to meet the concerns of the Venice Commission as well as those of the European Court of Justice.

As regards the *premature termination of the term of office of the Supreme Court's President* (para 27) the Hungarian Constitutional Court held that such an institutional restructuring was a sufficient ground for the early termination of the office of the President. The European Commission has opted not to initiate an infringement procedure on this issue.

Concerning the new regime on the *upper age limit applicable in certain judicial relations* (para 31), it must be pointed out that the solution that not all dismissed judges are guaranteed to be reinstated in exactly the same position with the same duties and responsibilities they were holding before their dismissal has been approved by the European Commission as well. Reinstatement of previous presiding positions would result in an unmanageable legal situation. The Commission is regularly informed in detail about the implementation of the reinstatement (e.g. the number of judges seeking reinstatement, compensation, etc.).

Media pluralism

With regard to *political marketing in commercial media* (para 37) it must be reiterated that political advertising is not banned in commercial media as political marketing in newspapers, billboards, internet, cinemas, etc. remains free. What the Fourth Amendment does is the introduction (along with a number of Member States such as France, Italy, etc. applying similar restrictions) of an equal-opportunities-scheme for political advertising in audio-visual broadcasting. Here, the scheme limits political advertising to the national media service providers under the condition that all actors must be allocated proportionate air-time free of charge. This enhances, rather than limits the provision of balanced information as no political party can outweigh others in the audio-visual scene through financial means.

The statement in para 42 that "the *biased information of the public service broadcasting* reaching a wide audience distort the media market" in Hungary must be rejected. The report fails to provide any examples of "biased information of the public service broadcasting". Short of that it remains an unfair political judgement with no support of factual evidence.

The statement in para 42 that *recent anti-Roma public stances* remained unsanctioned by Hungary's Media Authority must be corrected. It must be pointed out that indeed the National Media Authority issued a financial penalty of HUF 250 000 (slightly under EUR 1000) on 8 May 2013 against a journalist for hate speech against the Roma. It also must be underlined that the Media Authority has only residual jurisdiction over these cases, only if a particular press outlet does not join a self-regulatory body. In most cases these measures are implemented by the self-regulatory body rather than the Media Authority itself.

Freedom of religion and recognition of churches

The concern expressed in para 46 in relation to *the procedure of the recognition of churches* is unfounded. The proposal on the amendment to the Act on Churches addresses these concerns. It will introduce a two-stage application process for the recognition of churches with clearly defined procedures, timelines and remedies. Importantly, under the new regime any religious

community can call itself a church. Parliamentary recognition is only necessary for a privileged legal-financial relationship with the state. The special (recognised) church status or the lack of it does not affect the right to the freedom of religion and the prohibition of discrimination. The state cannot influence or intervene in religious activities in the theological sense.

As a source of juxtaposition it should also be recalled that several Member States maintain legal (even constitutional) distinctions among religious denominations. Finland, Denmark, the United Kingdom, etc. have a system of established religions. Moreover, the status of church is awarded by the Government in the Czech Republic, Denmark, Poland, Portugal, Romania, Spain and Slovakia. In Lithuania and Belgium churches are recognised by the Parliament, while in Austria both the Government and the Parliament can register churches. In Latvia and Luxembourg the Government and the Parliament have consultative role in the process of registration.

Conclusion

The report concludes in para 47 that the systemic and general trend of repeatedly modifying the constitutional and legal framework in very short time frames, and the content of such modifications are incompatible with the values referred to in Article 2 TEU. Unless corrected in a timely and sufficient manner, as the report assumes, this trend will result in a *clear risk of a serious breach of the values referred to in Article 2 TEU.*

First, it must be underlined that the major constitutional reforms have been completed during 2011-2012. There is no "systemic and general trend" as the report says. What happens these days is a fine-tuning of a system (mainly as a result of the activity of the Constitutional Court) whose building blocks are already firmly in place. Even if there was a systemic and general trend of modification, the report does not substantiate why repeated modifications of a constitutional system goes against the Treaties.

Moreover, the report does not cite any examples where the content of the new constitutional rules goes against the EU Treaties. It is for the European Commission to identify instances of incompatibility with EU law and for the European Court of Justice to adjudicate any such case. Where such instances have been found, they have been either decided by the ECJ or have been (or being) revised in consultation with the Commission. Hungary thus fully complies with EU law or where it proves not to, it is ready to amend its legislation. It is difficult to see how this approach can equal to a systemic breach of the fundamental values of the EU.

In summary: the conclusions of the report are not based on pre-established benchmarks, but on an arbitrary set of requirements not supported by EU law. Moreover, the report misses even its own standards as it fails to demonstrate that Hungary violates the cited procedural and substantive constitutional requirements.

III- RECOMMENDATIONS

The recommendations part of the report tries to introduce – without any legal or political authority to do so – a *special procedure against Hungary*. The major elements of this procedure are as follows:

- a set of vague, undefined recommendations addressed to Hungary, normally well

beyond the scope of the Treaties;
- an obligation to report on the corrective actions planned by the Government as well as reporting on their implementation;
- assessment of the Hungarian action by an "Article 2 Trilogue" composed of the representatives of the Commission, the Council and the European Parliament;
- launch of the Article 7(1) TEU procedure if – under the assessment of the "Trilogue" – Hungary fails to respond promptly to the recommendations of the European Parliament.

It is not difficult to see that despite its declared intention to avoid the use of double-standards against Hungary *this exercise is a disciplinary test-case against Hungary* that finds no legal ground whatsoever in the Treaty.

Recommendations to the European Commission

In addition to calling for creative sanctions against Hungary (para 60), the report also envisages a special "*Article 2 TEU/Rule of Law Alarm Agenda*". This mechanism would require the Commission to block "negotiations" in any policy field other than Article 2, until the Commission is satisfied with the corrective measures taken by the Member State. Irrespective of the institutional inconsistence of this proposal (which negotiations, which field?), this solution *would require the Commission to blackmail Member States through the creation of linkages of completely unrelated matters*. The call for such sheer political pressurising not only falls outside the scope of the Treaties, its spirit is completely alien to the governing principles of the EU legal order.

Recommendations to the Hungarian Authorities

The report formulates a number of recommendations that go beyond existing EU powers. Recommendations concerning issues falling within national competence (e.g. the structure of constitutional institutions) can only carry legitimacy, if they are based on an exhaustive comparative survey covering all Member States. In addition, such recommendations should be based on pre-determined (and universally endorsed) benchmarks and be applicable to all Member States. Any other situation would give rise to double standards.

Moreover, the individual recommendations advanced by the report are vague in nature and content. This can only generate further debate. No matter what the Member States does to address such a recommendation, any political actor may easily claim that they are not good enough.

As to the concrete recommendations:
- "*to remove from the Fundamental Law the provisions previously declared unconstitutional* by the Constitutional Court":
    - The provisions previously annulled by the Constitutional Court were not constitutional provisions themselves. Reintroducing such provisions – as confirmed by the Venice Commission – does not go against a rule of law requirement, it is a political choice of the legislative power;

- "to *revise the list of policy areas requiring a qualified majority* with a view to *ensuring future meaningful elections":*

- This point must be rejected in the strongest possible term. The list of policy areas subject to two-third majority has not been expanded under the Fundamental Law. The call to "ensure future meaningful elections" hints that voters' right to elect a free Parliament is constrained in Hungary;

– "to *secure a lively parliamentary system* which also respects opposition forces":
  - This is a rather subjective statement with no clear content or direction. The rights of the opposition and the public in legislative procedures are laid down by law;

- "to restore the *right of the Constitutional Court to review all legislation without exception*" :
  - in the absence of common European standards of constitutional jurisdiction, any Member State may determine the scope of external constitutional review. "Full judicial review" has never existed in Hungary (or hardly anywhere);

- "to fully restore the Constitutional Court's power to *review the constitutionality of any modifications of the Fundamental Law*":
  - The Constitutional Court has never held full powers to review constitutional amendments. A comprehensive review power of constitutional amendments by the Court, as is recognised by the Venice Commission, would equal to a political take-over by the Court of the responsibilities of the elected legislator.

- "to *restore the case-law of the Constitutional Court* issued before the entry into force of the Fundamental Law":
  - The case-law developed prior to the Fundamental Law can be (and is being) applied by the Court in the future as well.

- "to restore the prerogatives of the parliament in the budgetary field by *removing the* restriction of parliamentary *powers by the non-parliamentary Budget Council*":
  - This would contradict the terms of the 2008 IMF/EU agreement as well as the country-specific recommendations issued by the Commission and endorsed by the European Council in 2012.

- "to provide clarifications on how the Hungarian authorities intend to remedy the premature termination of the term of office of senior officials with a view to securing the institutional independence of the *data protection authority*";
  - The early removal of the date protection ombudsman from office is subject to a court procedure before the ECJ. If the ECJ decides against Hungary, the Government will comply with the judgement. It must be pointed out that the "institutional independence" of the new data protection authority is not questioned.

- "to fully restore and guarantee the *independence of the judiciary* by ensuring that the principles of irremovability and guaranteed term of office of judges, the rules governing the structure and composition of the governing bodies of the judiciary, as well as the safeguards on the independence of the Constitutional Court, are enshrined in the Fundamental Law":
  - All these conditions are fully ensured in Hungary through the Fundamental Law or cardinal laws. The report itself fails to mention any instances where the

independence of the judiciary is in question. The current system of guarantees has been elaborated following the advice of the Venice Commission;

- "*to promptly and correctly implement the above-mentioned decisions of the Court of Justice* of the European Union, by enabling the dismissed judges to be reinstated in their previous positions, including those presiding judges whose original executive posts are no longer vacant":
    - The modalities of the implementation of the judgement of the European Court of Justice have been drawn up in consultation with the European Commission. The Commission accepted that judges will be reinstated into their previous executive functions on a selective basis, as explained above;

- "to *establish objective* selection *criteria*, or to mandate the National Judicial Council to establish such criteria, with a view to ensuring that the rules on the *transfer of cases* respect the right to a fair trial and the principle of a lawful judge":
    - A new system of transfer of cases, drawn up in consultation with the Commission, will introduce such criteria.

- "to implement the *remaining recommendations* laid down in the *Venice Commission*'s opinion No CDL-AD(2012)020 on the cardinal acts on the judiciary":
    - The remaining recommendations of the Venice Commission have not been accepted because they are in part erroneous (see for example the participation of the judges in the administration of the judiciary, the functions of the legal secretaries, the application procedure, the fixed term appointment of judges, the transfer and appointment of judges etc.), or because they contradict to the traditions of the Hungarian judicial system (for example the abolition of the law uniformity procedure). The Government requested the opinion of the Constitutional Court on the remaining recommendations of the Venice Commission. This case is still pending before the Constitutional Court.

- several recommendations on the *media and pluralism*:
    - The recommendations on the media and pluralism lack the necessary precision to be seen as implementable. It is difficult to assess the normative content of indent 1-4. The recommendations contained in indent 5-6 are already met. The last indent is again too vague to discern any precise content.

- "to take positive action to ensure that the *fundamental rights of all persons*, including persons belonging to minorities, *are respected*":
    - Hungary is fully committed to ensuring the fundamental rights of all, including minorities. Such a vague recommendation however generates an impression to the opposite effect. In its current form the recommendation is pointless and misleading.

- "to establish clear, neutral and impartial requirements and institutional procedures for the *recognition of religious organisations as churches*":
    - The revision by Parliament of the current system of the recognition of churches is in progress in view of the decision of the Constitutional Court.

IV- FOLLOW-UP

In para 75 the report calls upon *Hungary to report* on the intended corrective measures and their calendar of implementation *to the EU institutions*.

This call introduces a reporting obligation specifically designed for Hungary. This equals to the creation of a new legal obligation outside the scope of the Treaties.

Moreover, in para 76 the report invites the Commission and the Council to each designate a representative who, together with the Parliament's rapporteur (*"Article 2 Trilogue"*), will carry out an assessment of the information sent by the Hungarian authorities on the implementation of the recommendations.

The "Article 2 Trilogue" envisaged by the report is a new institution that is not supported by the Treaties. Such a new institution would basically overtake the role of the Commission as a guardian of the Treaties as well as empty the infringement procedure and the Article 7 procedure. The Trilogue would lack any legal and political legitimacy, its operation would amount to a clear breach of the rule of law.

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Annex