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*Brussels, 12 December 2011*

*Dear Mr Navracsics,*

*I need to bring to your urgent attention a number of legal issues that arise under new measures that the Hungarian authorities are currently taking under the new Hungarian Constitution.*

*As you know, earlier this year, the European Commission has been conducting a review of the new Hungarian Constitution in order to check that it is consistent with EU law, in particular the Charter of Fundamental Rights, and with the letter and spirit of the Treaties.*

*As we said at the time, a precise view on the interaction of the Constitution with EU law and its legal effects can only be fully evaluated by taking into account the implementing legislative, administrative and judicial practice based on it.*

*In this respect, certain aspects of the recent reform process raise serious concerns from an EU law perspective inter alia: the retirement age of judges, which appears to be on the way to be drastically reduced from 70 to 62 only to be raised again shortly afterwards and the independence of the Data Protection Supervisor.*

*As regards these matters, the Commission is faced with a series of complaints by Supreme Court judges of several Member States, Members of the European Parliament and non governmental organisations.*

*Dr Tibor Navracsics  
Vice-Prime Minister of the Republic of Hungary, Minister of Public Administration and Justice  
Közigazgatási és Igazságügyi Mmisztérium  
Postacímünk: 1357 Budapest  
Postafiók 2.*

*In order for the Commission to carry out a detailed assessment of the compatibility of the various measures with EU law, I should ask you to provide your observations on the questions indicated in the attached document.*

*Given the fact that the effect of these new rules will be felt from 1 January 2012, I would ask to receive your answer as a matter of urgency by 16 December 2011. I would also ask you to ensure, in the interest of legal certainty, that no measure is implemented until doubts about their compliance with EU law have been removed.*

*Yours sincerely*

A handwritten signature in black ink, appearing to be 'V. Reding', with a long horizontal flourish extending to the right.

*Viviane Reding*

## **Annex to the Letter of Vice-President Reding of 11 December 2011**

### **1. Retirement age for judges**

According to the Commission's understanding, under the new Constitution, no judge may serve who is older than the general retirement age. At present, the mandatory retirement age for judges in Hungary is 70 years. The general retirement age, which is not mandatory but allows workers/employees (including judges) to retire with a pension, is 62 years (but will be raised to 65 between 2014 and 2022). The mandatory retirement age for judges is therefore lowered by eight years, from currently 70 years to (de facto) 62 years, with very short transitional periods (6 months to 1 year).

According to Directive 2000/78/EC, discrimination on grounds of age is generally prohibited, but can be objectively justified by a legitimate aim, if the means of achieving that aim are appropriate and necessary.

In order to examine the compatibility of the lowering of the mandatory retirement age of judges with this Directive as interpreted by the Court of Justice of the European Union, the Commission would like to receive the following information:

- What is the objective pursued by lowering the mandatory retirement age of judges? For which reason is the mandatory retirement age lowered to 62 now, even if it will be raised again as from 2014?
- How does this measure fit into the general policy objective of all EU governments to consolidate public finances?
- For which reason has the general retirement age been made mandatory for judges whilst it is not mandatory for other categories of workers? For which reason has the mandatory retirement age of 70 years not been lowered for other similar categories of public servants (e.g. public notaries, university professors) and for civil servants in general?
- Why are the transitional measures for judges who have already reached the new age limit or will do so next year so short, compared with the extent of the change and in view of the imminent increase of the general retirement age? Have any measures been taken to compensate the financial losses faced by judges who will have to retire much earlier than expected?
- Are there cases of judges who will have to retire at the general retirement age (62 years) without a full pension as a consequence of the reform? Will judges in the future even be able to obtain the right to a full pension if they retire at 62 or 65 given the new minimum age of 30, also introduced in the Constitution?
- What is the concrete impact of these measures (i.e. the number of judges concerned, the backlog of cases, recruitment of new judges etc)?

### **2. President of the new National Judicial Office**

According to the Constitution and the adopted legislation on the organisation of the courts which will enter into force on 1 January 2012, the National Judicial Council will be abolished and replaced by a National Judicial Office and a National Council of Judges. The Commission understands that the President of the new National Judicial Office will have sole competence as regards operational administrative management of the court system, including the power to appoint all judges. The National Council of Judges appears to be a consultative body to the President of the National Judicial Office. It appears therefore that there is a concentration of power in the person of the President of the National Judicial Office.

National judicial systems must enable citizens to fully enjoy the rights under EU law and the independence of the judiciary is necessary to uphold these rights. Insufficient guarantees of judicial independence could negatively impact on the application of EU law and the right to an effective remedy before a tribunal as enshrined in the Charter of Fundamental Rights.

The Commission would like to receive the following information:

- What are the objectives of the reorganisation of the judiciary and what precisely is the role of (i) the President of the new National Judicial Office, (ii) the National Judicial Office itself and (iii) the National Council of Judges?
- What are the guarantees provided for ensuring the independent administration of the courts?
- Which authority has a decisive influence on the appointment and promotion of judges and on disciplinary measures against them, and what is the decision making process?

### **3. The transformation of the Hungarian Supreme Court into Curia**

The Commission understands that there is no legislation relating to the transition from the current Supreme Court to the future 'Curia'. The concrete impact on this transformation is not clear, in particular as regards the judges of the current Supreme Court. As for the President of the Supreme Court, the old Constitution has been amended in order to provide that the President of the Curia has to be elected by 31 December 2011 at the latest. This means that the current mandate of the President of Hungarian Supreme Court will expire by that date, before the end of the regular term.

The Commission would like to receive the following information:

- What is the competence of the Curia and the power of its President in comparison to the existing Supreme Court?
- What is the regime applicable to the various aspects of the transformation of the Hungarian Supreme Court into the Curia, in particular as regards the appointment of the judges, and why will the mandate of the Chair of the current Hungarian Supreme Court terminate before the end of the regular term?
- Given the importance of an independent judiciary in upholding rights enjoyed under EU law, how is it ensured that the ending of the mandate before the end of the regular term does not effectively put in question the independence of the judiciary?

### **4. The Data Protection Supervisor**

The Act on Informational Self-Determination and Freedom of Information was adopted on 11.7.2011 and will enter into force on 1.1.2012. According to the Commission's understanding, the new Hungarian data protection legislation will bring about a restructuring of the Hungarian Data Protection Authority. A National Agency for Data Protection and Freedom of Information will replace the Data Protection Commissioner's Office as of 1.1.2012. Thereby prematurely an end will be put to the six year term of the Data Protection Commissioner currently in office, who was appointed in 2008. According to the legislation, the new Data Protection authority is independent and is headed by a President who is nominated by the Prime Minister and appointed by the President of Hungary for a period of nine years. His assignment shall end only if certain conditions are fulfilled.

The current EU data protection legislation in force, Directive 95/46/EC, and the Charter of Fundamental Rights of the European Union require that the data protection supervisory authorities in the Member States act in complete independence. In order to determine

whether the new supervisory authority will be set up in line with the applicable legislation, the Commission would like to receive the following information:

- Why was it decided to replace the current supervisory authority with a new one?
- What are the reasons for not providing any interim measures until the term of the current data protection supervisor is due to end in 2014?
- How is it ensured that early ending of the Data Protection Commissioner's Office does not put in question the independence of the data protection authority as provided in EU law?

While we appreciate that the new data protection legislation provides for an independent supervisory authority, we would like to enquire more concretely on the conditions foreseen in the new legislation for ending the term of the chairman of the future data protection supervisory authority. The Commission would like to receive information on the scope and the meaning of the following conditions:

- Failure to meet the conditions necessary for the appointment of the supervisory authority;
- Determination of incompatibility of the supervisory authority;
- Discharge; and
- Disqualification from holding office.

**Commission Deadline for Replies by Hungary: 16 December 2011.**