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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
(VENICE COMMISSION)

**HUNGARY**

**DRAFT OPINION**

**ON THE AMENDMENTS TO THE ACT ON EQUAL TREATMENT  
AND PROMOTION OF EQUAL OPPORTUNITIES  
AND TO THE ACT ON THE COMMISSIONER FOR FUNDAMENTAL  
RIGHTS**

**AS ADOPTED BY THE HUNGARIAN PARLIAMENT  
IN DECEMBER 2020**

on the basis of comments by

**Mr Richard BARRETT (Member, Ireland)**  
**Mr Philip DIMITROV (Member, Bulgaria)**  
**Mr Cesare PINELLI (Substitute Member, Italy)**  
**Mr Jorgen-Steen SØRENSEN (Member, Denmark)**

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Draft  
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## I. Introduction

1. By letter of 5 February 2021, the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) of the Parliamentary Assembly of the Council of Europe (PACE) requested an opinion of the Venice Commission on the legislative and constitutional package adopted by the Hungarian Parliament in December 2020. The Venice Commission adopted its opinion on the constitutional amendments at its 127<sup>th</sup> Plenary Session in July 2021.<sup>1</sup> The scope of this opinion is limited to the legislative amendments concerning the Act on Equal Treatment and Promotion of Equal Opportunities and the Act on the Commissioner for Fundamental Rights (CDL-REF(2021)060 and CDL-REF(2021)061).

2. Mr Richard Barrett, Mr Philip Dimitrov, Mr Cesare Pinelli and Mr Jorgen-Steen Sørensen acted as rapporteurs for this opinion.

3. Due to the health situation, it was not possible to travel to Budapest. Instead, the rapporteurs, assisted by Ms Sopio Japaridze and Ms Martina Silvestri from the Secretariat, held a series of online meetings on 13 and 14 September 2021 with representatives of the Ministry of Justice, the Office of the Commissioner for Fundamental Rights, the representatives of political parties from the parliamentary majority (Fidesz and KDNP) and opposition (Jobbik), as well as with representatives of civil society. The Commission is grateful to the authorities for the excellent organisation of these meetings.

4. This opinion was prepared in reliance on the English translation of Act CLXV of 2020 Amending Certain Laws in the Field of Justice, extract concerning Act CXI on the Commissioner for Fundamental Rights (CDL-REF(2021)060), Act CXXVII of 2020 Amending Certain Laws to Ensure More Effective Enforcement of the Requirement of Equal Treatment (CDL-REF(2021)061), Act CXI 2011 on the Commissioner for Fundamental Rights (CDL-REF(2021)067) and Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities (CDL-REF(2021)068). The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings and written submissions from stakeholders. Following an exchange of views with representatives of the authorities, it was adopted by the Venice Commission at its .....Plenary Session ( ..... 2021).

## II. Background

### A. The law-making process and the rationale behind the amendments introduced by ACT CLXV of 2020 and ACT CXXVII of 2020

6. Act CLXV of 2020 was submitted to parliament by the Ministry of Justice on 10 November 2020. It was adopted on 15 December 2020. Act CXXVII of 2020 Amending Certain Laws to Ensure More Effective Enforcement of the Requirement of Equal Treatment was initiated on 10 November 2020 by the Parliamentary Committee of Justice Affairs. Act CXXVII of 2020 was adopted on 1 December 2020.

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<sup>1</sup> See Venice Commission, CDL-AD(2021)029 - Opinion on the constitutional amendments adopted by the Hungarian Parliament in December 2020.

7. The relevant part of Act CLXV amending Act CXI 2011 on the Commissioner for Fundamental Rights, and Act CXXVII entered into force on 1 January 2021. The Commissioner for Fundamental Rights became ETA's legal successor.

8. Both Acts constitute part of a wider legislative and constitutional package adopted by the Hungarian Parliament during the state of emergency in December 2020.<sup>2</sup>

9. The effect of Act CLXV and Act CXXVII of 2020 is to merge the 2005 Equality Treatment Authority (hereinafter: ETA), an autonomous public administrative body with overall responsibility for ensuring compliance with the principles of equal treatment, with the Office of the Commissioner for Fundamental Rights (hereinafter: CFR).

10. The Venice Commission has been informed that the legislative amendments introduced by Act CLXV and Act CXXVII were fast tracked, which limited the possibility of civil society and other interested stakeholders to provide meaningful input.<sup>3</sup> No information has been received by the Hungarian authorities as to the urgency or necessity for expedition of the law-making process. Moreover, no reason was offered as to why it was necessary to adopt the amendments at stake during a state of emergency which was accompanied by severe restrictions on the fundamental rights, including the right to gather and discuss.<sup>4</sup>

11. The rationale provided by the Hungarian authorities in response to the queries contained in the Joint Communication from Special Procedures,<sup>5</sup> concerning the merger of ETA and CFR was to ensure even more effective protection of fundamental rights. By integrating ETA into CFR, equal treatment violation cases would be heard by a constitutional institution that was primarily concerned with the protection of human rights and, unlike ETA, has the right to initiate ex-post norm control of the Constitutional Court.<sup>6</sup>

## **B. The scope of the opinion**

12. The present opinion will assess the compatibility of the legal amendments concerning the merger of ETA with CFR with international standards on equality bodies/national human rights institutions.

## **III. Analysis**

### **A. International standards**

13. "Effective, pluralistic and independent national human rights institutions (hereinafter: NHRI) are among the pillars of respect for human rights, the rule of law and democracy".<sup>7</sup>

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<sup>2</sup> *Ibid.*, para. 7.

<sup>3</sup> See *Mandates of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Independent Expert on the enjoyment of all human rights by older persons; the Special Rapporteur on freedom of religion and belief; and the Working Group on discrimination against women and girls*, OL HUN 1/2021, 22 March 2021, pages 3-4.

<sup>4</sup> See *supra* (note 1), para. 13.

<sup>5</sup> See *supra* (note 3).

<sup>6</sup> See [Observations of the Government of Hungary concerning Joint Communication OL HUN 1/2021](#).

<sup>7</sup> See *Recommendation (2021)1 of the Committee of Ministers of the Council of Europe to member States on the development and strengthening of effective, pluralist and independent national human rights institutions*, 31 March 2021.

14. A broad range of international instruments require member states to establish national equality bodies (hereinafter: NEB)/national human rights institutions and develop standards for their operation. The Paris Principles,<sup>8</sup> as well as the ECRI General Policy Recommendation No. 2<sup>9</sup> provide detailed standards in this regard. Building on numerous regional instruments on NEBs/NHRIs, the Venice Principles<sup>10</sup> further elaborate on standards which are aimed at protecting and promoting Ombudsman institution and encourage States to undertake all necessary actions to strengthen and develop this institution in line with these standards.

#### *Institutional architecture*

15. There is no standard model across Council of Europe member States for NEBs/NHRIs.<sup>11</sup> Their forms may vary depending on the legal and administrative traditions of member State. They may be organised at different levels and with different competences. States enjoy a wide margin of appreciation concerning the institutional arrangement. However, selected models have to “strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country”,<sup>12</sup> and the “practical effectiveness of the chosen framework for such institutions should be [...] consistent with internationally accepted and recognized standards, and this framework should neither threaten the autonomy nor the independence of the institution nor diminish its ability to carry out its mandate”.<sup>13</sup>

16. ECRI General Policy Recommendation No. 2 clarifies that: “Equality bodies can be stand-alone or form an equal part of multi-mandate institutions that include a human rights or Ombudsperson mandate”. In this latter case, among other things, legislation should explicitly set out the equality mandate of the institution and allocate appropriate human and financial resources to each mandate to ensure an appropriate focus on the equality mandate. In addition, governing, advisory, and management structures should be organised in a manner that provides for clear leadership, promotion and visibility of the equality mandate.<sup>14</sup>

17. States’ wide margin of discretion concerning the model of the NHRI and the need, in the framework of the chosen model, to provide necessary conditions and safeguards to ensure the independent and effective functioning of the institution, in accordance with relevant standards and good practices in the field, has been consistently underlined by the Venice Commission in its previous opinions.<sup>15</sup> The Commission always stressed “that states enjoy a wide margin of appreciation with regard to such institutional arrangements, which depend to a large extent on the domestic specific situation”. However, it also emphasized that re-organisation and the

<sup>8</sup> See United Nations General Assembly *Resolution 48/134 of 20 December 1993 on national institutions for the promotion and protection of human rights*. (“The Paris Principles”).

<sup>9</sup> See European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No. 2 on Equality Bodies to combat racism and intolerance at national level*, 7 December 2017.

<sup>10</sup> The Venice Commission adopted the Principles on the protection and promotion of the Ombudsman Institution (the “Venice Principles”), at its 118<sup>th</sup> Plenary Session (Venice, 15-16 March 2019). The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345<sup>th</sup> Meeting of the Ministers’ Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, Resolution 2301(2019), on 2 October 2019; by the Congress of Local and Regional Authorities of the Council of Europe, Resolution 451(2019) on 29-31 October 2019. The Venice Principles have been heavily referenced and promoted by the UNGA Resolution A/RES/75/186.

<sup>11</sup> See PACE Resolution 2301(2019) on Ombudsman institutions in Europe -The need for a set of common standards, para.3.

<sup>12</sup> See *supra* (note10), paras.4 and 5.

<sup>13</sup> See *UNGA Resolution 75/186* on the role of the Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law,16 December 2020, para.4.

<sup>14</sup> See *supra* (note 9), para 7. Paragraph 8 of the same recommendation further stipulates that “*Where equality bodies form part of multi-mandate institutions, this General Policy Recommendation shall apply to these institutions and their activities in the field of equality. The competences and powers attached to all mandates in such institutions should be harmonised and levelled up so that each mandate should, as far as possible, enjoy the broadest competences and powers available to any of the other mandates*”.

<sup>15</sup> See CDL-AD(2015)017, Republic of Moldova – Opinion on the Law on the People’s Advocate, paras. 25 and 26; See also CDL-AD(2021)017, Republic of Moldova - Opinion on the draft Law amending some normative acts relating to the People’s Advocate, para.52.

decrease in the number of independent institutions has to exclude a lowering of the existing level of guarantees for the protection of the rights involved and a negative impact on a country's system of checks and balances and its efficiency.<sup>16</sup>

18. As underlined by the COE Commissioner for Human Rights, the determining factor for embedding NEB within another body is to make the promotion of equality and the combating of discrimination even more effective, with safeguards of affording an adequate priority for these issues with the embedded structure.<sup>17</sup>

19. European Commission Recommendation on standards for equality bodies refers to a wide margin of discretion left by the text of the equality Directives on the structure and functioning of the equality bodies.<sup>18</sup>

#### *Independence and effectiveness*

20. Independence and effectiveness are key factors for ensuring efficient functioning of NEBs/NHRIs and for securing a desired impact. Independence includes financial and administrative independence, while effectiveness requires that these institutions should be able to deploy all of their functions and powers to the extent that ensures impact and full realisation of their potential.<sup>19</sup>

21. The Paris Principles are clear about the need for an NHRI to have adequate funding to ensure its independence and its ability to freely determine its priorities.<sup>20</sup> The Venice Principles further emphasise the importance of adequate funding for full, independent and effective discharge of Ombudsman's responsibilities and functions.<sup>21</sup> The United Nations' Resolution A/RES/75/186 further stresses the importance of the financial and administrative independence of these institutions and encourages member States to endow Ombudsman and mediator institutions with the adequate financial allocation for staffing and other budgetary needs, in order to ensure the efficient and independent exercise of their mandate.<sup>22</sup> Government funding should be allocated to a separate budget line item applicable only to the National Institution which in its turn should have complete autonomy over the allocation of its budget according to its priorities.<sup>23</sup>

22. One of the key elements of the NHRIs' independence is the ability to make decisions in relation to their own staff. The ECRI General Policy Recommendation No. 2 clarifies that NEBs should take independent decisions concerning their internal structure and management of resources and have the powers to recruit and appoint their own staff.<sup>24</sup> According to principle 22 of the Venice Principles "The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility [...] The Ombudsman shall be able to recruit his or her staff". Principle 22 is echoed by the Recommendations of the Committee of Ministers (2019)6 and (2021)1.<sup>25</sup>

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<sup>16</sup> See CDL-AD(2011)016 – Opinion on the new Constitution of Hungary, para. 115.

<sup>17</sup> See Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, 21 March 2011, 4.2 Diversity.

<sup>18</sup> See European Commission Recommendation on standards for equality bodies, 22.06.2018, para.18.

<sup>19</sup> See *supra* (note 17), 4.4 Independence and 4.5 effectiveness.

<sup>20</sup> See *supra* (note 8), paragraph 2 of the chapter "Composition and guarantees of independence and pluralism".

<sup>21</sup> See CDL-AD(2019)005, The Venice Commission Principles on the protection and promotion of the Ombudsman Institution ("The Venice Principles"), para.21.

<sup>22</sup> See *supra* (note 13), para. 1(b).

<sup>23</sup> See General Observations of the Sub-Committee on Accreditation, G.O. 1.10 on "Adequate funding of National Human Rights Institutions".

<sup>24</sup> See *supra* (note 9), paras 27 and 28.

<sup>25</sup> See Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the ombudsman institution, 16 October 2019, para.6; See *supra* (note 7), para.7 of Appendix to the Recommendation.

23. EB/NRI has to be provided with adequate human, technical and financial resources to perform its powers effectively. “Resources can only be considered adequate if they allow equality bodies to carry out each of their equality functions effectively, within reasonable time and within the deadlines established by national law”.<sup>26</sup>

24. The Venice Commission has previously noted that widening of the mandates of existing institutions, contain risks of under financing and therefore, any change in the office of the institution, under any circumstances, must be accompanied by financial and administrative support that will take institution’s work in carrying out the mandates(s) even to a higher level.<sup>27</sup>

## **B. Amendments to Act CXI of 2011(the Commissioner Act) and Act CXXV of 2003 (the Equality Treatment Act) in the light of international standards**

### **1. General remarks**

25. It has been consistently underlined by different international instruments that States enjoy a wide margin of appreciation concerning the institutional arrangement of NEBs/NHRIs. The diversity of these bodies encompasses their structure, as well functions and powers. There are potentials, as well as risks associated with linking NEBs and NHRIs, especially in a form of merger which “is the most complex of the linkages and therefore its implementation requires most careful attention”.<sup>28</sup>

26. During the virtual meetings, the attention of the Venice Commission delegation was drawn to the fact that ETA, as a well-functioning and politically unbiased institution, enjoys public respect and confidence, while the efficiency and independence of the CFR have been called into question.<sup>29</sup> Similar concerns had been expressed in different reports of international organisations.<sup>30</sup>

27. The Venice Commission is not in a position to state that the merger of ETA with CFR can be taken as *a priori* “downgrading” of the issue of non-discrimination as articulated by some interlocutors during the virtual meetings. It reiterates once again that it is not the form that matters, but the substance - chosen model to provide necessary conditions and safeguards to ensure the independent and effective functioning of the institution, in accordance with relevant standards and good practices in the field.

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<sup>26</sup> See *supra* (note 18), 1.2.2 Resources.

<sup>27</sup> See *supra* (note 15), CDL-AD(2021)017, paras. 66-67.

<sup>28</sup> See European network of equality bodies (Equinet), *Equality Bodies and National Human Rights Institutions, making the link to Maximise Impact*, November 2011, available at: <https://equineteurope.org/publications/equality-bodies-and-national-human-rights-institutions-making-the-link-to-maximise-impact/>; See also Equinet, *Enhancing the impact of equality bodies and ombudsperson offices: making links*, 2017, available at: <https://equineteurope.org/publications/enhancing-the-impact-of-equality-bodies-and-ombudsperson-offices-making-links/>

<sup>29</sup> See *European network of legal experts in gender equality and non-discrimination*, Flash Report on Hungary, 26 November 2020, available at: [Hungary - European Equality Law Network](#) ; See also Hungarian NGO coalition *Civilizáció*, statement of 26 November 2020, available at: [Abolishing the Equal Treatment Authority and transferring its tasks to the Ombudsperson may further weaken human rights protection in Hungary — Civilizáció \(civilizacio.net\)](#); See also ILGA-Europe statement of 10 November 2020, available at: <https://www.ilga-europe.org/resources/news/latest-news/ilga-europe-alarmed-hungarian-parliaments-moves-abolish-national-equal>

<sup>30</sup> See *Country Chapter on the rule of law situation in Hungary*, SWD(2021) 714, pp.23-24; See also Report by the Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law, A Democratic Renewal for Europe*, 2021, p.126, available at: [State of Democracy, Human Rights and the Rule of Law: A democratic renewal for Europe. \(coe.int\)](#); See also *the Council of Europe Commissioner for Human Rights*, statement of 20 November 2020, available at : [Commissioner urges Hungary’s Parliament to postpone the vote on draft bills that, if adopted, will have far-reaching adverse effects on human rights in the country - View \(coe.int\)](#)

## 2. The Commissioner for Fundamental Rights and the Sub-Committee on Accreditation of the Global Alliance of National Human Rights Institutions

28. The Global Alliance of National Human Rights Institutions (hereinafter GANHRI), through its Sub-Committee on Accreditation (hereinafter: SCA), is responsible for reviewing and accrediting NHRIs in compliance with the Paris Principles.<sup>31</sup>

29. In October 2019, the SCA, decided to defer the review of the status “A” (compliant with the Paris Principles) accreditation of the CFR, which had been granted in 2014, to its second session of 2020. In its report, the SCA concluded that the CFR did “not demonstrate adequate efforts in addressing all human rights issues, nor has it spoken out in a manner that promotes and protects all human rights”. The SCA further noted that the Commissioner made limited use of international and regional human rights mechanisms in relation to sensitive issues.<sup>32</sup> The SCA referred, *inter alia*, to concerns expressed by the Special Rapporteur on the situation of human rights defenders in 2017 that, despite its mandate, the CFR has been reluctant to refer complaints to the Constitutional Court for review in cases that it deems political or institutional.<sup>33</sup>

30. In June 2021, the Sub-Committee on Accreditation recommended that the CFR be downgraded to status “B” (partially compliant with the Paris Principles). However, in line with Article 18.1 of the GANHRI statute, this recommendation does not take effect for a period of one year. This is to allow an opportunity for the CFR to provide the documentary evidence necessary to establish its continued conformity with the Paris Principles.<sup>34</sup> In its report, the SCA came to the following conclusion:

*“the CFR has not effectively engaged on and publicly addressed all human rights issues, including in relation to vulnerable groups such as ethnic minorities, LGBTI, refugees and migrants as well as constitutional court cases deemed political and institutional, media pluralism, civic space and judicial independence. [...] the Commissioner has not spoken out in a manner that promotes protection of all human rights. The failure to do so demonstrates a lack of sufficient independence. [...] the CFR is operating in a way that has seriously compromised its compliance with the Paris Principles”*<sup>35</sup>

31. The Commission regrets that no careful planning of the reform (the merger of ETA with CFR) seems to have taken place and that it was carried through during a critical time for the CFR, when its status “A” accreditation review was deferred by the SCA, due to serious concerns related to its compliance with the Paris Principles.

## 3. New mandate of the Commissioner for Fundamental Rights

32. As a result of the amendments, the CFR shall perform the tasks laid down in the Equal Treatment Act (Section 9 of Act CXXVII) and act in the framework of administrative proceedings in the cases provided for in the Equal Treatment Act (Section 1 of Act CXXVII). As to the ETA, by way of merging into the OCFR, it shall cease to exist as of 1 January 2021, and its general legal successor shall be the CFR (Section 12 of Act CXXVII).

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<sup>31</sup> See “The Paris Principles”. These principles provide detailed standards for the establishment and operation of national human rights institutions.

<sup>32</sup> See Global Alliance of National Human Rights Institutions (GANHRI), Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), 14–18 October 2019, p.25, available at: [SCA reports - GANHRI](#)

<sup>33</sup> See *Ibid.*, p.24.

<sup>34</sup> See Global Alliance of National Human Rights Institutions (GANHRI), Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA), 14-21 June 2021, pp.12-13, the CFR maintains “A” status until the SCA’s first session of 2022.

<sup>35</sup> See *Ibid.*, p.13.



33. As a result of the amendment introduced by Section 9 of Act CXXVII, a whole new chapter (Chapter III/C) governing the proceedings under the Equal Treatment Act was inserted in the Commissioner Act. According to Section 39/M (2) – (6):

(2) If, based on the petition, the proceedings can be initiated under both this Act and the Equal Treatment Act, proceedings shall be initiated according to the statement from the petitioner. If, on the basis of the petitioner's statement, the petitioner requests proceedings to be initiated under the Equal Treatment Act, the petition shall be regarded as an application made under the equality Act.

(3) If the petitioner does not make a statement or requests the initiation of both proceedings, the Commissioner for Fundamental Rights, with the exception specified in Subsection (4), shall initiate proceedings under Equal Treatment Act and shall notify the petitioner thereof within 10 days, in which case the petition shall be regarded as an application made under the Equal Treatment Act.

(4) If, in a case relating to the enforcement of the rights of the nationalities living in Hungary, the petitioner does not make a statement, or requests the initiation of both proceedings, the Commissioner for Fundamental Rights shall make a decision based on the proposal of the Deputy Commissioner for Fundamental Rights responsible for the protection of the rights of the nationalities living in Hungary as to whether initiating proceedings under this Act or under the Equal Treatment Act. shall be considered justified.

(5) The Commissioner for Fundamental Rights may not examine the administrative decision made under this Act in the proceedings specified in Subsection (1).

(6) The proceedings conducted under this Act shall not preclude that, after their conclusion, the Commissioner for Fundamental Rights, upon request or ex officio, may initiate proceedings in the same case under the provisions of the Equal Treatment Act.

34. As a result of the merger, the CFR has a mandate to conduct two types of proceedings which are different in nature and outcome. Under the Equal Treatment Act, the complaints are investigated as part of an administrative procedure with clear deadlines, the possibility to impose fines and other sanctions, and the possibility to seek judicial review. In case of the proceedings under the Commissioner Act, no timelines are prescribed, and no binding decisions are issued in the end, only recommendations.

35. This is further complicated by the fact that it is the petitioner who has to choose one proceeding over another (the Equal Treatment Act or the Commissioner Act), and only in case no special preference is expressed by the petitioner, or he/she requests the initiation of both proceedings, shall the CFR initiate the proceedings under the Equality Act. It is unusual to leave the choice of the procedure to be followed to the petitioner. Il est inhabituel de laisser au pétitionnaire le choix de la procédure à suivre.

36. When the case concerns the enforcement of the rights of the nationalities living in Hungary, and if the petitioner does not make a statement, or requests the initiation of both proceedings, the CFR shall make a decision based on the proposal of the Deputy Commissioner for Fundamental Rights responsible for the protection of the rights of the nationalities living in Hungary. The Venice Commission is aware of the special mandate held by the Deputy Commissioner; however, in the absence of an explanatory report, this exception seems to further complicate the newly introduced system of protection against discrimination and may leave the impression of opening a space for an argument of differential treatment.

37. After the merger, the Commissioner's equal treatment role will be "within the framework of an administrative authority proceeding" (Section 39/M (1)) and the examination of such proceedings by the CFR will be specifically excluded by Section 39/M (5). It appears that such administrative proceedings have in the past been open to examination by the CFR. This further

highlights the difficulties which can arise with mixing a mandate resulting in recommendations with one taking a formal path of administrative proceedings.

38. Finally, the new legislation enables the Commissioner (i) to investigate a complaint first in his capacity as Ombudsman, and then, after that examination is completed (ii) to act as the successor of the ETA if the complainant requests or the Commissioner decides so *ex officio* (Section 39/M(6)). The Venice Commission observes in this respect that the Commissioner's quasi-judicial role in the second type of proceedings requires an impartiality that he/she is unlikely to guarantee after having already examined the case under the Commissioner Act.

39. An analysis of the legal provisions suggests that, after merger, the CFR combines both, the support and litigation and the decision-making functions. In this case, as suggested by the ECRI General Policy Recommendation No. 2, it is necessary to ensure that each function is provided by a different unit or by different staff.<sup>36</sup> This seems not be the case.

40. It appears that, eventually, as a result of the merger and the collision of the competences already enjoyed by the CFR under Act CXI and acquired in his capacity as successor of the ETA, the new system of protection against discrimination is overall more complicated and thus has the potential to be less effective than the previous one.

#### **4. Internal operational consequences**

##### **a. With regard to the internal structure**

41. According to Section 10 of Act CXXVII, Chapter III/C - Proceedings under the Equal Treatment Act, was inserted in ACT CXI. Section 39/M (7) of the new Chapter establishes that "the performance of the tasks of the Commissioner for Fundamental Rights specified in the Equal Treatment Act shall be carried out by a separate organisational unit of the Office designated for this purpose" (hereinafter: Equality Treatment Directorate (ETD)). Section 11(1) of Act CXXVII adds Subsections (2e) – (2h) in Section 42 of the Commissioner Act. According to Section 42 (2g), the head of the separate organisational unit shall be a "Director General for Equality Treatment" (hereinafter: DGET) who shall be aided in his/her work by a Deputy Director General (Section 42 (2h)). Section 42 (3c) further explains that public servants employed at the ETD shall be appointed and dismissed by the DGET with the consent of the CFR. Section 42 (3d) adds that the content of Subsection (3c) shall be applicable to employees employed at the ETD. Finally, according Section 42(3e), if the position of the DGET is vacant, the rights listed above concerning public servants or employees employed at the ETD shall be exercised by the CFR (Section 11(3) of Act CXXVII).

42. During the virtual meetings, the Venice Commission was informed that to date (after 9 months of the merger), neither the Director General for Equality Treatment nor the Deputy Director General have been appointed. Moreover, the CFR could not confirm either the date for filling these vacancies or elaborate on the criteria and rules of selection. According to the additional information received by the Venice Commission, due to various reasons the ETD is currently understaffed, which affects the overall quality of its performance. The Commission reminds the Hungarian authorities that member States should ensure sufficient adequately qualified staff for the equality bodies to guarantee effective fulfilment of their functions.<sup>37</sup>

43. The Venice Commission is not in a position to assess the developments concerning staff turnover or the effect caused by the failure to appoint the DGET or his/her Deputy. The Commissions' role is to assess the above-mentioned amendments in light of the relevant international standards.

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<sup>36</sup> See *supra* (note 9), para. 28. See also *supra* (note 17), 6. Conclusions and recommendations, 6.2.2.

<sup>37</sup> See *supra* (note 18), 1.2.2 (2).

44. An analysis of these provisions suggests that they do not contradict the standards of effectiveness and independence encompassing, inter alia, a decision on the internal structure of the institution and the recruitment/appointment policy of the staff.<sup>38</sup> However, the Commission reminds the Hungarian authorities that failure to follow the relevant regulations renders the guarantees provided therein purely theoretical and illusory, devoid of any practical and effective implication. Without DGET, it is hard to imagine the promotion and visibility of equality mandate as required by ECRI General Policy Recommendation No 2.<sup>39</sup> The Commission encourages the Hungarian authorities to ensure a timely appointment of GDET and his/her Deputy in accordance with clear and transparent criteria defined by law.

b. With regard to the financial and administrative means

45. According to amendment introduced by Act CLXV (Section 36) to Section 41 (4) of Act CXI, "The Office shall have a separate chapter in the central budget and the powers of the head of organ directing the chapter shall be exercised by the Commissioner for Fundamental Rights"

46. In the past, concerns were expressed about the lack of funding and its potential effect on the independence of the CFR and his capacity to act as a strong and effective mechanism.<sup>40</sup> In its October report of 2019, the SCA encouraged the Commissioner to continue to advocate for adequate funding.<sup>41</sup>

47. During the virtual meeting with the CFR, the Venice Commission was informed that 462 000 000 HUF, a budget of ETA for 2020, was added to the overall budget of CFR for 2021 for tasks related to equal treatment, internal distribution of which is a competence of the CFR. The Venice Commission has not been provided with additional information concerning the internal distribution of the budget, in particular the budget distributed to the ETD.

48. Once again, it falls beyond the mandate of the Venice Commission to assess whether the 2021 budget of the CFR is adequate to the needs of the institution and whether the sum allocated to the ETD is appropriate to ensure its effective operation. However, the Commission reminds the Hungarian authorities that this element bears serious consequence for the independent and efficient exercise of the NEBs' mandate and therefore should be adequately considered.

49. The Commission welcomes the fact that the CFR has a separate chapter in the central budget and an autonomy to allocate its budget according to its priorities as required by international standards. It remains hopeful that ETD is under no risk of under financing and that work on equality issues, as a result of the merger, is taken to a higher level.<sup>42</sup>

**C. Procedure used for the adoption of the amendments**

50. The amendments introduced by Act CLXV of 2020 and Act CXXVII of 2020 were adopted in a speedy way and apparently without consultation. Civil society and other interested stakeholders did not get a chance to provide any meaningful input in line with the Venice Commission's recommendations in the Rule of Law Checklist.<sup>43</sup> The Council of Europe Commissioner for Human Rights expressed her fear that "several proposals contained in the complex legislative package, submitted without prior consultation and relating to matters

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<sup>38</sup> See paras. 22-24 above.

<sup>39</sup> See *supra* (note 9), para 7(C).

<sup>40</sup> See Report of the Special Rapporteur on the situation of human rights defenders on his mission to Hungary, 19 January 2017, para.94.

<sup>41</sup> See *supra* (note 32), page 26, 1 Adequate Funding.

<sup>42</sup> See *supra* (note 15), CDL-AD(2021)017, paras. 66-67.

<sup>43</sup> See Venice Commission, *Rule of Law Check List*, CDL-AD(2016)007, point 5.

including the functioning of the [...] national human rights structures [...] could serve to undermine democracy, the rule of law and human rights in Hungary".<sup>44</sup>

51. Concerns about frequent and sudden changes of legislation in Hungary and accelerated pace of new legislation have been expressed in 2021 Rule of Law Report of the European Commission.<sup>45</sup> In addition, concerns have been expressed by the Secretary General of the Council of Europe regarding the level of transparency and consultation with which legislative proposals have to be processed.<sup>46</sup>

52. The Secretary-General of the United Nations stressed the particular importance of the right to meaningful participation in times of crisis like COVID-19. He underlined that meaningful participation in decision-making is a human right that must be defended in the face of pushback, an imperative amplified by crisis such as COVID-19.<sup>47</sup>

53. During the virtual meetings with the Ministry of Justice and with the parliamentary majority, the rapporteurs were informed that the Hungarian legislation<sup>48</sup> does not require public consultations when draft bills are submitted by members of Parliament. Therefore, there was no need to conduct public consultations concerning Act CXXVII of 2020, initiated by the Parliamentary Committee of Justice Affairs. On the other hand, no explanations were provided as to failure to comply with mandatory requirement of public consultations in relation to Act CLXV of 2020, initiated by the Ministry of Justice. During the virtual meetings, concerns were expressed by representatives of civil society about a practice routinely applied by the Government, when members of Parliament initiate draft bills on highly contested topics to avoid public consultations.<sup>49</sup>

54. The Venice Commission is aware that in Hungary, as in other countries, the rules applicable to the legislative process differ depending on the author of the draft law and that drafts submitted by Members of Parliament, unlike those submitted by the Government or the President of the Republic, do not require an obligatory public consultation. However, a public consultation for drafts submitted by members of Parliament is not explicitly ruled out either.<sup>50</sup> Moreover, the Venice Commission reiterates the importance, in a democratic society, of inclusive public debate and a meaningful participation in the law-making process and encourages the Hungarian authorities to always follow this significant international standard.

55. The Commission has repeatedly underlined the importance of the procedural element of the quality of the legislative process: conducting a public, transparent and accountable consultation

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<sup>44</sup> See the Council of Europe Commissioner for Human Rights, statement of 20 November 2020, available at : [Commissioner urges Hungary's Parliament to postpone the vote on draft bills that, if adopted, will have far-reaching adverse effects on human rights in the country - View \(coe.int\)](#)

<sup>45</sup> See European Commission, *Rule of Law Report, The Rule of law Situation in the European Union*, COM (2021) 700, 20 July 2021, p.21, available at : [2021 Rule of law report - Communication and country chapters | European Commission \(europa.eu\)](#)

<sup>46</sup> See Report by the Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law, A Democratic Renewal for Europe*, 2021, p.80, available at: [State of Democracy, Human Rights and the Rule of Law: A democratic renewal for Europe. \(coe.int\)](#)

<sup>47</sup> See Secretary-General's remarks at High-level side event: "Participation, Human Rights and the Governance Challenge Ahead", 25 September 2020, available at: <https://www.un.org/sg/en/content/sg/statement/2020-09-25/secretary-generals-remarks-high-level-side-event-participation-human-rights-and-the-governance-challenge-ahead-delivered>

<sup>48</sup> See Act CXXXI of 2010 on Public Participation in the Preparation of Legislation, Articles 1 and 8.

<sup>49</sup> See Comments of Hungarian NGOs on the Draft Report on the situation of fundamental rights: standards and practices in Hungary and on the Position of the Hungarian Government, 23 May 2013, available at: [https://helsinki.hu/wp-content/uploads/HUN\\_Draft-report\\_Gov\\_NGOs\\_comments\\_20130523.pdf](https://helsinki.hu/wp-content/uploads/HUN_Draft-report_Gov_NGOs_comments_20130523.pdf)

<sup>50</sup> See CDL-AD(2017)015, Hungary - Opinion on the draft Law on the transparency of organisations receiving support from abroad, para. 26.

with civil society organisations and relevant stakeholders prior to the adoption of legislation,<sup>51</sup> *inter alia*, concerning a very sensitive matter - Ombudsman / National Human Rights Institutions.<sup>52</sup> Moreover, it emphasized that consultations with all stakeholders and civil society have to take place irrespective of strict time schedule or other commitments a state has to comply with.<sup>53</sup> Democratic participation in and supervision of public decision-making is one important aspect of the rule of law, the fundamental principle of which must prevail even in a state of public emergency“.<sup>54</sup> The Venice Commission reiterates that a state of emergency cannot function as a justification or a pretext for circumventing the rules and principles which Council of Europe Member States have agreed to respect.

56. The speedy adoption of Act CLXV of 2020 and Act CXXVII of 2020, apparently without consultation, does not meet the above-mentioned requirements.

#### IV. Conclusion

57. The Venice Commission regrets that the Acts in question were adopted during the state of emergency, in a rushed manner, apparently without consultation with civil society and other stakeholders. The Commission reiterates that any change related to the structure of the equality bodies/national human rights institutions, has to be made with the aim of making the protection and promotion of rights at stake even more effective and efficient.

58. The efficient functioning of the national human rights institution depends on its independence, including financial and administrative. The Venice Commission observes with satisfaction that the Commissioner for Fundamental Rights is able to take decisions on internal structure of the institution and recruitment/appointment of the staff as required by relevant international standards. However, it regrets that no Director General for Equality Treatment has been appointed to-date, 9 months after the merger. In a similar spirit, the Venice Commission welcomes the autonomy enjoyed by the Commissioner for Fundamental Rights to allocate its budget according to its priorities and despite the absence of relevant information, remains hopeful that the budget is allocated in a way that ensures unhindered and efficient work of the newly established unit (Equality Treatment Department).

59. The Venice Commission reiterates that there are risks associated with the merger of the equality bodies with the national human rights institutions including, but not limited to, different traditions, legal procedures and approaches the institutions may have in place and observes that collision of the competences already enjoyed by the Commissioner under Act CXI and those acquired in his /her capacity as successor of the Equal Treatment Authority, is a clear demonstration of a risk that may undermine the effectiveness of the work in the field of promoting equality and combating discrimination.

60. The Venice Commission therefore makes the following key recommendations:

- To ensure that the Commissioner for Fundamental Rights has adequate human, technical and financial resources for the effective implementation of its new mandate under the Act on Equal Treatment and Promotion of Equal Opportunities.

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<sup>51</sup> See *Ibid.*, para. 27, See also 2014 OSCE/ODIHR *Guidelines on the Protection of Human Rights Defenders*, Section II, Sub-Section G on the Right to participate in public affairs.

<sup>52</sup> See CDL-AD(2021)017, Republic of Moldova - Opinion on the draft law amending some normative acts relating to the People's Advocate, para. 81

<sup>53</sup> See CDL-AD(2021)023, Turkey - Opinion on the compatibility with international human rights standards of law no. 7262 on the prevention of financing of the proliferation of weapons of mass destruction, paras. 14 and 84.

<sup>54</sup> See Venice Commission, *Report on respect for democracy, human rights and the rule of law during states of emergency: Reflections*, CDL-AD(2020)014, para.9.

- To ensure that the staff with new or multi-disciplinary competences receive adequate support to develop their knowledge and skills;
- To ensure that support and litigation and the decision-making functions are provided by a different unit or by different staff;
- To ensure that the dual mandate of the Commissioner for Fundamental Rights and the complicated system of two different sets of proceedings under the Equal Treatment Act and the Commissioner Act, should be applied only in a manner that is in the best interest of a petitioner and makes the work under each mandate more effective and efficient.

61. The Venice Commission remains at the disposal of the Hungarian authorities and the Parliamentary Assembly for further assistance in this matter.

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