

Brussels, 8 September 2021

Subject: Excessive criminal penalties in Slovakia – Request to initiate Article 258 TFEU

Dear Commissioner Reynders,

By way of this letter, the undersigned appeal to the European Commission to initiate proceedings under Article 258 of the Treaty on the Functioning of the European Union (TFEU) for a failure on the part of the Slovak Republic to fulfil its obligations under the Treaties when it comes to the proportionality and foreseeability of criminal penalties for minor drug-related offences. More specifically, the Slovak Republic has failed to implement the provisions of Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, in particular Article 4 thereof, read in conjunction with Article 49 of the Charter of Fundamental Rights of the European Union (CFR).

The failure to comply with Union law has been particularly ruinous for many individuals prosecuted for cannabis cultivation, possession and sale. Despite the comparatively low level of harm to health and society posed by these criminal offences, Slovak law prescribes disproportionately draconic punishments in such cases, including up to twenty-five years of imprisonment accompanied by confiscation of property. In addition, the legal design of the criminal penalties in combination with an ad-hoc mechanism for determining the gravity of the offences makes the relevant Slovak provisions contrary to the requirement that criminal penalties are reasonably foreseeable.

The initiation of proceedings under Article 258 TFEU is particularly justified in this case in light of national courts' repeated failure to refer a question for a preliminary ruling under Article 267 TFEU to the Court of Justice of the European Union (CJEU). In at least two instances preliminary references concerning the interpretation of the Council Framework Decision 2004/757/JHA were withdrawn following pressure from higher courts,<sup>1</sup> a practice considered contrary to Article 267

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<sup>1</sup> See Case C-510/17 and Case C-149/19. See also case 2 TO/90/2020 before the Regional Court in Bratislava and case 4Tdo/51/2020 before the Slovak Supreme Court in which the respective courts failed to refer a question to the CJEU.

TFEU by the CJEU.<sup>2</sup> It should also be recalled that since 1 December 2014 the European Commission is competent to initiate proceedings pursuant to Article 258 TFEU when the failure to fulfil obligations under the Treaties concerns the transposition of acts adopted under former Title VI of the Treaty on European Union.

### **Violation of the principle of proportionality of criminal penalties**

Pursuant to Article 4(1) of Council Framework Decision 2004/757/JHA, Member States must ensure that offences linked to trafficking in drugs and precursors are “punishable by effective, proportionate and dissuasive criminal penalties”. Likewise, Article 49(3) CFR stipulates that “[t]he severity of penalties must not be disproportionate to the criminal offence”. Slovak law, namely Article 172 of Law No 300/2005 on the Criminal Code, does not comply with these requirements.

Whereas Article 4 of the Framework Decision envisages penalties of between one and three years of imprisonment for offences listed in Article 2, which include among others the cultivation of cannabis, and penalties of between five and ten years of imprisonment when the offence involves large quantities of drugs or has resulted in significant damage to the health of a number of persons, Article 172 of Law No 300/2005 prescribes the imposition of disproportionately harsher prison sentences. Under Article 172(2)(a) repeat offenders face between ten and fifteen years of imprisonment. As a result, individuals charged two or more times with possession of even small quantities of cannabis have been sentenced to twelve or more years of imprisonment. Similarly, under Article 172(3)(c) and Article 172(4)(c) of Law No 300/2005, drug-related offences are punished respectively by between fifteen and twenty years of imprisonment when they are of “significant extent” and by twenty to twenty-five years when the offences are of “large extent”. As a consequence, individuals with no prior criminal record cultivating cannabis for medical use are currently facing between twenty and twenty-five years of imprisonment and confiscation of property even when the latter is disconnected from criminal activity.<sup>3</sup> Such penalties cannot be considered proportional in view of the gravity of the offences. More serious crimes, such as murder and rape, frequently entail lower prison sentences under Slovak law.

Although it has been recognized that the Member States enjoy a wide margin of discretion as regards the implementation of some aspects of Council Framework Decision 2004/757/JHA,<sup>4</sup> any

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<sup>2</sup> Judgment of 16 December 2008, *Cartesio*, C-210/06, EU:C:2008:723, paragraphs 91 and 96.

<sup>3</sup> The fact that Article 58(3) of the Criminal Code enables confiscation of property even when the latter has no connection to criminal activity goes beyond the objectives of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

<sup>4</sup> Judgment of 11 June 2020, *Prokuratura Rejonowa w Słupsku*, C-634/18, EU:C:2020:455, paragraph 41.

national implementation of the provisions of the Council Framework Decision must as a matter of Article 49 CFR respect the principle of proportionality of criminal penalties. Although according to public records<sup>5</sup> the Slovak Republic has failed to notify the transposition measures taken in fulfilment of the Framework Decision – which in itself constitutes a ground to initiate proceedings under Article 258 TFEU – Article 172 of Law No 300/2005 on the Criminal Code ostensibly implements the substance of Article 4 of the Council Framework Decision. As a result, the Slovak Republic must be considered to be “implementing Union law” within the meaning of Article 51 CFR when it comes to criminal offences linked to trafficking in drugs and precursors.

### **Violation of the requirement of foreseeability of criminal penalties**

In addition to violating the principle of proportionality, Slovak law and its application in practice violates the requirement that criminal penalties must be foreseeability. This requirement forms part of the principle of legality of criminal penalties enshrined in Article 49(1) CFR which, in accordance with Article 52(3) CFR, is considered to have the same meaning and scope as Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>6</sup> As stated by the CJEU in case C-634/18, “the law must define clearly offences and the penalties which they attract (...) if need be, with the assistance of the courts’ interpretation of it.”<sup>7</sup> However, where the interpretation of key concepts relating to criminal offences and penalties hinges on a case-by-case assessment by national courts, the interpretation must be “reasonably foreseeable”.<sup>8</sup> Significant divergence in the application of the relevant provisions of Law No 300/2005 on the Criminal Code testifies to the absence of foreseeability in Slovak law.

As the qualification of the criminal offence and severity of imprisonment under Article 172 of the Criminal Code depends among others on its “extent”, consistent criteria and determination of the gravity of drug-related offences is crucial to reasonable foreseeability. However, existing police and judicial practices in the Slovak Republic, which focus on the determination of the price of the drug on the market, are neither consistent nor grounded in science and lead to widely different criminal penalties depending on where and when the arrests were made. These practices lead to paradoxical outcomes whereby drug dealers can decrease their criminal sentence by declaring they were selling the drug for less than assumed by the police, whereas drug producers and consumers can be hit with more severe sentences depending on the price set by the police.<sup>9</sup>

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5 <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32004F0757>

6 Judgment of 5 December 2017, M.A.S. and M.B., C-42/17, EU:C:2017:936, paragraph 53.

7 Judgment of 11 June 2020, Prokuratura Rejonowa w Słupsku, C-634/18, EU:C:2020:455, paragraph 49.

8 Judgment of 11 June 2020, Prokuratura Rejonowa w Słupsku, C-634/18, EU:C:2020:455, paragraph 52.

9 Drug prices are revised by the police every quarter and depend on the location of the sale activity.

The ongoing non-compliance with Union law is severely impacting lives of many individuals who are currently imprisoned, have lost their legitimately acquired property or are in custody facing disproportionately long prison sentences. By initiating proceedings under Article 258 TFEU, the European Commission has a chance to make a contribution to the fairness of Slovakia's criminal justice system.

We are looking forward to your reply.

Kind regards,

Michal Šimečka

Member of European Parliament

Martin Hojsík

Member of European Parliament

Lucia Ďuriš Nicholsonová

Member of European Parliament

Vladimír Bilčík

Member of European Parliament

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