



6 April 2021

TO THE EUROPEAN COMMISSION

European Commission Vice-President for Values and Transparency **Mrs. Věra Jourová**
European Commissioner for Justice **Mr. Didier Reynders**

RE:

Exposure of a situation of clear risk of a grave breach of the rule of law in Spain.

Request for measures and recommendations, assessment of the application of Regulation 2020/2092 and, where appropriate, initiation of the procedure of art. 7 TEU, of a clear risk of a serious breach of the rule of law in Spain, as a value on which the European Union is based (art. 2 TEU).

Vice-President and Commissioner:

The Legal Associations that subscribe to this letter represent the vast majority of associated judges in Spain and, with great regret, we are obliged to turn to the European Commission to inform it of our concern about the current situation regarding judicial independence in Spain, even though we know that the EU only rarely makes pronouncements on matters of internal organisation.

Despite the fact that the Commission has already stated its concern about the possible limitation of guarantees to judicial independence in Spain, the recommendations that have been proposed continue to be ignored and, unfortunately, the Commission continues along the lines of gradually undermining judicial independence. Therefore, instead of undertaking a reform that once and for all establishes a system of appointment of the members of the General Council of the Judiciary that is in line with the standards existing in most EU countries - that is, by election of the judges themselves among their peers -, the opposite direction is being taken.

Therefore, we are addressing the European Commission to highlight the risk to which the Rule of Law in Spain is being subjected due to the legislative drift of the reforms of the Organic Law of the Judiciary currently being processed. [The first reform, already in force](#), provides for a "blackout" of the General Council of the Judiciary, leaving it without the powers of appointing judicial positions in the current situation and until its members are renewed. [The second reform](#) envisaged involves a reduction in the majorities required in the Legislative Chambers for the appointment of legal members, so that the governing parties alone can decide the entire composition of the General Council of the Judiciary.

This situation is shown below and we request to guarantee the rule of law in Spain, as a fundamental value of the EU.

1. Let us remember that Spain, for more than 35 years, has not complied with the [recommendations of the Council of Europe](#) by depriving the judges of the election of the members of the General Council of the Judiciary of judicial origin, since they are [elected by the Chambers](#) (Congress of Deputies and Senate).
2. In Spain, since the Organic Law of the Judiciary of 1985, the 20 members of the General Council of the Judiciary are appointed by the legislative chambers (Congress of Deputies and Senate) by a 3/5 majority, [including the 12 members of judicial origin](#), who, since 2013, are appointed from among candidates who are presented with endorsements of 25 members of the judicial career or a legal association. Once their candidatures have been admitted, the appointment is formally made by the Chambers.
3. This system was endorsed by the Spanish Constitutional Court (STC 108/86), although with the following clarifications:
 - a) That the preferred model for the selection of members is direct election by judges and magistrates.
 - b) That the parliamentary election entailed the risk that the Chambers, in making their proposals, would allocate seats to be filled among the different parties in proportion to their parliamentary strength.
 - c) That there was a risk of politicisation of the judiciary; and in its 13th Legal Ground it made it clear that the appointment of members according to partisan criteria "was not admissible". However, it concluded that this was not grounds for declaring the rule unconstitutional, because there was the possibility of an interpretation in accordance with the word and spirit of the Constitution.
 - d) In short, the condition of constitutionality was that the political formations should not distribute the members according to their parliamentary representation."
4. After thirty-five years, the risks foreseen by the Constitutional Court have become unfortunate realities. It can be stated that the current "de facto" system is contrary to the Constitution and to the requirements of the European Institutions, according to which "the political authorities may not intervene at any stage of the process in the election of members of judicial origin".
5. The practice, from 1985 to the present day, is that [the main political parties divide up the seats](#) to be filled in secret negotiations outside parliament; and once agreement has been reached, [deputies and senators vote according to the instructions](#) given by their parties. This used to be done discreetly, but nowadays it is done with public knowledge and by means [of press](#) statements by politicians.
6. The current process of renewal of the General Council of the Judiciary began more than [two years ago](#). The candidacies for judicial members of the General Council of the Judiciary were admitted. Since then the negotiators of the political parties have been meeting without reaching an agreement. [The Chambers are not convened](#) to debate the issue. Therefore, the decision of the legislative chambers is supplanted by the dominant political parties, which have also refused to modify the

system of election of judicial officers - despite the fact that some parties have proposed it and legal associations have demanded it in accordance with European recommendations -.

7. In this situation, given that the General Council of the Judiciary continues to perform its institutional duties, including the appointment of high court judges in Spain, in accordance with the law, the parties governing in coalition in Spain (PSOE and Unidas Podemos) have promoted two legislative reforms:

a) The first consists of reducing the majorities required for the election of members of judicial origin from 3/5 to the same as for forming the Government. The reform means eliminating the only guarantee of the deficient Spanish system of electing judicial members of the General Council of the Judiciary. This proposal has been harshly rejected by legal operators (especially almost all judicial associations), the press and the General Council of the Judiciary itself. The European Commission expressed its opposition as being contrary to EU recommendations. The proposal is at a standstill, although its promoters have publicly stated that they will go ahead if the General Council of the Judiciary is not renewed.

b) The second is aimed at preventing the General Council of the Judiciary from carrying out its most important function, which is to appoint senior judicial officials, when their term of office has expired. This legal reform came into force on 31 March 2021 and removes other powers of the General Council of the Judiciary that we consider essential, such as the legitimacy to promote conflicts of competence between constitutional bodies. In short, it reduces the powers of the General Council of the Judiciary to merely bureaucratic aspects, to the detriment of its essential function: to be the guarantor of judicial independence. We are facing a ["blackout or disempowerment law" of the General Council of the Judiciary](#), since this limitation will persist until the new General Council of the Judiciary is elected, highlighting the political dependence of the judges' governing body on the Chambers that appointed it.

8. The opinion of the Venice Commission, safeguarding the guarantees of the rule of law and judicial independence, has not been sought, as it should have been, as VE stressed at the time, when assessing the first of the proposals. In addition, the second proposal has prospered without a hearing to the General Council of the Judiciary or legal associations, despite the fact that this procedure had been expressly requested.

9. It is particularly worrying that legal associations are not given a specific hearing in this type of reform, which is contrary to European recommendations on strengthening and guaranteeing judicial independence.

10. In this regard, the recent GRECO report of the end of 2020 about San Marino underlines: *"It goes without saying that judges must be consulted and they have the right to speak in basic decisions about the shape of modern justice and the priorities involved. Such a consultation process must be endowed with appropriate guarantees of inclusiveness, transparency and accountability."*

11. Likewise, the Advisory Council of European Judges itself in its Opinion No. 23 (2020) stated: *"41.- (...)In general, the views of judicial associations should be sought and considered by the executive at all levels with regard to legal reforms and projects, including budgetary matters and the*

allocation of resources, working conditions and all aspects of the status of judges."

12. [And the next step](#), which has already been announced, will consist, as already stated, in replacing the reinforced majority of 3/5 of the members of the Chambers that is required to elect the members of the General Council of the Judiciary with an absolute majority, which would be achieved with the parties that support the Government (some of them openly encourage disrespect for the Constitution). This is a law of subjugation of the judiciary to the political parties that dominate at any given moment, which is the beginning of totalitarianism, undermining of human rights and corruption.
13. In conclusion, this action constitutes a disempowerment of the General Council of the Judiciary as the constitutional governing body of the judges of Spain, to be carried out in two phases:
 - a) [The "blackout" of the General Council of the Judiciary in](#) its duties of appointing high judicial positions, by means of a legal reform that has already been approved;
 - b) [The submission of the judiciary to the Government](#) at all times, with the power to decide on the appointment of senior judicial posts, as well as all governmental activity on judges (disciplinary actions, promotion, training,...), through the reform of the Organic Law of the Judiciary on majorities that is in process.
14. [The Judicial Associations have been demanding for years](#) that the 12 judicial members of the General Council of the Judiciary be elected directly by the judicial career, following the standards of the Council of Europe.
15. We understand that the above initiatives aggravate the political interference in the judiciary that is taking place in Spain, which compromises the values enshrined in articles 2 and 49 of the EU Treaty insofar as it proclaims the obligation of all States to preserve the rule of law.
16. We consider that the separation of powers and judicial independence are at stake. They underpin the rule of law, as a guarantee of respect for human rights, inseparable from the values of human dignity, freedom, democracy, equality, being the foundations of our European Union (Article 2 of the Treaty on European Union); and as part of our spiritual and moral heritage of the European Union, founded on these indivisible values and based on the principles of democracy and the rule of law (Charter of Fundamental Rights of the European Union).
17. The separation of powers and respect for judicial independence are prerequisites for the rule of law, which is how democratic states guarantee respect for fundamental rights and the indivisible and universal values of human dignity, freedom, equality, justice, political pluralism and solidarity.
18. We assume that national judges are essentially also European judges, applying Union law, which is why the Union, including the Court of Justice of the European Union, must monitor the independence of the judiciary in all Member States as one of the requirements of the rule of law, and as laid down in Article 49 TEU and Article 47 of the Charter.
19. We recall that one of the major goals pursued by the European Union is the creation of a

common area of freedom, security and justice without internal borders. This is not possible without guaranteeing the application of Union law among its members constituted as states governed by law, subject to the rule of law, with independent national and EU judges who can properly apply national law and EU law.

20. It is also worth recalling that Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general cross-compliance regime for the protection of the Union budget states in recitals 3 and 16 that:

a) (3) *The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (...) and under the control of independent and impartial courts. It requires, in particular, that the principles of (...) effective judicial protection, including access to justice, by independent and impartial courts, and separation of powers, be respected ; and that*

b) (16) *The identification of breaches of the principles of the rule of law requires a thorough qualitative assessment by the Commission. That assessment should be objective, impartial and fair, and should take into account relevant information from available sources and recognised institutions (...) and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission, in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission if necessary for the purpose of preparing a thorough qualitative assessment.*

21. And Article 3 of the aforementioned Regulation 2020/2092, under the heading 'Infringement of the principles of the rule of law', provides: *"For the purposes of this Regulation, the following may be indicative of breaches of the principles of the rule of law: endangering the independence of the judiciary."*

22. The European Commission, together with other institutions of the Union and its Member States, is responsible under the Treaties for ensuring respect for the rule of law as a fundamental value of our Union and for ensuring that EU law, values and principles are observed.

23. In the exercise of this high responsibility and in application of Art. 7 TEU, we request that, in the event that the above measures do not produce results, a procedure be initiated, at the proposal of the Commission, to establish the existence of a clear risk of a grave breach of the rule of law by Spain as a value of the European Union, as referred to in Article 2 TEU.

In view of the above, WE REQUEST the European Commission:

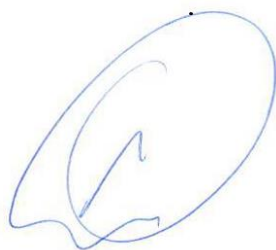
1. To note this letter from the three Judge Associations regarding the legislative reforms on the blackout and disempowerment of the General Council of the Judiciary and its colonisation by political parties, which compromise the appointments of senior judicial positions, as well as all governmental activity

on judges (disciplinary actions, promotion, training,...), and their independence and impartiality. This action puts the rule of law at risk, which constitutes a clear risk of a serious breach by Spain of the values enshrined in Article 2 of the Treaty on European Union and, therefore, of Union law itself.

2. That within the Commission's field of competence, the Spanish Government should be urged to undertake the legislative reforms that are compatible with the guarantees required by Article 49 of the TEU, in the terms in which the ECJ has been interpreting them.
3. Where appropriate, to assess the appropriateness of the application of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general cross-compliance regime for the protection of the Union budget.
4. That, as a last resort and if the situation complained of is not remedied, to initiate the procedure provided for in Article 7 of the Treaty on European Union, in the event of a clear risk of a serious breach by the Kingdom of Spain, as a Member State, of the values referred to in Article 2 and of the rule of law.

In Spain, 6 April 2021

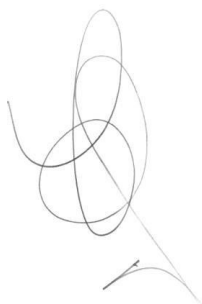
Representing the Judicial Associations



Asociación Profesional de la Magistratura



Asociación Judicial Francisco de Vitoria



Foro Judicial Independiente