



HUNGARIAN
HELSINKI
COMMITTEE



ASSESSMENT OF THE GOVERNMENT'S DRAFT PROPOSAL

**on the amendment of certain laws on justice related to the
Hungarian Recovery and Resilience Plan,
published on 18 January 2023 in light of the milestones
set out in the Annex to the European Commission's proposal**

BY

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List of Abbreviations

- Abtv.** Act CLI of 2011 on the Constitutional Court
Be. Act XC of 2017 on the Criminal Procedure
Bjt. Act CLXII of 2011 on the Legal Status and Remuneration of Judges
Bszi. Act CLXI of 2011 on the Organisation and Administration of Courts
Iasz. Act LXVIII of 1997 on the Service Relationship of Judicial Employees

ASSESSMENT OF THE GOVERNMENT'S DRAFT PROPOSAL¹
on the amendment of certain laws on justice related to the Hungarian
Recovery and Resilience Plan (18 January 2023)
in light of the milestones set out in
the Annex to the European Commission's proposal²

I. SCOPE AND TRANSITIONAL PROVISIONS

I.1. Temporal scope and the timelines of implementation

(A) Timelines for the fulfilment of the envisaged milestones

For each of the justice reform components³, the Annex explicitly states that "*[t]he implementation of the reform shall be completed by Q1 2023 and before the first payment request under the recovery and resilience plan*". This implies that **the regulations containing the reforms must enter into force by 31 March 2023 at the latest.**

(B) Proposed measures

Although the Proposal states that "*the Act shall enter into force on 31 March 2023*"⁴ exceptions are made by explicit provisions with respect to two key milestones:

- (1) **in relation to the election of the President of the National Judicial Council (NJC), it unjustifiably delays** the entry into force of the new legislation compared to the deadline for its implementation⁵;
- (2) **in relation to the appointment of members of the Constitutional Court as Supreme Court (Kúria) judges, it unjustifiably maintains** the effect of the legislation that the Proposition abolishes to achieve the milestone, by making the previous legislation applicable even years after the entry into force of the rules set out in the Proposal.⁶

¹ In Hungarian: 2023. évi ...törvény egyes igazságügyi tárgyú törvényeknek a magyar helyreállítási és ellenállóképességi tervhez kapcsolódó módosításáról <https://cdn.kormany.hu/uploads/document/6/67/674/6749f8f4633ec8e09cc1f558b48c544a3e3a1fe.pdf> (hereinafter referred to as Proposal)

² European Commission, Annex to the proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary. Brussels, 30.11.2022 COM(2022) 686 final, https://eur-lex.europa.eu/resource.html?uri=cellar:aaafc026-70cb-11ed-q887-01aa75ed71a1.0001.02/DOC_2&format=PDF

³ Components C9.R15, C9.R16, C9.R17 and C9.R18 of the Annex.

⁴ Article 67 of the Proposal.

⁵ Article 44 (2) of the Proposal.

⁶ Article § 57 of the Proposal.

(C) Evaluation of the proposed measures

Regarding its temporal scope, the provisions of the Proposal **do not fully comply with the timeline** for the fulfilment of the milestones; in order to comply, it is necessary to amend

(1) Article 44(2) of the Proposal so it enables the NJC members to elect a new NJC President from 31 March 2023;

(2) Article 57 of the Proposal so that the possibility of automatic appointment of members of the Constitutional Court as Kúria judges shall cease to exist no later than 31 March 2023.

In addition to the above, further transitional provisions are necessary to ensure effective applicability and enforceability after the date of the Proposal's entry into force.

I.2. Transitional provisions

When it comes to the fulfilment of milestones, not only the scope of the legislation is relevant, given that all the milestones for the reforms require that they "**enter into force and are applied before the first payment request under the recovery and resilience plan is submitted**". This means that, for the achievement of the milestones, it is necessary to demonstrate not only that the legislation is in force but also that it is actually applicable.

[Lack of provisions to ensure organisational operational and budgetary transition]

At present, the NJC does not have a legal personality or a registered office, nor does it have the staff, or the material and organisational conditions to ensure an adequate background for its autonomous operation. Creating these conditions implies the setting up of a new budgetary body and the creation of a complete working organisation and infrastructure. While the Proposal creates the legal framework for a strengthened organisation to meet the envisaged milestones, it does not provide for a safe transition to this organisational framework. Although the Impact Assessment accompanying the Proposal⁷ states that "*the regulation has a budgetary impact*", it does not disclose the actual organisational, operational and budgetary consequences of the entry into force of the legislation. The Proposal's **transitional provisions should not only ensure that the resources necessary for the NJC to become autonomous are available by 31 March 2023 at the latest, but also that the final organisational and staffing arrangements can be put in place safely and smoothly after an appropriate transition period of at least six months**". The transitional provisions to support the Integrity Authority set up by Act XXVII of 2022 on the control of the use of EU budgetary funds may serve as an example of ensuring such a transition: these provisions foresee that for six months after the establishment of the Integrity Authority, an existing body (the Directorate General for the audit of European funds) shall provide secretariat and administrative support for the establishment of the Integrity Authority and shall ensure the necessary infrastructure for its operation.⁸

⁷ See <https://cdn.kormany.hu/uploads/document/c/c2/c28/c284c24ac9e96a1fg3eaf6d1gggcff75a61obdc5.pdf>.

⁸ See Article 71 of the transitional provisions of Act XXVII of 2022 on the Control of the Use of EU Budgetary Resources.

[Lack of transitional rules related to the exercise of the right to consent]

The Proposal ensures that the NJC shall give its consent on a number of issues, not only regarding individual decisions, but also in relation to the regulations adopted by the President of the National Office for the Judiciary (NOJ) and the decree of the Minister of Justice. In particular, this power covers the rules relating to the training system for judges,⁹ the rules on award bonuses other than cafeteria benefits,¹⁰ and the NJC's right of consent also applies to the opinion of the NOJ President on the Regulation of the Minister of Justice determining the points system for the assessment of applications for judicial and higher judicial posts.¹¹ In order **to ensure the effective exercise of this power, the Proposal should also provide, among the transitional provisions, for a maximum initial period during which the NJC, endowed with new powers, should be able to review the rules in question and exercise its right of consent.** Some of the regulations in question have been in force for many years with unchanged content and may continue to be in force for a long period of time without the NJC being able to exercise its right of consent. For example, *Decree No. 7/2011 (III. 4.) of the Ministry of Justice on the detailed rules for the evaluation of judicial candidates and the scores to be given in the ranking of candidates* has been in force for more than five years without any amendments. If the Proposal does not specify the maximum period during which the NJC must be granted the right of consent for the first time with respect to the regulations currently in force, this new power could be rendered empty for a long time by simply maintaining the current regulations in force.

II. Amendment of Act CLI of 2011 on the Constitutional Court (Abtv.)

II.1. Appointing the members of the Constitutional Court as judges

(A) The envisaged milestone

"removing the possibility for members of the Constitutional Court to become judges and then be appointed to the Kúria without following the normal application procedure"¹²

(B) Proposed measures

The Proposal repeals (i) **Article 10/A of the Abtv.**¹³ [Proposal § 15], (ii) **Article 69 (10) of the Abtv.**¹⁴ [Proposal § 15], (iii) the **Article 3 (4a) of the Bjt.**¹⁵ [Proposal § 59] and (iv) **Article 88 (1a) (b) of the**

⁹ Article 22 (7) of the Proposal.

¹⁰ Article 56 of the Proposal.

¹¹ Article 48 of the Proposal.

¹² Component C9.R16(c)(ii) of the Annex.

¹³ According to the current Article 10/A of the Abtv.: 'A member of the Constitutional Court may apply to the President of the Republic, through the President of the Constitutional Court, for appointment as a judge. The President of the Constitutional Court shall inform the President of the National Office for the Judiciary of the application at the same time as it is forwarded to the President of the Republic.'

¹⁴ According to the current Article 69(10) of the Abtv: '(10) A member of the Constitutional Court in office at the time of entry into force of Act CXVII of 2019 amending certain Acts in connection with the creation of single-tier district office procedures, if he or she has not yet reached the general retirement age pursuant to Article 26(2) of the Fundamental Law, may apply to the President of the Republic, through the President of the Constitutional Court, for appointment as a judge. The President of the Constitutional Court shall inform the President of the National Office for the Judiciary of the application at the same time as forwarding it to the President of the Republic.'

¹⁵ Under the current Article 3(4a) of the Abtv.: '(4a) If a member of the Constitutional Court has applied for appointment as a judge under the Constitutional Court Act, the President of the Republic shall appoint him or her as a judge for an indefinite term without a call for applications.'

Bjt.¹⁶ [Proposal § 59]; and (v) amends the provisions of the **Bjt. Article 8(1)(a)** by removing the automatic appointment of members of the Constitutional Court from the scope of the exemptions from the application procedure [Proposal § 47]. According to the Explanatory Memorandum to the amendment, the Proposal "removes for the future the possibility for members of the Constitutional Court to request their appointment as judge."¹⁷

(C) Evaluation of the proposed measures

The milestone provision was made necessary by a 2019 amendment, "as a result, in practice, the election by Parliament to the Constitutional Court, which does not entail the involvement of a body drawn in substantial part from the judiciary, can in itself lead to the appointment as a judge of the Kúria if requested by the judge concerned. These legislative changes have de facto increased the role of Parliament in judicial appointments to the Kúria."¹⁸ The solution, according to the Venice Commission, "opens the door to a potential politicisation of the Supreme Court."¹⁹ The Proposal only partially remedies the objectionable regulatory framework introduced in December 2019 (the amendment created a gateway between two constitutional institutions, which are supposed to be independent of each other, i. e. the Kúria and the CC for the members of the latter, who are elected by the political majority of the legislative power). To achieve this milestone, two further provisions should be repealed, Article 10(1a) of the Abtv. and Article 88(3) of the Bjt., and the Proposal's Articles 57 and 58 should also be deleted.

(i) **Article 10(1a) of the Abtv.**²⁰ should be repealed, which provides that the appointment as a judge shall not constitute a conflict of interest concerning the mandate of members of the Constitutional Court. This provision **maintains the possibility for members of the Constitutional Court who have already been appointed as judges to retain their judicial appointment** after the amended legislation will have entered into force **and to become active judges even years later**. In order to effectively end the possibility of transferring members of the Constitutional Court to the judiciary by 31 March 2023 at the latest, Article 10(1a) Abtv. should be repealed, and it should be provided explicitly that the two positions constitute a conflict of interest, **otherwise this milestone will not be achieved**. For those judges who had been members of the judiciary as appointed judges as judges before being elected as members of the Constitutional Court, the Proposal should ensure the possibility of returning to their former position without an application procedure.

(ii) Should also be repealed **Article 88(3) of the Bjt.**²¹ that allows the appointment of members of the Constitutional Court to the Kúria without an application procedure. **The provision allows members**

¹⁶ According to Article 88 (1a) (b) of the Bjt.: "(1a) The service of a judge, except in the case provided for in Article 96 (3), shall be suspended from the date of his appointment until the termination of his membership of the Constitutional Court, if [...] b) is established pursuant to Article 3 (4a)."

¹⁷ Explanatory Memorandum to Article 15 of the Proposal.

¹⁸ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0316&from=EN> page 8.

¹⁹ See Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges Adopted by the Hungarian Parliament in December 2020, [CDL-AD\(2021\)036](#), Venice Commission, Paragraph 16.

²⁰ Article 10(1a) of the 2019 amendment to the Abt. provides that "A member of the Constitutional Court shall not have a conflict of interest in relation to his or her judicial office."

²¹ According to Article 88(3) of the Bjt.: 'After the termination of the service relationship pursuant to paragraph 1a, the Kúria President shall assign the judge to the Kúria.'

of the Constitutional Court holding a passive ("suspended") judicial status to be appointed to the Kúria without a call for applications even after 31 March 2023. In order to effectively end the possibility of appointing members of the Constitutional Court to the Kúria without a call for applications by 31 March 2023 at the latest, Article 88(3) of the Bjt. should be repealed, **otherwise, this milestone will not be achieved.**

(iii) **In order to fulfil the milestone, Article 57 of the Proposal should be deleted.** Contrary to the description of the relevant milestone, this provision allows the appointment of current members of the Constitutional Court to be appointed as judges at the Kúria without a time limit by means of *ad hominem* rules. Article 57 of the Proposal states that the amended provisions of the Bszi. shall not affect the appointment of those members of the Constitutional Court who were appointed as a judge under the provisions in force prior to the entry into force of the Proposal (31 March 2023) and stipulates that "[t]he judicial status shall be suspended from the date of appointment until the date of termination of his or her mandate as member of the Constitutional Court. After the suspension, the judge shall be assigned according to the rules in force at the time of his/her appointment." Under the provision, for example, members of the Constitutional Court who have been appointed as judges on 1 July 2020²² will, when their mandate expires (even years after the Proposal's entry into force), be appointed as judges of the Kúria according to the rules applicable on 1 July 2020, and the Kúria President will be obliged to assign them to the Kúria according to the rules applicable on 1 July 2020, even if this would no longer be possible according to the rules in force at the time of the expiry of their mandate as members of the Constitutional Court. **Article 57 of the Proposal would carry over the previous rules, and without deleting it, the milestone will not be achieved.**

(iv) **In order to fulfil this milestone, Article 58 of the Proposal should be deleted,** its sole purpose being to convert the *ad hominem* provisions established in Article 57 of the Proposal into cardinal laws (of constitutional importance).

Without the above modifications, the **Proposal does not address the concerns raised by the European Commission's rule of law reports and does not take genuine steps to strengthen the independence of the judiciary.** In fact, currently a total of nine members of the Constitutional Court hold a judicial status (seven of them because they have already requested their judicial appointment, further two obtained the dual status by law²³), who, despite the concerns expressed by the European Commission and other international actors, could retain their dual status under the Proposal and automatically be appointed as presiding judges at the Kúria in the future. Compared to the number of judicial posts at the Kúria (currently 112) and the number of presiding judge positions at the Kúria (currently 36), this is a significant number of judges, which remarkably changes the composition of the Kúria and is therefore likely to raise legitimate doubts about the Kúria's independence. **In case of Kúria judges appointed in this way, the requirement of appointment based on genuine competition and merits is not met, nor is the independence from the influence of other branches**

²² As of 1 July 2020, the President of the Republic has appointed eight judges to the Constitutional Court. Among them, Dr. Tamás Sulyok, Dr. Ágnes Czine, Dr. Ildikó Hörcherné Marosi, Dr. Balázs Schanda, Dr. Marcel Szabó, Dr. Péter Szalay and Dr. Imre Juhász currently have the status of passive judges. <https://magyarkozlony.hu/dokumentumok/60f048c6a5daf11dea3c076149c70e640a5fq2od/megtekintes>

²³ According to Article 88 of the Bszi., since December 2019, the appointment as a member of the Constitutional Court is just a reason to suspend a judicial status. Dr. Tünde Handó and Dr. Zoltán Márki have a suspended judicial status by the force of the law.

of power or the constitutional requirement that judges appointed to the highest level of the judiciary should appear impartial to an outside observer.

II.2. Public authorities' right to challenge final judicial decisions before the Constitutional Court

(A) The envisaged milestone

„legislative amendments shall enter into force and start being applied ensuring that the possibility, introduced in 2019 by amending Section 27 of Act CLI of 2011, for public authorities to challenge before the Constitutional Court final judicial decisions, is removed;“²⁴

(B) Proposed measures

According to the Proposal, on 31 March 2023, **Article 27 of the Abtv.** will be amended [Proposal § 14],²⁵ and on the same day **Article 55** (4a) of the Abtv. will be repealed [Proposal § 15].²⁶ According to the Proposal's Explanatory Memorandum, the amendment *"removes from the legal system the possibility for bodies (public authorities) exercising public power to lodge a constitutional complaint with the Constitutional Court."*

(C) Evaluation of the proposed measures

According to the Explanatory Memorandum, the amendment aims to remove the possibility for bodies exercising public authority²⁷ to submit a constitutional complaint with the Constitutional Court against a decision on the merits of a case or any other decision ending the court proceeding. Public authorities were enabled to submit a constitutional complaint by Act CXXVII of 2019 (the 2019 Omnibus Act) on 20 December 2019.²⁸ According to the Explanatory Memorandum of the 2019 Omnibus Act, the purpose of the amendment was to clarify the conditions for submitting a constitutional complaint, based on the jurisprudence of the Constitutional Court.

As a result of the Proposal, Article 27 of the Abtv. would essentially revert to its text prior to 20 December 2019.²⁹ As indicated in the Explanatory Memorandum of the 2019 amendment to the Abtv., the eligibility of public authorities as complainants was recognised by the Constitutional Court

²⁴ Component Cg.R18 of the Annex.

²⁵ According to Article 14 of the Proposal (which is of cardinal nature), the proposed new Article 27 of the Abtv. is the following: '(1) Article 24. (a) the person or organisation concerned in an individual case may lodge a constitutional complaint with the Constitutional Court against a judicial decision that is contrary to the Fundamental Law, if the decision on the merits of the case or any other decision ending the court proceedings a) violates the right of the petitioner guaranteed by the Fundamental Law, and b) the petitioner has already exhausted his/her legal remedies or has no legal remedies available to him/her. (2) A person or organisation is deemed to be an interested party if a) he (she) was a party to the court proceedings, b) the decision contains a provision concerning him (her), or c) the decision of the court concerns his (her) rights, obligations or the legality of his (her) conduct."

²⁶ According to the repealed provision, "The merits of a petition by a petitioner exercising public authority challenging the limitation of his powers shall be examined only if the challenged decision a) results in a serious disruption of the petitioner's functioning, or b) infringes any of his powers under the Fundamental Law."

²⁷ The milestone relates to cases in which bodies exercising public power refer cases to the Constitutional Court in that capacity. The jurisprudence of the Constitutional Court differs in cases in which the bodies exercising public power appear in a private-law relationship, as a private-law entity in a dispute.

²⁸ Article 55 (3) of Act CXXVII of 2019.

²⁹ The difference is that paragraph (2) now defines the persons concerned.

through the interpretation of the Abtv.,³⁰ and was subsequently incorporated in the Act. The Constitutional Court thus considers that bodies exercising public power are also legal entities that are entitled to those rights guaranteed by the Fundamental Law which, by their nature, are not only granted to natural persons.³¹ The Explanatory Memorandum of the 2019 Omnibus Act reflects this interpretation. The Constitutional Court has typically dealt with constitutional complaints submitted by such bodies in the context of the right to a fair trial.³² The **Proposal does not address the problem that under the case-law of the Constitutional Court, bodies exercising public authority may have constitutionally protected fundamental rights, i.e. they may be entitled to bring a constitutional complaint of any type. The Proposal reinstates the rules in force before 20 December 2019, on the basis of which the aforementioned jurisprudence of the Constitutional Court was established.** Nor would the Proposal solve the problem if the right of complaint by public authorities were *expressly* excluded by the Abtv., since, as mentioned above, the jurisprudence of the Constitutional Court is an indirect consequence of the interpretation of the Fundamental Law.³³ The only solution, therefore, would be for the **Proposal to amend Article I(4) of the Fundamental Law by** stating that '*With the exception of bodies exercising public authority acting in their capacity as such, legal entities established by law are also guaranteed fundamental rights and are subject to obligations which, by their nature, are not limited to human beings.*'

III. Amendment of Act CLXI of 2011 on the Organisation and Administration of Courts (Bszi.)

III.1. Amendment of the rules on electing the President and Vice-President of the Kúria

(A) The envisaged milestone

„Legislative amendments shall enter into force and start being applied, which shall amend the rules on the election of the Kúria President in order to ensure that: (i) the candidates have at least five years' experience as a judge; (ii) the Kúria President cannot be re-elected; (iii) the NJC gives a motivated binding opinion on the suitability of the candidates for the post of Kúria President that can be proposed by the President of the Republic. The suitability criteria, including independence, impartiality, probity and integrity, shall be determined by the law. The legislative amendments shall ensure that the candidates found unsuitable by the NJC shall have access to an accelerated judicial review before the competent court.”³⁴ In relation to the above milestone, the Annex also states that “[t]he objective of the reform is to strengthen the judicial independence of the Supreme Court (Kúria)” and that “the reform shall result in a strengthening of the independence and impartiality of courts and judges established by law”.³⁵

³⁰ Decision 23/2018 (XII. 28.) AB, paragraph [15].

³¹ Cf. Article I(4) of the Fundamental Law.

³² Article XXVIII (1) of the Fundamental Law. See, for example, Decision 23/2018 (XII.28.) AB; Decision 3130/2022 (IV.1.) AB; Decision 3151/2022 (IV.12.) AB.

³³ See: “Article 27(3) of the amended Abtv. provides as an additional statutory condition for petitioners exercising public authority that it shall be examined whether the right guaranteed by the Fundamental Law (in this case the right to a fair trial invoked by the petitioner) is granted to them. In the case-law of the Constitutional Court, certain fundamental rights are, by their very nature, specific to human beings, while others are also conferred on legal persons, including bodies exercising public authority. In the light of the above considerations, the Constitutional Court has held that the right to a fair trial invoked by the petitioner [Article XXVIII(1) of the Fundamental Law] is a right guaranteed by the Fundamental Law which, by its nature, does not apply only to human beings. In view of this, the petition meets the statutory requirement of Article 27(3) of the Act.” AB 3328/2020 (VIII.5.), Reasons [15]-[16]; or: AB 3130/2022 (IV.1.), Reasons [18]; AB 3151/2022 (IV.12.), Reasons [20].

³⁴ Component C9.R16 (a) of the Annex.

³⁵ Annex, p. 104 Textual explanation of component C9.R16.

(B) Proposed measures

According to the Proposal, from 31 March 2023, Article 114(1) of the Bszi.³⁶ and Article 114(3) of the Bszi. are amended [Proposal § 36(2)],³⁷ and Article 114 of the Bszi. is supplemented by a new paragraph (3a) [Proposal § 36(3)],³⁸ Article 103(3) of the Bszi. is supplemented by a new point (m) [Proposal § 28(4)],³⁹ furthermore, Article 103(3)(a) of the Bszi. would be repealed [Proposal § 46],⁴⁰ which grants the NJC the right to hear and give an opinion on the candidate proposed for the office of the Kúria President and the NOJ President.

(C) Evaluation of the proposed measures

None of the three conditions of the envisaged milestone are fully achieved.

This milestone was made necessary by the amendment to the law adopted in 2019, which resulted in the election of the current Kúria President in October 2020. Several international organisations have expressed serious concerns about the amendment to the election rules. The European Commission, in relation to the election of the current Kúria President, claimed that it was "*already flagged in the 2020 Rule of Law Report, with an appointment to the top judicial post being decided without the involvement of a judicial body, and not in line with European standards. [...] In the light of the administrative powers of the Kúria President and the key role of the Kúria in the justice system, these developments raise serious concerns as regards judicial independence.*"⁴¹ The UN Special Rapporteur on the Independence of Judges and Lawyers characterised the election as an "*attack to the independence of the judiciary and as an attempt to submit the judiciary to the will of the legislative branch, in violation of the principle of separation of powers*".⁴² According to the Venice Commission's opinion of 2021, "*the system of appointment of the President of the Kúria, introduced by the 2019 amendments, entails a serious risk of politicisation and could have significant consequences for the independence of the judiciary and its public perception, given the key role of this position in the judicial system*".⁴³

The milestone's requirements should be interpreted and implemented in light of the above concerns.

³⁶ According to Article 36 (1) of the Proposal, Article 114(1) of the Bszi. shall be amended as follows, '*In calculating the length of service as a judge, experience as a judge in an international judicial organisation, as an Advocate General, as a judge of the Constitutional Court and as an Advocate General in the Office of the Constitutional Court shall also be taken into account. The Kúria President may not be re-elected.*' [the highlighted parts are inserted as new criteria].

³⁷ According to Article 36 (2) of the Proposal, Article 114(3) of the Bszi. is amended as follows, '(3) *In the election of the President of the Kúria, the provisions of paragraphs (1), (2a) to (2f) and (3) and (4) of Article 67 shall apply mutatis mutandis, with the exception that the Metropolitan Court shall examine in the non-litigation procedure whether the candidate meets the statutory requirements for the President of the Kúria.*'

³⁸ According to Article 36 (3) of the Proposal, a new Article (3a) shall be inserted in Article 114 of the Bszi. as follows, '(3a) *If the term of office of the Kúria President has been terminated for the reasons specified in points (b) to (f) of Paragraph (1) of Article 115, the President of the Republic shall propose a replacement for the Kúria President within 75 days.*'

³⁹ According to Article 28 (4) of the Proposal, Article 103(3) of the Bszi. is amended by adding the following point (m): [The NOJ in the field of personnel] "m) shall give a binding opinion on the suitability of the candidate for the office of NOJ President and Kúria President for the office of NOJ President and on the suitability of the candidate for the office of NOJ Vice-President and Vice President of the Kúria for the office of Kúria President for the office of NOJ President".

⁴⁰ According to the current Article 103(3)(a) of the Bszi., "The NJC shall, in the field of personnel matters, a) give a preliminary opinion on the nominees for the office of NOJ President and President of the Kúria, on the basis of a personal interview."

⁴¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0714&from=EN> p. 6.

⁴² <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26371> p. 4.

⁴³ Venice Commission, [Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges Adopted by the Hungarian Parliament in December 2020](#), CDL_AD(2021)036, para. 16

(i) The milestone implies the rules for the election of the Kúria President to ensure that "***the candidates have at least five years' experience as a judge***". The main reason for this part of the milestone was the amendment of the rules on the election of the Kúria President as of 1 January 2020, allowing for the inclusion of time spent as a judge or senior legal advisor at the Constitutional Court or at an international court in the calculation of "*experience as a judge*". In its 2020 Rule of Law Report, the European Commission stated that "[t]his widening of the eligibility criteria increases the pool of candidates that could potentially be elected as Kúria President, increasing the discretion of the President of the Republic in this regard".⁴⁴ The Proposal does not comply with the requirements of the milestone because it does not affect the contested provisions and continues to allow the position of Kúria President to be filled without judicial experience at ordinary courts. **In order to fulfil the milestone, the relevant wording of Bszi. Article 114(1) that allows to substitute judicial service at ordinary courts should be deleted.**

(ii) The milestone also provides that "*the Kúria President cannot be re-elected.*" Although formally the Proposal fulfils the milestone in this regard, the problem with the mandate of the Kúria President is not simply the possibility to be re-elected, but that a **minority of one-third of the Members of Parliament can keep the Kúria President in office until the end of time**. Under the current rules, "*with the exception of the Kúria President and the President of the National Office for the Judiciary, judges may remain in office until the general retirement age.*"⁴⁵ In other words, **neither the Kúria President's nor the NOJ President's mandate terminates when they reach retirement age**. However, after the expiry of the term of office, the Kúria President may remain in office until a new Kúria President is elected by a two-thirds majority⁴⁶ of the Members of Parliament.⁴⁷ As long as the current rules remain in force and a minority of Members of Parliament can keep the Kúria President in office even beyond the retirement age, **the provision in the Proposal excluding the possibility of re-election does not prevent effectively the minority of Members of Parliament from *de facto* placing the Kúria President in the same position as being re-elected. In order to comply, it is necessary to delete the provisions of Bszi. Article 115 (4).**

(iii) According to the milestone description, the reform should ensure that "*the NJC gives a motivated binding opinion on the suitability of the candidates for the post of Kúria President that can be proposed by the President of the Republic. The suitability criteria, including independence, impartiality, probity and integrity, shall be determined by the law.*" **The Proposal fails to meet the requirements of the milestone** for several reasons and, overall, **represents a step backwards from the current legislation for the following reasons:** (a) it removes the right of the NJC, currently provided by law, to hear the candidate for the office and does not provide for the possibility of a personal hearing before the NJC under the procedural rules for the selection of candidates either; (b) it limits the scope of NJC's right to give an opinion to the examination of compliance with the selection criteria laid down by law and does not allow any substantive assessment of the candidate's eligibility; (c) the eligibility criteria to be examined by the NJC are not in any way apt to ensure that the criteria of

⁴⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0316&from=EN> p. 8.

⁴⁵ Article 26(2) of the Fundamental Law.

⁴⁶ According to Article 26(3) of the Fundamental Law, "(3) The Kúria President shall be elected with the votes of two-thirds of the Members of the Parliament."

⁴⁷ Article 115(4) of the Bszi. states: "If the term of office of the Kúria President has expired pursuant to paragraph (1) a [after the expiry of the term of office] and Parliament has not elected a new President by the time the term of office expires, the Kúria President shall exercise the powers of the President until the election of a new President of the Kúria."

independence, impartiality, integrity and probity required by the milestone are respected and enforceable by the NJC. Although the NJC's opinion is formally binding and the Proposal provides for the possibility of legal remedy against it, the binding nature of the opinion and the possibility to appeal against it are only illusionary legal instruments, because of the extremely limited scope of the opinion, and it does not provide the NJC with real supervisory powers (nor do they provide real remedies for the candidate concerned). **In order to fulfil the milestone, the Proposal should provide the NJC with a right to give a full and binding opinion on candidates covering all the eligibility criteria set out in the milestone, in such a way that the available remedies would only allow to challenge any supporting decision on the basis of alleging inadequate reasoning .**

In addition to the above, the Proposal lays down a new condition, not set out in the milestone, which implies that the Kúria President should "*have at least two years of experience as a Kúria judge or be a theoretical lawyer (university professor or doctor of the Hungarian Academy of Sciences) with outstanding knowledge*". None of these new conditions can be closely linked to the eligibility criteria required by the milestone (independence, impartiality, integrity, probity). Beyond the fact that none of the criteria requires judicial management experience (although the Kúria President exercises significant judicial management powers), they also significantly narrow down the pool of potential candidates who can be selected from within the judicial organisation, thus further pointing in the undesirable direction of selecting the Kúria President from outside the judicial organisation. The conditions of appointment of the Vice-President of the Kúria should be aligned with those of the President.

III.2. Amendment of the criteria for electing the President and the Vice-Presidents of the NOJ

(A) The envisaged milestone

*"the legislative amendments shall ensure that the NJC shall give a motivated binding opinion on the following matters: the suitability of candidates for the post of President and NOJ Vice-President, that can be proposed by the President of the Republic or the NOJ President, respectively; the suitability criteria, including independence, impartiality, probity and integrity, shall be determined by the law. The legislative amendments shall ensure that the candidates found unsuitable by the NJC shall have access to an accelerated judicial review before the competent court."*⁴⁸

(B) Proposed measures

The Proposal amends, with effect from 31 March 2023, Article 66 of the Bszi. [Proposal § 20],⁴⁹ Article 79 of the Bszi. is supplemented by a new paragraph (2a) [Proposal § 23(1)]⁵⁰ and its paragraph

⁴⁸ Component C9.R15 (a)(iv) of the Annex.

⁴⁹ According to Article 20 of the Proposal, Article 66 (1) of the Bszi. is amended as follows, "The NOJ President shall not be eligible for re-election." A new paragraph (2) is added: "The following may be elected NOJ President: a) who has held a judicial office for at least 2 years, b) who has received an evaluation of at least excellent merit in all his/her judicial evaluations, except for the evaluation prior to appointment for an indefinite term, c) who is not subject to the circumstances set out in Article 68(1)."

⁵⁰ According to Article 23(1) of the Proposal, the following paragraph (2a) shall be added to Article 79(2) of the Bszi.: '(2a) The NOJ President may propose the appointment of a candidate as NOJ Vice-President who has been found by a decision of the NOJ or by an order of the Metropolitan Court to meet the statutory requirements for the office of NOJ Vice-President. The NOJ President shall send the list of candidates

(3) is amended [Proposal § 23(2)].⁵¹ The Article 103(3) of the Bszi. is amended by adding a new point (m),⁵² however, Bszi. 103(3)(a) is repealed [Proposal § 46]⁵³ although it gives the NJC the right to hear and give an opinion on the person proposed for the office of NOJ President.

(C) Evaluation of the proposed measures

According to the milestone, the legislative amendment should set out eligibility criteria for both the NOJ President and the NOJ Vice-President "*to ensure independence, impartiality, integrity and probity*". However, **the amendments do not meet the milestone requirements** for either the NOJ President or the NOJ Vice-President, for the reasons explained below.

(i) **With regard to the NOJ President**, the Proposal introduces only two new selection criteria compared to the existing ones. First, it requires at least two years' experience as judicial leader, which does not sufficiently justify the required managerial skills, given that the NOJ President and the NOJ Vice-President are the administrative heads of the entire judiciary. Second, the Proposal does not narrow down the scope of the relevant judicial leadership experience, so even leadership experience as a presiding judge could be considered as relevant. However, in our view, it is essential to require more than two years of administrative type of judicial leadership experience (as court president, court vice-president, chair and vice-chair of department of judges or group leader) to demonstrate eligibility.

On the other hand, for the position of the NOJ President, the Proposal requires that the candidate must be a person who has received at least an excellent rating in all judicial evaluations, except for the evaluation before granting indefinite judicial appointment. The requirement for a judicial evaluation is not a sufficiently objective condition for verifying suitability and may even be open to misuse of powers, given that the evaluation of judges is not carried out anonymously, and is done in a procedure and by a method which is not sufficiently transparent to the person evaluated. The very fact that a judge's performance is evaluated by his/her "*immediate superiors, who know him/her personally and on whom his professional career depends to a decisive degree*" is a problem in itself. "*This situation raises the problem that, in addition to the otherwise detailed evaluation criteria [8/2015 (XII. 12.) OBH], the personal opinion of the assessor on the judge under evaluation may also play a role in the evaluation.*"⁵⁴ For the above reasons, in the proposed Article 66(2) of the Bszi., the criteria under

and their curricula vitae to the NOJ for a decision on the candidates' compliance with the legal requirements on a case-by-case basis. Article 67(2c) to (2f) shall apply to the decision of the selection board and to any objection thereto, with the following exceptions:

a) the applicant is the applicant,
b) the Metropolitan General Court shall examine in the non-litigation procedure whether the candidate meets the legal requirements for the position of Deputy President of the National Council of the Hellenic Republic,
c) if the Metropolitan General Court finds that the applicant fulfils the statutory requirements for the Vice-Chairman of the NOJ, it shall notify its order to that effect to the applicant, the NOJ and the NOJ President."

⁵¹ According to Article 23 (2) of the Proposal, Paragraph 79(3) of the Bszi. is amended as follows: "A member of the judiciary who has been a member of the judiciary or a judge for at least 10 years and who has no family relationship with the NOJ President within the meaning of the Code of Civil Procedure may be appointed NOJ Vice-President."

⁵² According to Article 28 (4) of the Proposal, Paragraph 103(3) of the is amended by adding the following point (m): [The NJC in the field of personnel decisions] "m) shall give a binding opinion on the suitability of the candidate for the office of NOJ President and Kúria President for the office of NOJ President and on the suitability of the candidate for the office of NOJ Vice-President and Kúria Vice-President for the office of Kúria President for the office of NOJ President".

⁵³ According to the current Article 103(3)(a) of the Bszi.: 'The NJC shall, in the field of personnel, a) give a preliminary opinion on the nominees for the office of NOJ President and President of the Kúria, on the basis of a personal interview.'

⁵⁴ Mátyás Bencze - Attila Badó: *Structural and personal conditions affecting the efficiency of the Hungarian court system and the quality of judgments*, In. Hungarian Academy of Sciences Research Centre for Social Sciences, Institute of Law, Budapest, pp. 415-441.

paragraph (a) should be amended to increase the length of the required judicial leadership experience and to specify the type of judicial leadership positions that may count for the fulfilment of the conditions; and the criteria under paragraph (b) should be replaced by the suitability criteria to be assessed by the NJC (independence, impartiality, integrity, probity).

(ii) **In the case of the NOJ Vice-President**, the criteria of appointment shall be the same as those applicable to the NOJ President, taking into account that the NOJ Vice-President shall fully replace the NOJ President in the event of absence of the NOJ President or in case of a vacancy in the office of NOJ President. According to the Proposal judicial staff, who serve in the framework of a subordinate legal relationship can also be appointed to the position, which gives rise to a particular concern regarding the integrity of the candidate. Accordingly, we recommend to delete the possibility to appoint judicial staff from the Bszi. Article 79(3).

(iii) The Proposal (for the same reasons as the rules for the selection of the Kúria President) is in fact a step backwards compared to the current rules, because (a) it deprives the NJC of its statutory right to hear the candidate for NOJ President and does not provide for the possibility of a personal hearing before the NJC even under the procedural rules for selecting the candidates; (b) it limits the power of giving an opinion to the extent that it can only be used to assess compliance with the selection criteria laid down by law, and thus does not provide for a substantive assessment of eligibility; (c) the eligibility criteria to be assessed by the NJC do not in any way ensure that the criteria of independence, impartiality, integrity and probity required by the milestone are met and are enforceable by the NJC. Although the NJC's opinion is formally binding and the Proposal provides for a legal remedy against it, the binding nature of the opinion and the possibility to appeal against it are only illusionary legal instruments, because of the extremely limited scope of the opinion, and the rules do not provide for any real supervisory powers for the NJC or any meaningful remedy for the candidate concerned. In order to comply with the milestone, the Proposal should provide the NJC with a right to give a full and binding opinion on candidates for the position of NOJ President and NOJ Vice-President covering all the eligibility criteria set out in the milestone, in such a way that the available remedies would only allow to challenge any supporting decision on the basis of alleging inadequate reasoning. It is proposed that Article 66(2) of the Bszi. clearly includes the requirements of independence, impartiality, integrity and probity as selection criteria, and vest the NJC with full right to establish compliance with the criteria.

III.3. The NJC's right to access to documents, information and data

(A) The envisaged milestone

"establish the right of the NJC to have access to all documents, information and data (including personal data) related to the administration of the courts "⁵⁵

⁵⁵ Component C9.R15 (b) of the Annex.

(B) Proposed measures

A new Article 103/A is added to Chapter 27 of the Bszi [Proposal 29 §].⁵⁶

(C) Evaluation of the proposed measures

In order for the NJC to be able to effectively perform its supervisory function under Article 25(5) of the Fundamental Law, it is essential that members of the NJC, acting in their capacity as such, have access to all documents and data relating to the administration of the courts and created in the course of the administrative activity of the courts. Under the current legislation, the substantive obstacle to the powers of the NJC to inspect documents has not been caused primarily by the absence of a statutory power to inspect documents, but by the restrictive interpretation of the law applied by the NOJ President. According to the position taken by the NOJ President, the NJC is entitled to inspect documents only in connection with the supervision of the '*general central administration*' area and has accordingly refused access to documents in all other administrative areas.⁵⁷ A highly disputed area was the disclosure of documents related to the NOJ's powers exercised in relation to personnel matters⁵⁸, in particular documents relating to award bonuses other than statutory allowances or to the secondment of judges. **The Proposal does not resolve this legal interpretation dispute**, so that the restrictive interpretation of the law by the NOJ President may continue to pose a substantive limitation on the NJC's right of access to documents. It is essential for the exercise of the supervisory powers conferred by the Fundamental Law on the NJC that the law fully guarantees the right of access to documents to the members of the NJC. The Proposal should make it clear that the right of access to the file cannot be restrictively interpreted as applying exclusively to the supervisory functions falling within the scope of the so-called "*general central administration*". In order to avoid further disputes over the interpretation of the law and to ensure full compliance with the milestone, the **general right of access to the file should be granted to the NJC and all members of the NJC**.

The Proposal imposes unjustified restrictions on the NJC members' access to personal data, contrary to the requirements of the milestone. It would make it impossible to exercise the powers and perform the tasks related to supervising the central administration of the courts if the NJC, along with the members of the NJC, were not allowed to have access to personal data in the exercise of its right of access to the file. This would render Article 29 of the Proposal an empty clause and point (b) of milestone 213 would not be fulfilled.

We recommend the deletion of the restrictive provision on access to personal data. We further recommend that, **in order to strengthen the enforcement of the right of access to documents, the law should set a time limit for granting access to documents and data**, for example by providing for a 15-day time limit for compliance, analogous to the provisions of Act CXII of 2011 on the Right of Informational Self-Determination and Freedom of Information (Privacy Act).

⁵⁶ According to Article 29 of the Proposal, the following Article 103/A shall be added to the Bszi: "The NJC may, subject to compliance with the legislation on the protection of personal data, inspect documents and gain access to data necessary for the exercise of its powers and duties in connection with the supervision of the central administration of courts and its involvement in the administration of courts pursuant to this Act."

⁵⁷ See Bszi. § 112(1)(a) and (2).

⁵⁸ See Bszi. § 76 (5).

III.4. Case allocation

(A) The envisaged milestone

"Legislative amendments, and other amendments, to the rules on the case allocation scheme of the Kúria shall enter into force and start being applied, which shall ensure that:

- (i) electronically filed cases be given a case number without human intervention;
- (ii) cases be allocated to chambers following pre-established, objective criteria;
- (iii) the bench hearing the case be composed following an algorithm prescribed in advance;
- (iv) the parties to proceedings be able to verify on the basis of the case file whether the rules on case allocation have been duly applied;
- (v) the judicial council of the Kúria and the departments of judges ('kollégium') concerned give a binding opinion on the case allocation scheme;"⁵⁹

(B) Proposed measures

With effect from 31 March 2023, Article 9(1) of the Bszi. is amended [Proposal § 17],⁶⁰ Article 10 of the Bszi. is supplemented with a new paragraph (4) [Proposal § 18],⁶¹ Article 151(1)(d) of the Bszi. is amended [Proposal § 42(1)],⁶² a new Article 151(1)(d) of the Bszi. 151(2) is introduced [Proposal § 42(2)],⁶³ Article 155 of the Bszi. is replaced by a new provision [Proposal § 43(2)].⁶⁴

(C) Evaluation of the proposed measures

The milestones are only partially achieved by the Proposal.

⁵⁹ Component C9.R16 (b) of the Annex.

⁶⁰ According to Article 17 of the Proposal, Article 9(1) of the Bszi. shall be replaced by the following provision: '(1) The President of the Court shall determine the order of assignment of cases, after having obtained the opinion of the judicial council and the department of judges, and in the case of the Kúria, in accordance with the agreement of the Judicial Council and the department of judges, and the President of the Court (at the regional court and the district court, the president of the regional court) shall determine the order of assignment of cases. In the event of a difference of opinion between the Judicial Council and the department of judges of the Kúria, the opinion of the department of judges shall prevail."

⁶¹ According to Article 18 of the Proposal, Article 10 of the Bszi. is supplemented with a new paragraph: "(4) The following criteria shall apply to the allocation of the Kúria's cases: (a) when registering cases received electronically, the case shall be assigned a case number automatically; (b) the assignment of the chamber hearing the case shall be made according to a method of assigning cases based on predetermined objective criteria; (c) after the assignment of the chamber hearing the case, the members of the adjudicating chamber hearing the case shall be assigned automatically from among the members of the assigned chamber by means of an electronic system; (d) the parties to the proceedings shall be provided with a means of monitoring compliance with the rules on the assignment of cases."

⁶² According to Article 42 (1) of the Proposal, Article 151(1)(d) of the Bszi. is replaced by the following: [The Judicial Council] "(d) shall give its opinion on the rules of organisation and operation of the court and, with the exception of paragraph (2)(b)(bb), on the rules for the allocation of cases".

⁶³ According to Article 42 (2) of the Proposal, the following paragraph (2) shall be added to Article 151 of the Bszi.: "(2) The Judicial Council of the Kúria shall a) give an opinion on the application for the court leader specified in point (d) of Article 131, b) exercise the right of consent ba) with regard to the assignment of judges to the Kúria, bb) with regard to the allocation of cases of the Kúria."

⁶⁴ According to Article 43 of the Proposal, Article 155 of the Bszi. is replaced by the following: 'The department of judges shall: a) give an opinion on applications for judicial posts, with the exception of applications for district court posts, b) participate in the evaluation of the professional activities of judges, c) give an opinion on the case allocation procedure, with the exception of paragraph 2, d) give an opinion on the application of Article 131. § 131 c) and may initiate the ordering or dismissal of a judicial manager's judicial examination, and e) perform other duties prescribed by law. (2) The department of judges of the Kúria shall exercise the right of consent with regard to the assignment of cases to the Kúria. (3) The department of judges of the Kúria of the case area corresponding to the case area of the judge to be seconded shall exercise the right of consent with regard to the assignment of a judge to the Kúria."

i. electronically filed cases be given a case number without human intervention

The text of the Proposal in the **Article 10(4)(a) of the Bszi.** should be supplemented by adding that the cases received should be assigned a case number "**without human intervention, in the order of arrival**", as this is the only way to ensure that case numbers are allocated without any human intervention.

ii. cases be allocated to chambers following pre-established, objective criteria;

iii. the bench hearing the case be composed following an algorithm prescribed in advance;

The Proposal broadly follows the general wording of the above commitments when it stipulates that the designation of the *chamber hearing the case* will be **based on predefined objective criteria and that the members of the chamber will be selected automatically** from among the members of the designated chamber by means of an electronic system.

The text of the Proposal makes a distinction between "*the chamber proceeding in the case*" and "*the adjudicating chamber hearing the case*", but in our view, and in the light of the provisions of the Bszi, this is not lawful, as explained below.

The text of the Proposal reflects recent years' court practice, whereby cases are not assigned to adjudicating chambers, but typically to five-member (or larger) chambers with two or more presiding judges; despite the fact that these chambers are not defined as an administrative unit in the current legislation, including in the Bszi either.⁶⁵ This practice raised serious criticism in recent years because, in the absence of permanent adjudicating chambers, the composition of a chamber cannot be predicted and may even be manipulated, resulting in a breach of the right to a lawful judge.⁶⁶ Automatic assignment of cases would be established if cases were assigned to **permanent chambers chaired by a single presiding judge**. In case of proceedings involving three-member chambers (such as election cases⁶⁷), automaticity requires that the case allocation scheme establishes these three-member chambers separately.

It follows from the text of the Proposal that in the **legislation will continue to lack a general requirement for a permanent composition of adjudicating chambers at the Kúria**, which is not in line with the current provisions of the Bszi either. According to Article 10(1) of the Bszi., the case allocation scheme must allow to determine in advance which chamber (and specifically which judges) will hear a given case. In the absence of permanent chambers, this is in not foreseeable.

In order to strengthen the automaticity of case allocation, it is a safeguard rule that the presiding judge should not appoint the judge who will be the rapporteur (as is the case in the current case

⁶⁵ See, for example, the case allocation scheme of the Kúria effective from 1 January 2022: https://kuria-kozadatok.birosag.hu/sites/default/files/field_attachment/ugyelosztasi_rend_2022_01_01_am_vegleges_o_o.pdf and the Kúria case allocation scheme effective from 1 January 2023: https://kuria-kozadatok.birosag.hu/sites/default/files/field_attachment/ur_2023_januar_1_vegleges.pdf

⁶⁶ This problem was also highlighted in the joint NGO submission to the European Commission's Rule of Law Report 2022. See: https://helsinki.hu/en/wp-content/uploads/sites/2/2022/01/HUN_NGO_contribution_EC_RoL_Report_2022.pdf

⁶⁷ See Article 229 (2) of Act XXXVI of 2013 on Electoral Procedure

allocation system)⁶⁸; instead, the role of rapporteur judge should be automatically assigned among the judges assigned to a chamber. This should be clearly indicated in the rules of the Bszi. on case allocation.

Under the current rules, it is not foreseeable what the composition of the uniformity complaint chambers will be, and the Bszi. should therefore also fix the exact number and composition of the uniformity complaint chambers. The current Article 41/A(1) of the Bszi. only stipulates that "*the uniformity complaint chambers shall consist of the president and at least 8 other members, who shall be appointed by the president, with at least 1 member from each department of judges.*" It is also concerning from the perspective of judicial independence that, according to Article 41/A(1) of the Bszi., irrespective of the subject matter of the uniformity complaint "*the uniformity complaint chambers shall be presided over by the Kúria President or the Kúria Vice President.*"

As the provision that required the case allocation scheme to be established for the given reference year was removed from the Bszi. by the 2019 Omnibus Act, the legal guarantees that exclude the possibility of serial modifications to the case allocation scheme are still lacking. In addition, the Bszi. continues to mention a number of criteria (e.g., the significance of cases, the timeliness of adjudication, etc.) which are difficult to verify, and which allow for reviewing the case allocation scheme. The possibility of successive modifications jeopardises the predictability of case allocation and, eventually, the stability of the composition of the adjudicating chambers. The Bszi. also allows derogation from the case allocation scheme "*for important reasons affecting the functioning of the court*".⁶⁹ The latter rule gives broad discretionary powers to court leaders responsible for allocating cases, against which there are currently no adequate safeguards built into the law.

iv. the parties to proceedings be able to verify on the basis of the case file whether the rules on case allocation have been duly applied

Although the Proposal states that "*the parties to the proceedings shall be provided with a means of verifying compliance with the rules on the allocation of cases*", the Proposal merely adopts the general wording of the milestone and **does not provide for specific means of verification and a possibility to object**, thus in its current form, it does not provide the parties with a meaningful and effective right to verification. The procedural laws should set out how the client can verify the application of the rules on case allocation and what remedies are available if a breach of the case allocation rules is detected.

v. the judicial council of the Kúria and the departments of judges ('kollégium') concerned give a binding opinion on the case allocation scheme

The Proposal strengthens the powers of the judicial council and the departments of judges at the Kúria in relation to the allocation of cases by **giving them the right to consent on the case allocation scheme**. This power is, however, emptied in the case of the judicial council by the rule that, in the event of a difference of opinion between the judicial council and a department of judges, the opinion

⁶⁸ See the case allocation scheme of the Kúria, effective from 1 January 2023: https://kuria-kozadatok.birosag.hu/sites/default/files/field_attachment/ur_2023_januar_1_vegeges.pdf, page 2

⁶⁹ Article 11(2) of the Bszi.

of the department of judges shall prevail; in such a case, the right of the judicial council to give its consent is not exercised. Since three (criminal, civil and administrative) departments of judges operate at the Kúria, it is not generally possible to speak of an opinion of "the department of judges", as the Proposal puts it. Since each of the departments of judges will give their own opinion on the case allocation scheme, it may be the case that there is a difference of opinion between the departments of judges as to whether they support the case allocation scheme (the general parts of the scheme applicable to all cases), in which case the procedure for the new case allocation scheme will be unclear.

The implementation of the above aspects – such as the institutionalisation of automatic case allocation, guaranteeing the right of consent for judicial bodies (judicial councils and departments of judges) and the safeguard that clients can effectively control compliance with case allocation rules – is not only crucial for the Kúria's independence but should be an equally important requirement in the context of the functioning of every court in the country.

III.5. Legal capacity of the NJC, its budgetary autonomy and the guarantee of adequate resources

(A) The envisaged milestone

*"endow the NJC with legal capacity and autonomy in disbursement of its budget, and ensure that the NJC has adequate resources, including staff and offices, to carry out its tasks in an effective manner"*⁷⁰

(B) Proposed measures

The proposal provides the following changes from 31 March 2023:

- in relation to legal capacity (i) **Article 88(2) of the Bszi.** is amended [Proposal § 25];⁷¹
- in relation to budgetary autonomy, (ii) **Article 4 of the Bszi.** [Proposal § 16],⁷² (iii) **Article 103(2)(a) of the Bszi.** [Proposal § 28(2)],⁷³ (iv) **Article 104(1) of the Bszi.** [Proposal § 30(1)]⁷⁴ are modified and (v) **Article 76 of the Bszi.** is supplemented by a new (11) paragraph [Proposal §

⁷⁰ Component C9.R15 © of the Annex.

⁷¹ According to Article 25 of the Proposal, Article 88 (2) of the Bszi. is replaced by the following provision: "*The NJC is an autonomous central budgetary body with its seat in Budapest.*"

⁷² According to Article 16 of the Proposal, Article 4 of the Bszi. is replaced by the following provision: '*The courts shall constitute a separate budget chapter in the Central Budget Act. Within this chapter, the National Council of the Judiciary (hereinafter referred to as the "NJC") and the Kúria shall form a separate title.*'

⁷³ According to Article 28(2) of the Proposal, Article 103(2)(a) of the Bszi. shall be replaced by the following: [The NJC shall, in the budgetary field] "(a) draw up its budget proposal and its report on its implementation, and give its opinion on the budget proposal and the report on its implementation of the courts,"

⁷⁴ According to Article 30 (1) of the Proposal, Article 104(1) of the Bszi. shall be replaced by the following: '(1) *The NJC shall determine its budget for the year in question before the beginning of the year and shall communicate it to the NOJ President.* [The President of the NJC shall manage the budget placed at the disposal of the NJC and shall have the right to authorise and commit appropriations in this area. The work of the NJC shall be assisted by a secretariat composed of the NJC's judicial staff, which shall perform the administrative tasks necessary for the functioning of the NOJ.]'

22(9)],⁷⁵ (vi) **Article 76(3)(a) the Bszi.** [Proposal § 22(1)],⁷⁶ (vii) Article 76(3)(a) of the Bszi. is modified and a new **Article 76(3)(c)(ca)** is added [Proposal § 22(2)],⁷⁷

- in relation to the guarantee of adequate resources (staff and office space) (viii), **Article 104(1) of the Bszi.** [Proposal § 30(1)],⁷⁸ and (ix) **Article 89/A of the Bszi.** [Proposal § 27]⁷⁹ are amended and (x) the new **Article 112(4) of Bszi.** is added [Proposal § 35(2)],⁸⁰ (xi) **Article 42/A(1) to (3) of the Iasz.** is amended [Proposal § 5].⁸¹

(C) Evaluation of the proposed measures

(i) The Proposal grants the NJC the status of a central budgetary body with autonomous management, which confers legal personality on the NJC pursuant to Article 7(1) of Act CXCV of 2011.

The NJC is entitled to set its own budget and send it to the NOJ President, and the NOJ President incorporates it without change into the proposal for the judiciary's budget, which the Government submits to the Parliament, again, without any amendment thereof. Furthermore, the NOJ President may not reallocate the appropriations of the NJC's budget. These provisions give the NJC sufficient budgetary autonomy in the long term. At the same time, the Proposal does not address the question of what rules will apply to the NJC's expenditure until the adoption and entry into force of the next budget for the current year: those of the NJC budget already adopted for the current year or a new or amended NJC budget should be adopted under the rules of the Proposal, which could reflect the increased NJC expenditure? The **increased powers and organisation of the office** will certainly increase the expenditures of the NJC, for which the **Proposal does not provide transitional rules guaranteeing adequate resources during** the initial period. It would therefore be appropriate to

⁷⁵ According to Article 22 (9) of the Proposal, the Bszi. (11) *The NOJ President shall record the proposal of the NJC for the budget of the courts determined by the NJC pursuant to paragraph (3)(a) and the report on its implementation in the proposal for the budget of the courts and the report on its implementation without alteration.*"

⁷⁶ According to Article 22 (1) of the Proposal, Article 76 (3)(a) of the Bszi. shall be replaced by the following: [The NOJ President shall, in relation to the budget of the courts] "(a) draw up a proposal for the budget of the courts and a report on its implementation, as determined by the NJC in relation to the chapter on the Courts of the Central Budget Act and the NJC in relation to the NJC, and by the Kúria President in relation to the Kúria, after having consulted and presented the opinion of the President of the Kúria, which the Government shall submit to Parliament without amendment as part of the bill on the central budget and the bill on its implementation,"

⁷⁷ According to Article 22 (2) of the Proposal, the Bszi. 76(3)(c) of the Proposal, the following subparagraph (ca) shall be added: [The NOJ President shall, in relation to the budget of the courts] "(ca) not reallocate the appropriations of the NJC,"

⁷⁸ According to Article 30 (1) of the Proposal, Article 104(1) of the Bszi., the following sentences shall be added: "(1) [The NJC shall determine its budget for the current year before the current year and shall communicate it to the NOJ President.] The President of the NJC shall manage the budget made available to the NJC and shall have the power of authorization and commitment in this area. The work of the NJC shall be assisted by a secretariat consisting of the NJC's judicial staff, which shall perform the administrative tasks necessary for the functioning of the NJC."

⁷⁹ According to Article 27 of the Proposal, the following Article 89/A is added to the Bszi: "The NJC President a) shall lead and represent the NJC, b) shall ensure, within the budgetary framework, the necessary personnel and material conditions for the operation of the NJC, c) shall direct the financial and economic activities of the NOJ, d) shall exercise the rights of the employer over the staff of the NJC."

⁸⁰ According to Article 35 (2) of the Proposal, the Bszi. The following paragraph (4) is added to Article 112: "(4) The president of the court of the place of service shall appoint a member of the NJC a chief assistant from among the judicial staff of the court with a law degree. The President of the court shall relieve the judicial staff member designated of his other duties, but the designation shall not otherwise affect the status of the judicial staff member."

⁸¹ According to Article 5 of the Proposal, the Iasz. Article 42/A is amended as follows: '(1) The NOJ President may assign the court secretary to the NOJ and, on the proposal of the NJC President, to the NJC. (2) The NOJ President shall exercise the powers of an employer in respect of a court secretary assigned to the NOJ, and the President of the NJC shall exercise the powers of an employer in respect of a court secretary assigned to the NJC.(3) A court secretary assigned to the NOJ shall, in the performance of his duties, carry out the measures and instructions of the NOJ President. The judicial secretary attached to the NJC shall, in the course of his duties, be bound to carry out the measures and instructions of the President of the NJC. [...]"

establish transitional rules which would provide for an autonomous budget for the NJC, as defined by the NJC, for the period immediately after the entry into force of the Proposal, including for year 2023. It can also be suggested, as in the case of the Integrity Authority⁸², to state that the budget of the NJC can only be reduced with the consent of the NJC. This could guarantee that the Parliament does not reduce the already approved budgetary heading of the NJC in the course of the year.

The Proposal should be supplemented by the following in Article 88(2) of the Bszi.: '*The budget of the NJC may be reduced only with the consent of the NJC. The budget of the NJC for the current year may not be lower than the budget of the NJC for the year preceding the current year.*'

Article 22(2) of the Proposal supplements Article 76(3)(c) of the Bszi. by adding a new subparagraph (ca), according to which the NOJ President may not reallocate appropriations of the NJC to other budgetary bodies under its budgetary heading during the year. We agree with the Proposal in the sense that the NOJ President should not have the autonomous power to take decisions to divert resources from the NJC by transferring appropriations from the budget. At the same time, the NOJ President performs the tasks of the head of the managing body of the budget chapter in his/her capacity as the head of the budget of the courts in respect of the relevant chapter of the Central Budget Act, whereas the NJC does not have such tasks, and therefore the NJC appropriations could not be reallocated at all during the year, while of course, a reallocation may become necessary. It is therefore proposed that, as in the case of the Kúria, the appropriations of the NJC may be reallocated during the year with the agreement of the NJC.

The NOJ President, under Article 76(3)(c) of the Bszi., shall participate as an invited guest, i.e., with the right of consultation, in the sessions of the Government and the Budget Committee of the Parliament when the budget chapter of the bill on the central budget and the bill on its implementation relating to the courts are debated. Since the NJC itself determines the part of the proposal of the NOJ President and the report on its implementation that concerns its own budget and has the right to give an opinion on the entire proposal and on the report on the budget and implementation of the courts, it would be appropriate for the NJC President to be invited to attend the meetings of the Government and the Budget Committee of the Parliament when the budget chapter of the courts is debated – this would require the amendment of Article 103 (2) of the Bszi.

(ii) Appropriate conditions are guaranteed in that the NJC President will be able to provide for the staff and material conditions within the budget, will be free to manage the NJC's expenses and will be assisted by a secretariat, which will be staffed by judicial employees over whom the NJC President will exercise the rights of the employer.

A major shortcoming of the Proposal, and one that could cause serious problems for the functioning of the strengthened NJC, is that the new powers and increased office structure granted to the NJC do not imply a temporary support for the NJC's functioning, as was the case for the Integrity Authority.⁸³ This support would be needed in the initial period because the members of the NJC, being primarily judges with judicial experience, do not necessarily have the skills required to run an office

⁸² Act XXVII of 2022 on the Control of the Use of European Union Budgetary Resources, § 2 (4) paragraph 2

⁸³ Article 71 of Act XXVII of 2022.

organisation (i.e., the NJC secretariat) (payroll, development of policies and procedures, HR tasks, renting and maintaining office space, IT, etc.). It is proposed that the transitional provisions of the Proposal include the provision that "*(1) The NOJ shall provide support and the necessary infrastructure for the secretarial and administrative tasks related to the functioning of the NJC for a period of 6 months from the entry into force of this Act. (2) The NOJ shall assist in the performance of tasks facilitating the functioning of the NJC for a period of at least 6 months from the entry into force of this Act and shall provide support for the performance of the tasks of the NJC President and the NJC Vice President as defined in this Act, in addition to those specified in paragraph (1).*" **Failing this, the milestone is not achieved.**

(iii) The member of the NJC will also be assisted by a judicial employee, but in order to guarantee the independence of the NJC member and his/her work, it would be necessary that the NJC member should be able to select the assistant and that the assistant should be employed by the NJC, with the rights of employment over the assistant being exercised by the NJC President in the same way as for other staff working in the NJC secretariat.

Therefore, we propose that Article 8(1) of Iasz. should be amended by adding: [The power of employer] "*b) in respect of the employees of the NJC and assistants to the members of the NJC, the NJC President (shall exercise).*" We propose to supplement Article 112 of the Bszi. with a new paragraph (4): "*(4) The President of the court of the place of service of the member of the NJC shall, on the proposal of the member of the NJC, appoint an assistant from among the judicial employees of the court with a law degree, who shall be employed by the NJC as an employee of the NJC and over whom the NJC President shall exercise the power of the employer. The president of the court shall relieve the designated judicial employee of his other duties.*"

III.6. The status of the members of the NJC and the governance of the NJC

(A) The envisaged milestone

*"The legislative amendments shall also provide that, in order to carry out their tasks in the NJC, judges-members shall be entitled to be relieved from their adjudicating duties to the extent regional court (törvényszék) presidents are relieved from their adjudicating duties. The legislative amendments shall provide that judges-members of the NJC cannot be re-elected except for the next term of office, that judges-members of the NJC shall elect from among themselves the chairperson of the NJC, and that court presidents and vice-presidents as members of the NJC shall not participate in the deliberation and vote on matters relating to their administrative activities."*⁸⁴

(B) Proposed measures

The proposal provides that from 31 March 2023

⁸⁴ Component C9.R15 (c) of the Annex

- in relation to the requirement that elected members of the NJC can only be re-elected for the next term of office,⁸⁵ (i) **Article 197/F(1) of the Bszi.** is added [Proposal § 44];⁸⁶
- in relation to the selection of the NJC President from amongst the members of the NJC, (ii) the amendment of **Article 89(2) of the Bszi.** [Proposal § 26(1)],⁸⁷ (iii) **Article 197/F(2) of the Bszi.** is added [Proposal § 44];⁸⁸
- in relation to the fact that court presidents and court vice-presidents (i.e., deputy presidents), as members of the NJC, do not participate in deliberations and voting in connection with their own administrative activities (iv) the provisions of **Article 105(5) of the Bszi.** is inserted [Proposal § 31];⁸⁹
- in relation to the exemption of members of the NJC from judicial work (v) **Article 112 (3) of the Bszi.** [Proposal § 35 (1)].⁹⁰

(C) Evaluation of the proposed measures

(1) The restrictions on the deliberations and voting imposed on the NJC members who are court presidents and vice-president comply with the milestone description. However, we propose to establish a **conflict-of-interest rule whereby no judicial leaders** (i.e., court presidents, court vice-presidents, chairs of department of judges) **or their relatives who are within the scope of the employer's authority of the NOJ President may become members of the NJC.**

The reason of the above is that these judicial leaders have significant and extensive powers in the selection, promotion and evaluation of judges. Thus, the NJC's independence can also be affected if members, who are not judicial leaders, on controversial issues do not dare to challenge the views of those who hold a judicial leader position and exercise employer rights. There is also the question if judicial leaders, who had been appointed by the NOJ President, and against whom the NOJ President may open an investigation, would be able to exercise independent and impartial supervision over the NOJ President who appointed them. Finally, their formal and informal influence makes it easier for them to be elected as NJC member at the NJC's Assembly of Delegates - an example of this is the 9 October

⁸⁵ According to the current Article 90 (2) (g) of the Bszi., as a general rule, the members of the NJC are not eligible for re-election.

⁸⁶ According to Article 44 of the Proposal, the following Article 197/F (1) is added to the Bszi: "(1) *The members of the NJC in office at the time of the entry into force of [the Proposal] shall be eligible for re-election at the time of the election of the next members of the NJC.*"

⁸⁷ According to Article 26 (1) of the Proposal, the Bszi. Article 89(2) of the Draft Act shall be replaced by the following provision: '(2) *The President and the Vice-President of the NJC shall be elected by the members of the NJC from among themselves for a term of 3 years, with the exception of paragraph (2a). Any member of the NJC may propose a candidate for the office of president and vice-president. The NJC shall elect the President and the Vice-President from among the candidates by secret ballot and by simple majority. The result of the vote shall be recorded in a decision of the NJC. In the event of a tie, the NJC shall hold a second ballot. The President and the Vice-President of the NJC shall not be eligible for re-election.*"

⁸⁸ According to Article 44 of the Proposal, the following Article 197/F (2) is inserted into the Bszi.: "(2) *The President and the Vice President of the NJC elected for the first time pursuant to Article 89 (2) [as amended by the Proposal] shall hold office from 1 August 2023.*"

⁸⁹ According to § 31 of the Proposal, the following paragraph (5) shall be added to Article 105(5) of the Bszi.: '(5) *Members of the President of the NJC, including the President of the Kúria, and members of the Vice-Presidents shall not take part in deliberations and decisions relating to their administrative activities. If, in the event of the Kúria President being prevented from attending, the Kúria Vice-President replaces the President of the Kúria, the Deputy Kúria President shall not take part in deliberations and decisions relating to the administrative activities of the President of the Kúria.*"

⁹⁰ According to Article 35 (1) of the Proposal, Article 112(3) of the Bszi is amended as follows. "A member of the NJC shall be exempted from judicial duties to the same extent as the President of the Tribunal in order to perform the duties arising from his membership."

2018 by-election Assembly of Delegates, where court presidents and other judges prevented the Assembly from electing new NJC members.⁹¹ A declaration of conflict of interest was also proposed by the NJC in its September 2022 legislative proposal.⁹²

We therefore propose that Article 90(2)(e) of the Bszi. should be amended to read that "*Anyone who is a judicial leader falling under the scope of the appointing authority of the NOJ President or who has a family relationship with a judicial leader falling under the scope of the appointing authority of the NOJ President pursuant to the Civil Procedure Act [shall not be eligible for election as a member of the NOJ].*

The Proposal's amendment to Article 105 of the Bszi. should also be amended accordingly, as follows: '(5) *The senior members of the NJC, including the President of the Kúria, shall not participate in deliberations and decisions relating to their administrative activities.*' (Here, the legislation would refer to judicial leaders who are not appointed by the NOJ President.)

(2) As regards the re-election of the members of the NJC, the Proposal is in line with the milestone.

(3) The milestone's requirement to exempt an NJC member from judicial work is also fulfilled by the Proposal.

(4) With regard to the election of the NJC President and the NJC Vice-President by the members of the NJC, the Proposal does not comply with the milestone description, as it states that "*judges-members of the NJC shall elect from among themselves the chairperson of the NJC*", i.e., the Kúria President, not being an elected member of the NJC,⁹³ could neither be the NJC President nor the NJC Vice-President who could replace him. It is therefore proposed to provide that only elected members of the NJC should be able to stand for election as NJC President and as NJC Vice-president: the administrative activities of the Kúria President are subject to the same control by the NJC as those of the NOJ President, so it would be unfortunate if the NJC were to be headed by a person who is subject to the supervision of the NJC.

In addition, it is proposed to clarify the rules for the election of the NJC President and NJC Vice-President, so that they can be elected by a simple majority of NJC members (i.e., 50 % plus 1 vote), even in several rounds. It is not justified, nor is it explained in the Proposal's Explanatory Memorandum, why the NJC President and the NJC Vice-President should not be re-elected, as the NJC may decide that it is preferable to have a proven and experienced NJC President already in place. It would therefore be appropriate to remove this restriction.

Accordingly, we propose that **Article 89(2) of the Bszi.** should be amended as follows: '*The NJC President and the NJC Vice-President shall be elected by the members of the NJC from among the elected*

⁹¹ See the minutes of the meeting of delegates to elect the alternate members of the National Council of the Judiciary held on 9 October 2018, <https://www.mabie.hu/attachments/article/1055/K%C3%BCld%C3%B6tt%C3%A9rtekezleti%20jegyz%C5%91k%C3%B6nyv.pdf>.

⁹² Textual proposal for an amendment to the law adopted by the NJC by Resolution 65/2022 (IX.07.), <https://orszagosbirotanacs.hu/ahataskoreit-es-mukodesi-felteteleit-erinto-torvenyek-modositasat-javasolja-az-orszagos-biroi-tanacs/>

⁹³ The milestone at this point uses the phrase "judges-members shall elect...", which has been translated into Hungarian as "members of the judges of the NJC". Since in other places the milestone does not distinguish between the elected judges-members of the NJC and the ex-officio member (i.e. the President of the Kúria) (thus later in this point: "the presidents and vice-presidents of the courts shall not participate as members of the NJC..."), we can conclude that it gives the right to elect the President and the Vice-Presidents of the NJC to the elected judges-members.

members of the NJC for a term of 3 years, with the exception of Paragraph 2a. Any member of the NJC may propose a candidate for the office of President and Vice-President. The Presidents and Vice-Presidents shall be elected by secret ballot by the NJC from among the candidates by a simple majority of all the members of the NJC (i.e., by at least eight votes). In the event of a tie or if no candidate obtains a simple majority of the votes of the members of the NJC, more than one round of voting may be held. Voting shall continue until a President and a Vice-President have been elected. The result of the vote shall be recorded in a decision of the NJC."

(5) However, there is no reason, and the Explanatory Memorandum does not explain why the current NJC should not elect its new President and Vice-Presidents as soon as possible, already in accordance with the new rules. It is important that the NJC with its new powers should be led as soon as possible by a president and vice-president who can be elected by the members of the NJC and who can start setting up the NJC secretariat and organising the work of the office. In addition, this meets the requirement of the milestone, as it is a general requirement that "*the implementation of the reform must be completed before the submission of the first payment request under the Recovery and Resilience Building Plan in the first quarter of 2023*". However, the implementation of the reform is not fulfilled by the adoption of the legislation. The law must be applicable in order to be considered as implemented. As the milestone should give the judge members of the NJC the right to choose the NJC President among themselves, this element of this reform can only be considered properly implemented if this possibility is effectively in place by the end of the 2023 Q1.

Therefore, we propose - in agreement with the NJC - that the NJC may elect its President and Vice-President immediately after the entry into force of the Act, and that the new Article 197/F (2) of the Act be amended as follows: '*As per Article 89(2) as of Act No. ... of 2023 on the amendment of certain laws on judicial matters in connection with the Hungarian Recovery and Resilience Plan, the NOJ shall elect a new president and vice-president at its first meeting following the entry into force of Act No. ... of 2023 on the amendment of certain laws on judicial matters in connection with the Hungarian Recovery and Resilience Plan, who shall hold office from the date of their election. Until the date of the election of the new President and Vice-President, the office of President and Vice-President shall be held by the incumbent President and Vice-President at the time of the entry into force of Act ... of 2023 amending certain laws on justice in connection with the Hungarian Recovery and Resilience Plan.*' **Failing this, the milestone is not achieved** as set out above.

(6) It is important to note that the Kúria President is the only *ex officio* member of the NJC. Therefore, it is particularly important that he, like the other members, may only participate in the meetings of the NOJ in person and may not be replaced by anyone, including the Vice-President of the Kúria. The possibility of substitution could entail that another person votes instead of the only *ex officio* member of the NJC.

(7) At the same time, it is important that the NOJ President, who is supervised by the NJC, is obliged to be present at the meetings of the NJC in order to be able to answer questions posed by members of the NJC. This has been a problem in the past: according to the minutes of the 2021 NJC meetings, the NOJ President was present in person at only half of the NJC meetings held, i.e., in six out of twelve

occasions (in other cases the NOJ Vice-President usually attended the meetings). NJC members have criticised the NOJ President for this, as well as for not being present at all times at each meeting.⁹⁴

Accordingly, we recommend to add to Article 76 (1) of the Bszi. that the NOJ President "shall participate in the meeting of the NJC". Furthermore, we propose to amend Article **106(2) of the Bszi.** to read as follows: "*If prevented from attending NJC meetings of the NJC in person, the Minister of Justice shall be substituted at the meeting of the NOJ by the Minister of Justice, in exceptionally justified cases the NOJ President shall be substituted by the NOJ Vice-President, the Prosecutor General shall be substituted by the Deputy Prosecutor General, the President of the Hungarian Bar Association shall be substituted by the Deputy President, and the President of the Hungarian National Chamber of Notaries shall be substituted by the Deputy President. The Kúria President may not be replaced at the meeting of the NJC."*"

III.7. Strengthening the powers of the Kúria's judicial council and departments of judges

(A) The envisaged milestone

*"Establishing stronger powers for the judicial council of the Kúria and the departments of judges ('kollégium') concerned, ensuring, in particular, that they shall give a binding opinion (a) candidates for the post of chairs and vice-chairs of departments of judges, presiding judges and the Secretary General of the Kúria; (b) secondments to the Kúria;"*⁹⁵

(B) Proposed measures

According to the Proposal, from 31 March 2023 (i) **Article 131 of the Bszi.** will be amended by adding a new subparagraph d)⁹⁶ [Proposal § 38(2)] , ii) **Article 132(4) of the Bszi.** is amended [Proposal § 40(1)],⁹⁷ (iii) **Article 132 of the Bszi.** is amended by adding a new paragraph (4a) [Proposal § 40(2)],⁹⁸ (iv) **Article 132(5) of the Bszi.** shall be replaced by a new provision [Proposal § 40(3)],⁹⁹ (v) the new **Article 132(6)** shall be replaced by a new provision [Proposal § 40(3)],¹⁰⁰ (vi) **Article 151(1)(d) of the**

⁹⁴ See minutes of the NJC meeting of 8 September 2021, p. 61, available at: <https://orszagosbiroitanacs.hu/2021-09-08/>

⁹⁵ Component C9.R16.(c)(i) of the Annex.

⁹⁶ According to Article 38 (2) of the Proposal, Article 131(d) of the Bszi., which reads as follows [Candidates shall be subject to a secret ballot for an opinion:] "(d) *in the case of the Secretary General of the Kúria, the Judicial Council of the Kúria,*"

⁹⁷ According to Article 40 (1) of the Proposal, Article 132(4) of the Bszi. shall be replaced by the following provision. *The Appointing Authority shall not be bound by the recommendation of the review body, with the exception of paragraph 4a, but shall give detailed reasons in writing for any decision to the contrary.*"

⁹⁸ According to Article 40 (2) of the Proposal, Article 132 of the Bszi. shall be supplemented by a (4a) paragraph: "(4a) *In the case of the Kúria president, Kúria Vice-President, secretary general, president of the council, the Kúria President who is entitled to appoint shall be bound by the recommendation of the body or bodies entitled to issue opinions.*"

⁹⁹ According to Article 40 (3) of the Proposal, Article 132(5) of the Bszi. shall be replaced by the following provision: '(5) *The NOJ President and, if not bound by the recommendation of the opinion-forming body, the Kúria President shall, in the case of a decision of the opinion-forming body or, in the case of a chair of department of judges, of the department of judges, if he/she deviates from the recommendation of the opinion-forming body, inform the NJC in writing of the reasons for the deviation at the same time as the appointment and shall present the reasons for the deviation at the next meeting of the NJC. The written information provided to the NJC by the NOJ President and the Kúria President, and the oral information provided to the NJC at its next meeting shall not affect the appointment of the court leader, with the exception of paragraph 6.*"

¹⁰⁰ According to Article 40 (3) of the Proposal, Article 132(6) of the Bszi. is replaced by the following provision: '(6) *If the NOJ President or, if not bound by the recommendation of the opinion-forming body, the Kúria President intends to appoint a candidate who has not obtained the majority support of the opinion-forming body, the NOJ President or the Kúria President shall gain the prior opinion of the NOJ on the candidate before the appointment. The appointment of the candidate shall be subject to the agreement of the NJC.*"

Bszi. is replaced by a new provision [Proposal § 42(1)],¹⁰¹ (vii) **Article 151** of the Bszi. is supplemented by a new paragraph (2) [Proposal § 42(2)],¹⁰² (viii) **Article 155 of the Bszi.** shall be replaced by a new provision [Proposal § 43].¹⁰³

(C) Evaluation of the proposed measures

(1) According to the Proposal, the Kúria President shall be bound by the opinion of the judicial council of the Kúria in relation to the selection of the Secretary General of the Kúria, the secondment of judges to the Kúria and the case allocation scheme of the Kúria [see above]. However, contrary to the milestone description, the judicial council of the Kúria has neither binding nor non-binding powers of opinion in the **case of the chairs and vice-chairs of the Kúria departments of judges ('kollégium')** and presiding judges ('tanácselnök'). In doing so, the Proposal runs counter to the milestone's goal of allowing the judiciary - and thus the judicial council, composed of members elected by the judges - a greater say in filling important leadership positions at the Kúria.

(2) The opinion of the relevant level and specialised department of judges of the Kúria¹⁰⁴ will be binding in relation to the appointment of the **chairs and vice-chairs of the Kúria departments of judges** and presiding judges and the allocation of cases in the Kúria [see above], and in the case of a judge of a particular specialised department of judges, the opinion of that specialised department will be binding in relation to the secondment of judges to the Kúria. However, contrary to the milestone, the department of judges will have **no right of opinion in respect of the selection of the Secretary General of the Kúria**.

(3) In addition, the opinion of the full meeting ('teljes ülés') of the Kúria will be binding when appointing the chair of the department of judges at the Kúria.¹⁰⁵

(4) Moreover, contrary to the milestone, neither the judicial council of the Kúria nor the department of judges of the Kúria have a binding opinion on the proposal or appointment of the **Kúria Vice-President** (only the full meeting of the Kúria,¹⁰⁶ but the opinion of this full meeting is not binding on the appointing authority that is the President of the Republic). The Kúria Vice-President may even replace the Kúria President in full powers, for example in the exercise of employer's rights, in the drafting of the Kúria's rules of procedure or work plan, and, in addition, under the current wording of the Proposal, may also replace the Kúria President in the NJC and may even vote in place of the Kúria President. The Vice-President thus has considerable powers which would justify granting a binding opinion in the selection of this post for the above-mentioned judicial self-governing bodies.

¹⁰¹ According to Article 42 (1) of the Proposal, Article 151(1)(d) of the Bszi. shall be replaced by the following: [The Judicial Council] "(d) shall give an opinion on the rules of organisation and operation of the court and, with the exception of paragraph (2)(b)(bb), on the rules for the allocation of cases."

¹⁰² According to Article 42 (2) of the Proposal, Article 151 of the Bszi. the following paragraph (2) is added: "(2) The Judicial Council of the Kúria shall a) give an opinion on the candidature of the court leader specified in point (d) of Article 131, (b) exercise the right of consent ba) as regards the assignment of a judge to the Kúria, bb) as regards the allocation of cases to the Kúria."

¹⁰³ According to § 43 of the Proposal, Article 155 (3) of the Bszi. is replaced by a new paragraph (3) which reads as follows: "The department of judges of the Kúria corresponding to the section of the case of the judge to be seconded shall give its agreement shall exercise its right of consent to the secondment of a judge to the Kúria."

¹⁰⁴ Article 131 of the Bszi.

¹⁰⁵ Article 131(a) of the Bszi., in conjunction with Article 132 (4a) of the Bszi.

¹⁰⁶ Article 131 (a) of the Bszi.

The Proposal therefore only partially fulfils the milestone. Our proposal is, therefore, as follows:

- **in the case of chairs and vice-chairs of Kúria departments of judges and presiding judges, the judicial council of the Kúria should have a binding opinion;**
- **in the case of the Secretary General of the Kúria, all the departments of judges of the Kúria should have binding opinion;**
- **in the case of the Kúria Vice-President, the judicial council of the Kúria and all the Kúria departments of judges should have a binding opinion.**

Without the above, the milestone will not be achieved.

III.8. Non-discretionary rules on the substitution of judicial leaders

(A) The envisaged milestone

„Establish in the law non-discretionary rules on the designation of ad interim court presidents through a pre-set order of positions within a court as follows:

- (i) in the absence of a court president, the president's competences are exercised by the vice-president;*
- (ii) in the absence of a vice-president, the president's competences are exercised by the chair of a department of judges with the longest tenure as a judge;*
- (iii) in the absence of a chair of department, the president's competences are exercised by the presiding judge with the longest tenure as a judge.”¹⁰⁷*

(B) Proposed measures

According to the Proposal, from 31 March 2023 onwards, (i) **Article 123 of the Bszi.** will be amended with a new 1(a) paragraph¹⁰⁸ and (ii) **Article 123(2) of the Bszi.** shall be replaced by a new provision [Proposal § 37(2)].¹⁰⁹

(C) Evaluation of the proposed measures

The Proposal also covers the substitution of the President and Vice-President of district courts, in addition to the milestone, where further rules need to be defined, given that there is no chair of department of judges and presiding judges in a district court, nor necessarily a head of group. The milestone is achieved on this point in the Proposal.

¹⁰⁷ Component C9.R15 (f) of the Annex.

¹⁰⁸ According to Article 37 (1) of the Proposal, Article 123(1a) is inserted to the Bszi. as follows: *'If the Vice-President is prevented from attending, including in the case of vacancy, the President shall be replaced by the chair of department of judges with the longest judicial service. If the chairs of the departments of judges is prevented from attending, including when the post is vacant, the President shall be replaced by the presiding judge who has held the office of presiding judge for the longest period. In the case of a district court, if the vice-chairman is prevented from attending, including when the post is vacant, the chairman shall be replaced by the head of group with the longest judicial service. If there is no head of group in the district court or if the heads of groups are prevented from exercising their functions, including when the post is vacant, the President shall be replaced by the judge with the longest period of judicial service.'*

¹⁰⁹ According to Article 37 (2) of the Proposal, Article 123 (2) of the Bszi. shall be replaced by the following provision: *'(2) Unless otherwise provided by law, the Kúria President shall be replaced by the Vice-Presidents of the Kúria in the order determined by the Kúria President in the event of his/her being prevented from attending to his/her duties, except in the event of the office not being filled. If the office of the Kúria President is vacant - with the exception of § 115(4) - the Kúria President shall be replaced by the Vice President who has the longest period of service as a Kúria judge. In the event of the Vice-Presidents of the Kúria being prevented from attending, including in the event of the office not being filled, the Kúria President shall be replaced by the chair of department of judges with the longest judicial service. If the chairs of departments of judges are prevented from attending, including in the event of vacancy, the Kúria President shall be replaced by the presiding judge who has held the office of presiding judge for the longest period of time.'*

III.9. Reporting obligations of the NOJ President

(A) The envisaged milestone

*"The legislative amendments shall provide that the NJC shall determine the structure of the biannual report of the NOJ President."*¹¹⁰

(B) Proposed measures

According to the Proposal, from 31 March 2023 (i) **Article 76(8)(a) of the Bszi.** is amended [Proposal § 22(8)],¹¹¹ (ii) **Article 103 of the Bszi.** is amended by adding a new paragraph (4a) [Proposal § 28(6)].¹¹²

(C) Evaluation of the proposed measures

In the past, there have been several disputes between the NOJ President and the NJC as to whether the information provided by the NOJ President to the NJC should expressly be accepted by the NJC,¹¹³ acknowledged in a formal decision or should not be decided upon.¹¹⁴ According to the NOJ President, there is no normative basis empowering the NJC to accept the information provided by the NOJ President.

In order to clarify this, given that the milestone aims to strengthen the NJC and its powers to effectively counterbalance the powers of the NOJ President, it is proposed that, instead of providing information, the NOJ President should report to the NOJ, as required in the NJC decision, even on several occasions.

It is suggested that Article 76(8)(a) of the Bszi. should be amended as follows: "[*(8) The NOJ President, in his/her function of providing information*] (*a*) report to the NJC every six months on its activities, in a report prepared with a structure determined by the NJC,"

Furthermore, we propose an amendment to **Article 103 of the Bszi.**, by adding the following (4a) paragraph: "*The NJC shall determine the structure of the report in the area of information with regard to the obligation of the NOJ President to report to the NJC on a semi-annual basis and shall adopt the report. In the event of non-acceptance of the report, the NOJ President shall be obliged to amend the report and to report again to the NJC as provided for in the decision of the NJC.*"

¹¹⁰ Component C9.R15. (b) of the Annex.

¹¹¹ According to Article 22 (8) of the Proposal, Article 76(8)(a) of the Bszi. is replaced by the following provision: [The NOJ President, in his/her function of providing information] "(a) shall inform the NOJ of his/her activities every six months in an information note with a structure determined by the NOJ,"

¹¹² According to Article 28 (6) of the Proposal, a new Article 103(4a) is inserted in the Bszi. as follows: "*The NJC shall determine the structure of the information in the field of information with regard to the obligation of the NOJ President to provide information to the NJC every six months.*"

¹¹³ According to the Decision of the National Judicial Council 64/2020 (6 May) on the information provided by the President of the National Office for the Judiciary on its activities in the second half of 2019: "The National Judicial Council adopts the information provided by the President of the National Office for the Judiciary on its activities in the second half of 2019."

¹¹⁴ See NJC meeting of 2 December 2020, pp. 7-12.

III.10. The NJC's binding opinion on regulations

(A) The envisaged milestone

"Regarding regulations, the legislative amendments shall ensure that the NJC shall give a motivated binding opinion on the following matters: [...]

- (ii) the detailed conditions for the award of bonuses and other benefits to judges and court executives;*
- (iii) the rules relating to the training system for judges;*
- (iv) the data sheet and methods for the assessment of the workload of judges, as well as the determination of the 'national workload for contentious and non-contentious proceedings broken down according to judicial level and case types',*
- (v) the number of judicial posts in each court within the framework determined in the annual budget, including the Kúria, and their departments."*¹¹⁵

(B) Proposed measures

The Proposal provides that from 31 March 2023,

- in relation to bonuses and other benefits, (i) **Article 189(1) of the Bjt.** [Proposal § 56]¹¹⁶ and (ii) the provisions of **Article 189(3) of the Bjt.** [Proposal § 56];¹¹⁷
- in relation to the system of training of judges, (iii) **Article 76(7) of the Bszi.** [Proposal § 22(7)],¹¹⁸ (iv) **Article 103(4) of the Bszi.** [Proposal § 28(5)]¹¹⁹ and (v) the amendment of **Article 45(4) of the Bjt.** [Proposal § 53];¹²⁰
- in relation to the measurement of workload, (vi) **Article 76(4)(e) of the Bszi.** [Proposal § 22(4)];¹²¹
- in relation to the number of judges and judicial employees (vii) amend **Article of the Bszi. 76(4)(a)** [Proposal § 22(3)].¹²²

¹¹⁵ Component C9.R15. (a) of the Annex.

¹¹⁶ According to Article 56 of the Proposal, Article 189(1) of the Bjt. shall be replaced by the following provision: '(1) Judges may, subject to the appropriations provided for in the annual budgets of the courts, be granted other allowances in addition to the cafeteria system, in particular: [...] h) a bonus for outstanding performance and for the effective performance of his/her duties.'

¹¹⁷ According to Article 56 of the Proposal, Article 189(3) of the Bjt. shall be replaced by the following provision: '(3) The amount and detailed conditions of the allowances provided for in paragraphs (1) and (2), including the conditions for the granting of allowances, shall be laid down by the President of the NOJ, in cooperation with the representative bodies and with the consent of the NJC, in regulations.'

¹¹⁸ According to Article 22 (7) of the Proposal, Article 76(7) of the Bszi. shall be replaced by the following provision: '[The President of the NOJ, in his/her functions relating to training] a) decides on the central training tasks and supervises their implementation, and determines the regional training tasks, b) determines, with the consent of the NJC, the rules of the training system for judges, c) determines the rules of the fulfilment of the training obligation of judges, d) appoints the head of the Hungarian Academy of Justice, e) determines the system of the uniform central training of court clerks.'

¹¹⁹ According to Article 28 (5) of the Proposal, Article 103(4) of the Bszi. is replaced by the following provision: '(4) The NJC shall, in the field of training, a) propose the central training plan, b) give its opinion on the rules for the fulfilment of the training obligations of judges, and c) exercise the right of consent with regard to the rules of the training system for judges.'

¹²⁰ According to Article 53 of the Proposal, Article 45(4) of the Bjt. shall be replaced by the following provision: *The rules for the system of training under paragraph 1 shall be laid down by the NOJ President in regulations issued with the consent of the NJC, and the rules for the fulfilment of the training obligation under paragraph 1 shall be laid down in regulations.*

¹²¹ According to Article 22 (4) of the Proposal, Article 76(4)(e) of the Bszi. is replaced by the following provision: [The NOJ President, in his/her function of statistical data collection, case allocation and workload measurement] "shall determine and, if necessary, review annually with the consent of the NOJ the data sheets and methods for measuring the judicial workload, review the development of the workload and national caseload data at least once a year, and determine the average national workload of litigation and non-litigation proceedings at court level and by case division."

¹²² According to Article 22 (3) of the Proposal, Article 76 (4)(a) of the Bszi. shall be replaced by the following: [The NOJ President shall, in his or her function of statistical data collection, case allocation and workload measurement] "determine, on the basis of the staffing estimates of the budget chapter of the Central Budget Act for courts and of the indicators of the average national workload in litigation and non-litigation,

(C) Evaluation of the proposed measures

The Proposal fulfils the milestone. However, as pointed out in the European Commission's 2022 Rule of Law Report, the NOJ President and the court presidents can decide on the bonuses to be rewarded to judges without any legal restrictions, and there are no clear criteria based on what kind of judicial activity bonus can be given.¹²³ This is partly due to the permissive phrasing of Article 189(1) of the Bjt. and that it does not provide an exhaustive list for the types of bonuses that can be rewarded. We therefore recommend the deletion of the phrase "*in particular*" from Article 189 (1) of the Bjt.

III.11. Defending the prerogatives and enforcing the rights of the NJC

(A) The envisaged milestone

*"establish the right for the NJC to seize the competent court and the Constitutional Court to defend its prerogatives and enforce its rights."*¹²⁴

(B) Proposed measures

With effect from 31 March 2023, the Bszi. will be supplemented by Articles 108/A and 108/B, according to which the NJC will have the right to appeal to the Constitutional Court if "*the NOJ President or the Kúria President does not fulfil their statutory obligation towards the NJC*" (Article 108/A of the Bszi.). In parallel, the NOJ President and the Kúria President will also have the right to appeal to the Constitutional Court if the NJC does not fulfil its obligation towards them (Article 108/B of the Bszi.).

(C) Evaluation of the proposed measures

According to current legislation, the most powerful power of the NJC against the NOJ President is to request the Parliament to remove the NOJ President from office if the NOJ President fails to perform the duties of his office for a period exceeding 90 days for reasons attributable to him, or if he has become unworthy of his office due to any act, conduct or omission (Article 74 of the Bszi.). The other tool in the hands of the NJC is to issue an official warning to the NOJ President "*if necessary*".¹²⁵

There have been several occasions in the past when there was a dispute between the members of the NJC, or between the NJC and the NOJ President about what falls within the supervisory competence of the NJC. For example, the NJC is only empowered to issue an official warning "*in the field of general central administration*" and the NJC could not refer to any decision-making body to decide what should fall under the scope of "*general central administration*". But even if the NJC did issue an official

the necessary number of judicial and judicial staff of the courts, and in the case of courts of law, of the district courts in their jurisdiction, with the agreement of the NOJ, taking into account the limits set out in the Central Budget Act,"

¹²³ European Commission, [Rule of Law Report 2022 Country Chapter - The State of the Rule of Law in Hungary](#), 13 July 2022: "continued concern about the discretionary awarding of rewards by judicial leaders"

¹²⁴ Component C9.R15. (d) of the Annex.

¹²⁵ Article 103(1)(a) of the Bszi. states that "*the NOJ shall, in the field of general central administration, (a) monitor the central administrative activities of the NOJ President and, if necessary, issue an official warning to the NOJ President, [...]*"

warning, the official warning is a very weak tool in the hands of the NJC, as illustrated by the fact that its warnings were not effective (for example, in 2022 the NJC issued an official warning twice, but with no result). Finally, it is also a problem that the strongest option, the removal from office, puts the judgement of the misconduct of the NOJ President in the hands of a political body, the Parliament.

The Proposal's solution is that the NJC can appeal to the Constitutional Court if the NOJ President or the Kúria President does not fulfil his/her obligations towards the NJC. In order to ensure the effectiveness of the remedy, the independence of the Constitutional Court needs to be strengthened by law. Without this, it is questionable how effective remedy the newly introduced legal route to the Constitutional Court will be in the protection of the powers and rights of the NJC.

As stated above, it is questionable whether the Proposal achieves the milestone.

IV. Amendment of Act CLXII of 2011 on the Legal Status and Remuneration of Judges (Bjt.)

IV.1. The points system for the assessment of applications for judicial posts

(A) The envisaged milestone

"Legislative amendments shall enter into force and start being applied ensuring the strengthening of the role and powers of the National Judicial Council (NJC) to effectively counterbalance the powers of the President of the National Office for the Judiciary (NOJ). The legislative amendments shall: a) establish stronger powers for the NJC so that it can effectively exercise its constitutional role in supervising the central administration of courts, while maintaining the Council's independence based on its members being elected by judges. [...] Regarding regulations, the legislative amendments shall ensure that the NJC shall give a motivated binding opinion on the following matters: (i) the points system for the assessment of applications for judicial posts within the legislative framework."¹²⁶

(B) Proposed measures

According to the Proposal, with effect from 31 March 2023, (i) a new provision will replace **Article 14(4) of the Bjt.** [Proposal § 48],¹²⁷ and (ii) **Article 103(3) of the Bszi.** will be supplemented [Proposal § 28(4)].¹²⁸

According to the Explanatory Memorandum, the NJC "exercises its right to consent with respect to the opinion of the NOJ President provided during the preparation of the Ministerial Decree on the detailed rules for the evaluation of judicial candidates and the scores to be given in the ranking of candidates."

¹²⁶ Component C9.R15. (a)(i) of the Annex with respect to regulations.

¹²⁷ According to Article 48 of the Proposal, Article 14(4) of the Bjt. is replaced by the following provision: *'When determining the scores, equal opportunities for candidates from within and outside the court system shall be ensured. The NJC shall have the right of assent to the opinion of the NOJ President in the preparation of the Regulation.'*

¹²⁸ According to Article 28 (4) of the Proposal, Article 103(3) of the Bszi. is amended by adding the following point (r): *'The NJC shall, in the field of personnel: [...] (r) exercise the right of consent with regard to the opinion of the President of the NJC in the preparation of the Regulation of the Minister of Justice on the detailed rules for the evaluation of judicial candidatures and the scores to be given in the ranking of candidates.'*

(C) Evaluation of the proposed measures

The introduction of the NJC's right of consent and its binding opinion in this area does not bring any substantive change since the decision lies in the hands of the Minister of Justice. The opinion of the NJC only binds the NOJ President as to how he/she will give his/her opinion on the Minister of Justice's decree. The fact that the law explicitly guarantees equal opportunities for applicants from within and outside the judicial system does not in itself eliminate all the concerns raised with respect to the currently effective Decree 7/2011 (III.4.) of the Minister of Justice (e.g., in the evaluation of applications, greater emphasis should be placed on the competencies that are essential for holding judicial office).¹²⁹

Previous experience has shown that **the NOJ President and the NJC have proposed** amendments to the decree, **but the Ministry has not taken a decision on the proposals.** If the opinion of the NJC is only binding on the NOJ President, the Minister of Justice can continue to ignore the opinion of the representatives of the judiciary without consequences.

The selection of judges is crucial for the independence of the judiciary. It would therefore be a **fundamental guarantee** that the criteria and the scoring system for the evaluation of applications for judicial posts should in the **future be regulated by law rather than by ministerial decree.** This higher-level legal instrument would require the drafting of a new law, which would allow the NJC to play a meaningful role in revising the current points system, in line with the objective of this milestone.

IV.2. Declaring judicial appointment procedures unsuccessful

(A) The envisaged milestone

"Legislative amendments shall enter into force and start being applied ensuring the strengthening of the role and powers of the National Judicial Council (NJC) to effectively counterbalance the powers of the President of the National Office for the Judiciary (NOJ). The legislative amendments shall: a) establish stronger powers for the NJC so that it can effectively exercise its constitutional role in supervising the central administration of courts, while maintaining the Council's independence based on its members being elected by judges. [...]. Regarding individual decisions, the legislative amendments shall ensure that the NJC shall give a motivated binding opinion on the following matters: (i) the annulment, by the NOJ President, of appointment procedures for judicial and court executive positions where there is at least one eligible candidate who has been supported by the judges of the given court;¹³⁰ and „ensuring that the strengthened powers of the NJC referred to in milestone 213 also apply in relation to the Kúria President when acting as appointing authority (in line with Act CLXII of 2011)."¹³¹

(B) Proposed measures

¹²⁹ <https://www.mabie.hu/index.php/kozlemenyek/339-a-mabie-allasfoglalasa-a-biroi-allaspalyazatok-elbiralasanak-reszletes-szabalyairol-es-a-palyazati-rangsor-kialkitasa-soran-adhato-pontszamokrol-szolo-7-2011-iii-4-kim-rendelet-modositasarol>

¹³⁰ Component C9.R15 (a)(i) of the Annex for individual decisions.

¹³¹ Component C9.R16 (c) (iv) of the Annex for individual decisions.

According to the Proposal, with effect from 31 March 2023, (i) **Article 18 of the Bjt. is amended by adding a new paragraph (6)** [Proposal § 49],¹³² (ii) **Article 103(3) of the Bszi. is amended by adding a point (p)** [Proposal § 28(4)],¹³³ **Article 103(3) of the Bszi.** is amended by adding a point (q) [Proposal § 28(4)],¹³⁴ (iii) **Article 133 of the Bszi.** is amended by adding a **new paragraph (1a)** [Proposal § 41(1)],¹³⁵ (iii) **Article 133(2) of the Bszi.** is replaced by a new provision [Proposal § 41(2)].¹³⁶

(C) Evaluation of the proposed measures

The milestone is achieved. However, in case of declaring an appointment procedure unsuccessful, it is essential that strict legal deadlines apply to the NOJ President to launch a new application procedure. Without this, a necessary vacancy may remain unfilled due to the NOJ President's omission. Accordingly, it is proposed that (i) Article 20(2) of the Bjt. be amended as follows: "*In the event of invalidity for the reasons set out in paragraph (1)(a) and (b)(ba) to (bc), a new call for applications shall be published within 15 days of the date of the annulment.*" In addition, Article 133(1) of the Bszi. should be amended as follows: "*An application procedure shall be deemed as unsuccessful if the appointing authority does not accept any of the applications. If an application procedure is unsuccessful, a new application procedure shall be opened within 15 days from the date on which the application procedure was declared unsuccessful.*"

IV.3. Secondment of judges ("kirendelés")

(A) The envisaged milestone

*"The legislative amendments shall ensure that the NJC shall give a motivated binding opinion on the following matters: [...] the transfer of judges, including secondments, to another court by the NOJ President referred to in Articles 27, 27/A, 31 and 32 of Act CLXII of 2011, except for secondments to the NOJ."*¹³⁷

¹³² According to Article 49 of the Proposal, the following paragraph 6 is added to Article 18 of the Bjt.: "If at least one candidate who has submitted a valid application in accordance with the conditions of the application and who is in the ranking list of the Council of the Judiciary has participated in the competition and the President of the NJC intends to declare the competition inconclusive, he shall first request the consent of the NJC and the declaration of inconclusiveness may be made with the consent of the NJC."

¹³³ According to Article 28 (4) of the Proposal, the following point p) shall be added to Article 103(3) of the Bszi.: [The NJC in the field of personnel] [...] "p) shall exercise the right of consent in respect of the decision of the NOJ President and the Kúria President declaring a judicial vacancy inconclusive, if at least one candidate who was in the ranking list of the Judicial Council and who submitted a valid application in accordance with the conditions of the vacancy participated in the vacancy."

¹³⁴ According to Article 28 (4) of the Proposal, the following point (q) is added to Article 103(3) of the Bszi.: [The NJC in the personnel field] "shall exercise the right of consent to the decision of the NOJ President and the Kúria President declaring a competition for the position of court leader inconclusive, if at least one candidate who has submitted a valid application in accordance with the criteria for the competition and who has been supported by the reviewing body or bodies has participated in the competition".

¹³⁵ According to Article 41 (1) of the Proposal, the following paragraph 1a is added to Article 133(1): '(1a) If the NOJ President or the Kúria President has received at least one valid application for a post which is subject to the powers of appointment of the NOJ President or the President of the Kúria, supported by the opinion-forming body or bodies, and the NOJ President or the Kúria President wishes to declare the application inconclusive, he/she shall first request the consent of the NOJ and the declaration of inconclusiveness may be made with the consent of the NOJ.'

¹³⁶ According to Article 41 (2) of the Proposal, Article 133(2) of the Bszi. is replaced by the following provision: '(2) In the event of the unsuccessful outcome of a new tender, the person entitled to be appointed may fill a judicial leadership post, with the exception of the posts of President and Vice-President of the Court, by way of mandate for a maximum period of one year.'

¹³⁷ Component C9.R15 (a) (ii) of the Annex for individual decisions.

(B) Proposed measures

With effect from 31 March 2023, (i) Article 76(5)(h) of the Bszi. is amended [Proposal § 22(6)],¹³⁸ (ii) Article 103(3) of the Bszi. is amended by the addition of a new point (n) [Proposal § 28(4)],¹³⁹ (iii) Article 32 of the Bjt. is amended by adding new (1a) and (1b) paragraphs.¹⁴⁰

(C) Evaluation of the proposed measures

For the achievement of this milestone, it is essential to oblige the NOJ President by law to state the reasons for his/her decisions as general rule. In absence of the above obligation, the supervisory function of the NJC will be disabled, as the criteria based on which the decision on the secondment took place will not be available for the NJC. We also recommend to establish by law the objective criteria that limit the discretionary power of administrative leaders in relation to secondments, in particular the criteria for applying the legal basis of secondment, the designation of the receiving court, the selection of the seconded judge or the term of the secondment should be established by law.¹⁴¹ We also recommend to extend the right to consent of the NJC so that it expressly covers the prolongation and termination of secondments.

IV.4. Transfer of judges ("beosztás")

(A) The envisaged milestone

"The legislative amendments shall ensure that the NJC shall give a motivated binding opinion on the following matters: [...] the transfer of judges, including secondments, to another court by the NOJ President referred to in Sections 27, 27/A, 31 and 32 of Act CLXII of 2011, except for secondments to the NOJ."

(B) Proposed measures

With effect from 31 March 2023, (i) Article 76(5)(f) of the Bszi. is amended¹⁴² and Article 103(3) of the Bszi. are supplemented by a new point (nb).¹⁴³

¹³⁸ According to Article 22 (6) of the Proposal, Article 76(5) of the Bszi. is amended as follows: "(The President of the Tribunal shall, in his or her function in relation to personnel matters) 'h) decide, with the consent of the NJC, and in the case of secondment to the Kúria, with the consent of the Judicial Council of the Kúria and the department of judges of the Kúria of the case division corresponding to the case division of the judge to be seconded, on the secondment of the judge to another place of employment if the secondment is not between the Tribunal and a district court within its jurisdiction or between district courts within the jurisdiction of the Tribunal.'"

¹³⁹ According to Article 28 (4) of the Proposal, the following shall be added to Article 103(3) of the Bszi.: "(The NJC shall exercise the right of consent in the field of staff) n) to the decision of the NOJ President on the assignment of a judge in the exercise of his functions under Article 76(5) [...] nc) h),

¹⁴⁰ According to § 53 of the Proposal, the following paragraph shall be added to Article 32 of the Bjt.: "(1a) If the NOJ President intends to second a judge, he shall first obtain the consent of the NJC and the secondment may be made with the consent of the NJC."

¹⁴¹ For problems with secondment, see:

<https://helsinki.hu/wp-content/uploads/2022/09/Background-Paper-on-the-Secondment-of-Judges-in-Hungary-updated-06092022.pdf>

¹⁴² According to Article 22 (5) of the Proposal, Article 76(5)(f) of the Bszi. is amended as follows: '(The NOJ President, in his/her capacity as the NOJ President in matters of personnel) f) may assign a judge to the Kúria, to the NOJ and to the body specified in the Act on the Status and Remuneration of Judges (hereinafter referred to as the body concerned), with the consent of the NOJ, except for assignment to the NOJ, or decide on the termination of the assignment and the reassignment of the judge to an actual judicial post.'

¹⁴³ According to Article 28 (4) of the Proposal, Article 103(3) of the Bszi. is amended by adding a new point (nb): (The NJC shall exercise the right of consent in the personnel area with regard to the decision of the NOJ President on the assignment of a judge to the Kúria and to the body concerned in the exercise of his or her functions under Article 76(5) [...] point (nb)(f))."

(C) Evaluation of the proposed measures

For the achievement of this milestone, it is essential to oblige the NOJ President by law to state the reasons for his/her decisions as general rule. In absence of the above obligation, the supervisory function of the NJC will be disabled, as the criteria based on which the decision on the transfer took place will not be available for the NJC. We recommend abolishing the institution of transfer to other state organs. Failing this, laying down the guarantee rules of the criteria of transfer together with the extension of the right to consent of the NJC so that it covers the termination of the transfer as well. It is problematic, that Article 55 of the Proposal continues to allow for judge's appointment as presiding judge without an application proceeding after the termination of the transfer, which still allows for the possibility of obtaining a judicial leadership position by circumventing the normal application system. In order to ensure the merit-based promotion of judges, the possibility to be appointed to the post of presiding judge "*without an appointment procedure*" should be deleted from Article 55 of the Proposal.

IV.5. Assignment of judges ("kijelölés")

(A) The envisaged milestone

*"The legislative amendments shall ensure that the NJC shall give a motivated binding opinion [...] the removal, by the NOJ President, of judges without their consent from the pool of judges that hear special cases, including administrative cases."*¹⁴⁴

(B) Proposed measures

With effect from 31 March 2023, Article 76(5)(e) of the Bszi. is amended [Proposal § 22(5)].¹⁴⁵

(C) Evaluation of the proposed measures

For the achievement of this milestone, it is essential to oblige the NOJ President by law to state the reasons for his/her decisions as general rule. In absence of the above obligation, the supervisory function of the NJC will be disabled, as the criteria serving as the basis of the decision on the assignment will not be available for the NJC. In general, we consider the use of the institution of assignment to be unjustified in relation to the administrative branch of adjudication. The solution was introduced on 1 April 2020, simultaneously with the abolition of administrative and labour courts, but, in contrast to judicial assignments within the criminal branch (e.g., an assignment as judge dealing with juvenile cases), the function of assignments is not clear in the administrative branch of adjudication, particularly because administrative judicial posts are filled by way of ordinary application procedures. The use of assignment for an entire branch of adjudication could lead to

¹⁴⁴ Component C9.R15 (a) (iii) of the Annex for individual decisions.

¹⁴⁵ Paragraph (5) of Article 22 of the Proposal amends Article 76 (5) (e) of the Bszi.: *"e) designate - as provided for in the Act on the Status and Remuneration of Judges - the judge who is to be appointed in accordance with the provisions of Act XC of 2017 on Criminal Procedure No 680. § (4) of the Criminal Procedure Act of 2017, judges and judges acting as court mediators, as well as judges acting in administrative and labour cases at the Metropolitan Court of Appeal upon the proposal of the President of the Metropolitan Court of Appeal, and at the proposal of the President of the Tribunal, and decides on the termination of the appointment in accordance with the Act on the Status and Remuneration of Judges, in the case of termination without the consent of the judge, with the consent of the NJC."*

misuse of powers, since the failure or refusal to assign a judge to an administrative judicial post may prevent the filling of the judicial post which has been awarded via a formal application procedure. We recommend abolishing the institution of assignment, or, failing this, laying down the guarantee rules of the criteria for assignment in law and extending the right of consent of the NJC so that it covers the decision on assignment, in addition to its termination.

V. Amendment of Act XC of 2017 on Criminal Procedure (Be.)

V.1. Implementation of the judgment of the Court of Justice of the European Union (CJEU) delivered in Case C-564/19¹⁴⁶

(A) The envisaged milestone

„Before the submission of the first payment request under the recovery and resilience plan, legislative amendments shall enter into force and start being applied ensuring that: (i) Sections 666 et seq. of the Criminal Procedure Code are amended in order to remove the possibility for the Kúria to review the legality of the decision of a judge to make a preliminary reference to the Court of Justice of the European Union, and (ii) Section 490 of the Criminal Procedure Code on staying the proceedings is amended in order to remove any obstacle to a court to make a preliminary reference in line with Article 267 TFEU.”¹⁴⁷

(B) Proposed measures

Two provisions are amended for the purpose of implementation with effect from 31 March 2023: (i) a new paragraph (4) is added to Article 490 of the Be. [Proposal § 61],¹⁴⁸ (ii) a new paragraph (2a) is added to Article 667 of the Be. [Proposal § 65].¹⁴⁹

According to the Explanatory Memorandum to the provisions, "*The Proposal, by amending Act XC of 2017 on Criminal Procedure, stipulates that there is no right of appeal against the order on the initiation of the preliminary ruling procedure or the rejection of the motion for the initiation of the preliminary ruling procedure. In this way, the Proposal clarifies that the right of Hungarian judges to refer a request for a preliminary ruling to the Court of Justice of the European Union, which is derived from the EU Treaties, is not limited by internal legal instruments.*"

(C) Evaluation of the proposed measures

In relation to the measures taken to fulfil the milestone, the problem is that decision Bt.III.838/2019/11 of the Kúria, which was also published earlier as EBH2019.B.22. gained precedential force and as

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<https://Kuria.europa.eu/juris/document/document.jsf;jsessionid=642B74353C3D61EF94193B74317206F4?text=&docid=249861&pageIndex=0&doLang=hu&mode=req&dir=&occ=first&part=1&cid=602>

147 Component C9.R17 of the Annex.

148 According to Article 61 of the Proposal, the following paragraph (4) is added to Article 490 of the Be.: '(4) No appeal shall lie against the order on the initiation of the preliminary ruling procedure or the rejection of the motion for the initiation of the preliminary ruling procedure.'

149 According to Article 65 of the Proposal, the following paragraph (2a) is added to Article 667 of the Be.: '(2a) No appeal may be lodged against an order issued pursuant to Article 490.'

such, despite the procedural amendments above, remains binding - in a substantive sense - i.e., courts must apply it and it can be a reference in the judge's evaluation if a judge applies to the CJEU for a preliminary ruling despite the precedent set in this decision. In its reply¹⁵⁰ to a freedom of information request by the Hungarian Helsinki Committee, the Kúria did not answer the question of which part of the order should be considered to have precedential value. In his 2019 report, the former Kúria President summarised the principal content of the decision, which was previously registered as a court decision in principle, as follows: "*I. Criminal proceedings may only be suspended due to the initiation of a preliminary ruling procedure if the decision on the case cannot be taken without answering the questions raised [Art. 490 (1) of Act XC of 2017.] II. Suspension of criminal proceedings is unlawful if the request to initiate the preliminary ruling procedure does not concern the interpretation or validity of European Community norms, acts of EU bodies, institutions or agencies, but questions unrelated to the subject matter of the case and not affecting the outcome of the case pending before the court [§ 490 (1) of Act XC of 2017.]*"¹⁵¹

In order to achieve this milestone, it is essential that the legislator excludes the applicability of the precedential findings of decision Bt.III.838/2019/11 by law.

VI. Reforms introduced that are not related to the requirements of the milestones

VI.1. Unjustified restrictions on the promotion of NJC members

Article 34 of the Proposal amends the conditions for terminating membership in the NJC.¹⁵² According to the current legislation, NJC membership shall terminate "*g) if the assignment of the level of the court at the time of election is changed and, as a result, the number of elected judges representing that level exceeds the number specified in Article 91(1).*" (According to Article 91(1) of the Bszi., the Conference of Delegates entitled to elect the members of the NJC shall elect from among the delegates **1 judge from a Court of Appeal, 6 judges from regional courts and 7 district court judges.**) While the current ground for termination is not linked to a change in the judicial status of the NJC member *per se*, but to **a change in the overall composition of the NJC** as a self-administrative (and representative) body of the judiciary as a result, the amended rules require no such result, i.e., the termination ground linked to the promotion of an NJC member does not protect the representative legitimacy of the NJC as a self-administration body, but purely limits the career moves of NJC members, in a totally unjustified manner, which may ultimately have a deterrent effect on all judges who consider becoming a member of the NJC.

¹⁵⁰ <https://helsinki.hu/wp-content/uploads/2022/11/Kuria-valasza-kozerdeku-adatigenylesre-20220830.pdf>

¹⁵¹ <https://www.parlament.hu/irom4/1/11035/11035.pdf>

¹⁵² According to the current conditions: Article 111 (1) The office of the elected member of the NJC shall cease: a) at the end of the term of office,
b) termination of judicial service, c) resignation from the NJC, d) a final finding of disciplinary or criminal liability, e) if the go. § (2) d) and e) of the NJC and has not ceased to exist within 30 days, f) if the member has been excluded from the membership of the NJC by a decision of the NJC taken by a two-thirds majority due to culpable breach, prolonged failure to perform or serious neglect of his/her duties as a member of the NJC, or g) if the assignment of the member to the judicial level at the time of election changes and as a result the number of elected members representing that level falls below the limit of § 91. § (2) The membership of the Kúria President in the NJC shall cease if the mandate of the Kúria President is terminated."

According to the regulation that will enter into force on 31 March 2023, the office of an NJC member will [automatically] cease [...] [...] "g) if ga) his/her position at the judicial level at the time of election changes, [he/she is promoted] gb) he/she is appointed as a judicial leader after his/her election, except for the appointment of the President of the Chamber, [he/she is appointed as a judicial leader, e.g. is appointed to a higher judicial management position than the judicial management position held at the time of their election." The Explanatory Memorandum to the Proposal states that "*given the fact that the NJC is granted additional powers over and above its existing powers with regard to judicial and court management nominations, the Proposal establishes additional conflict of interest rules* for NJC members." Our proposed text for the amendment of Article 111 (1) (ga) of the Bszi. is as follows: "ga) if the assignment to the judicial level at the time of election changes and, as a result, the number of elected judges representing that level exceeds the number specified in Article 91 (1)."

VI.2. Five-member chambers of the Kúria in civil and criminal matters

(1) **chambers of five judges in civil cases before the Kúria.** With effect from 31 March 2023, Article 9(5) of Act CXXX of 2016 on the Code of Civil Procedure (CCP) is amended [Proposal § 6o]: '*The Kúria shall sit in a chamber of five professional judges. The presiding judge may exceptionally refer the case to a chamber of three professional judges.*'

(2) **Chambers of five judges in criminal cases before the Kúria.** With effect from 31 March 2023, section 621 of the Criminal Procedures Code is amended as follows "*(2a) The Kúria, as a court of third instance, shall sit in a chamber of five professional judges. In the cases specified in subsections (1)(a) and (b), or if the appeal has been lodged pursuant to section 615(3)(b) of the Criminal Procedures Code., it shall decide in a chamber of three professional judges.*"

According to the case allocation scheme of the Kúria in force from 1 January 2023, the Kúria will now sit in chambers of five professional judges not only in administrative cases but also in civil and criminal cases. While in the case of administrative proceedings, the amendment to the Code of Civil Procedure in force since 1 March 2022 provides for five-member chambers, in criminal and civil cases, this is the result of a decision by András Zs. Varga, the President of the Kúria, with effect from 1 January 2023 based on the authorization received in Article 10(2) of the Bszi. The Proposal, therefore, seeks to confirm the decision of the Kúria President by means of an amendment to the law. As with the case allocation scheme, the Proposal does not provide any concrete and factual justification for the five-member chamber procedure, which is problematic in itself. According to the Explanatory Memorandum, "*in administrative cases, the Kúria already has a chamber of five professional judges. This model has proved its worth in practice in the operation of the Kúria, and the Proposal, by amending the Civil Procedure Code, makes it a general rule in civil proceedings that the Kúria should sit in a chamber of five professional judges, making the three-member chamber an exception.*"

The potential dangers of proceeding before a chamber of five professional judges:

- (i) provides a new opportunity to shift judges to the Kúria (so far, the most numerous shifts have been to the section of administrative cases),
- (ii) provides another opportunity to "redistribute" the composition of the chambers through the allocation of cases at the Kúria.

There are no objective conditions and no obligation to give reasons for applying the exception rule (of a chamber of three judges) proposed in the Civil Procedure Code. For problems with five-member chambers and with the allocation of cases at the Kúria in general, see the latest opinion of the Venice Commission of November 2021.¹⁵³

VII. Further proposed amendments

Further amendments are required to create the regulatory and operational environment that the reform seeks to achieve.

VII.1. The obligation of the NOJ President to state detailed reasons should be the general rule

In line with the milestones, the Proposal would amend Article 104 of the Bszi. by adding the following paragraph 3: "*The NJC shall give detailed reasons for decisions taken under its right of consent and for decisions taken under its mandatory right of opinion.*"

However, this leaves Article 77(2) of the Bszi. intact, according to which the NOJ President shall give reasons for his decisions only "where applicable" and not "in detail" as required of the NJC. This also means that in many cases the NJC cannot exercise a genuine review of the decision of the NOJ President, since it is not aware of the detailed reasons of the NOJ President's decision. As the Venice Commission has pointed out in its opinions¹⁵⁴, the current text leaves unnecessarily wide discretion to the NOJ President to decide on the depth of the reasons for his decisions, or whether he gives reasons at all. In order to ensure both the principle of good governance and the effective and real power of review of the NJC, it is essential that the Proposal establishes an obligation for the NOJ President to state the detailed reasons for all decisions taken by him/her. Accordingly, it is necessary to amend Article 77(2) of the Bszi.: '*The decisions of the NOJ President shall be communicated to the parties concerned in writing without delay and at the latest within 8 days. The NOJ President shall give detailed reasons for his decisions.*'"

VII.2. Ensuring the election of members and substitute members of the NJC

The current legal framework of the election of NJC members and substitutes is not conducive to the election of the missing NJC members or their substitutes by the judges. A serious problem in the past was the failure of the NOJ President to take action to reconvene the meeting of delegates to elect substitute members, despite a call from the NJC. In addition, it could also happen that, because of the influence of court presidents, the meeting of delegates proved inconclusive and, in the words of

¹⁵³ See Venice Commission, Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges Adopted by the Hungarian Parliament in December 2020, CDL-AD(2021)036, p. 7. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)036-e#](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)036-e#)

¹⁵⁴ See Venice Commission, Opinion on the Cardinal Acts on the Judiciary that Were Amended Following the Adoption of Opinion CDL-AD(2012)001, CDL-AD(2012)020, para 93.6. [https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD(2012)020-e) and Venice Commission, Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges Adopted by the Hungarian Parliament in December 2020, CDL-AD(2021)036, para 93.6. "6. *the obligation of the NOJ President to state the reasons of his or her decisions should be made a general rule; the limitation by the clause "where applicable" should be removed if it could be interpreted as giving discretion to the NOJ President whether or not to state reasons for his or her decisions;*" [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)036-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)036-e)

the NJC, "took place in scandalous circumstances and failing to carry out its task".¹⁵⁵ Court presidents and other judges loyal to them prevented the meeting of delegates from electing new NJC members, and some participants alleged that several procedural irregularities had occurred at the meeting of delegates. In addition, the NOJ President did not organise the next meeting of delegates until the summer of 2020, a year and a half after the failed meeting. There have also been cases where judges of a court have been unable to convene the judges' plenary meeting to elect delegates because of the resistance of the court president.¹⁵⁶

For this reason, safeguards must be included in the law to ensure that missing NJC members and substitutes can be elected by the delegates without further delay, in compliance with the law and without any external interference. The most effective way to ensure this is to delegate the organisation of the meetings of the judges' plenary meeting and of the delegates' meetings from the NOJ President and the court presidents to the NJC President, who will now be assisted by a Secretariat. The Proposal should also fill an important gap by laying down the rules and time limits for the organisation of judges' plenary meetings and delegates' meetings in the event of a reduction in the number of substitutes (Article 92 of the Bszi.).

To this end, we recommend the adoption of the following changes:

1. Article 90(2)(e) of the Bszi. should be amended to read that [A person shall not be eligible for election as a member of the NJC] "*e) who is a judicial leader falling under the appointment authority of the NOJ President or a relative of a judicial leader falling under the appointment authority of the NOJ President in accordance with the Code of Civil Procedure*". This would also ensure under Article 94(2) of the Bszi. that a court leader appointed by the NOJ President cannot become a delegate.
2. Article 96(1) of the Bszi. should be amended as follows: "The NJC president shall convene the judges' plenary meetings electing the delegates no later than 4 months before the expiry of the term of office of the NJC. In the case referred to in Article 92, the NJC president shall convene the judges' plenary meetings electing the delegates at short notice not later than 15 days after the number of substitutes has been reduced. In the event of the absence of a quorum, the judges' plenary meetings electing the delegates shall be reconvened within 15 days at the latest. The quorum of the resumed judges' plenary meetings electing the delegates shall be irrespective of the number of judges present."
3. Article 97 of the Bszi. should be amended as follows: '(1) Delegates shall send their curriculum vitae to the NJC president within 8 days of their election. (2) The NJC president shall invite the oldest delegate (hereinafter referred to as the 'President of the Delegates') to convene and chair the meeting of delegates. (3) At the same time as the invitation referred to in paragraph (2), the NJC president shall invite the nominating committee of 4 members - consisting of the oldest delegates of the Kúria, the regional courts of appeal, the regional courts, the district courts - in addition to forwarding the curricula vitae, to propose the members and substitute members of the NJC from amongst the delegates in accordance with Article 99(1)."

¹⁵⁵ <https://orszagosbiroitanacs.hu/a-hataskoreit-es-mukodesi-felteteleit-erinto-torvenyek-modositasat-javasolja-az-orszagos-biroitanacs/>

¹⁵⁶ https://nepszava.hu/3044104_nem-lat-hivatali-visszaelest-az-ugyeszseg

4. Article 98 (1) of the Bszi. should be amended as follows: "*The meeting of delegates shall be convened by the President of the Delegates, through the NJC president, no later than 2 months before the expiry of the term of office of the NJC or, in the case of Article 92, within 15 days of the invitation pursuant to Article 97 (2), and shall at the same time send the curricula vitae to the delegates.*"
5. Article 99 (1) of the Bszi. shall be amended as follows: '*The nominating committee shall propose the members and substitute members of the NJC, taking into account the maximum limits set out in Article 91(1), the need to ensure representation of the different branches of adjudication and the principle of regionality. Any delegate may make further proposals.*'

VII.3. Steps to restore the independence of the Constitutional Court

Strengthening the independence of the judiciary also requires the restoration of the independence of the Constitutional Court. This is all the more important as, since 1 January 2012, the Constitutional Court has been able to examine the conformity of individual judicial decisions with the Fundamental Law¹⁵⁷ and, as a result, it has the power to annul decisions of ordinary courts. In addition, under the current Proposal, the NJC may seek judicial remedies before the Constitutional Court in order to protect its powers,¹⁵⁸ which can only be effective if the independence of the Constitutional Court is guaranteed.

In order to ensure that the constitutionality of decisions of ordinary courts is reviewed in a procedure which respects the requirements of the right to an independent and impartial court and to a fair trial, and to ensure that the requirement of judicial independence is also respected in other proceedings of the Constitutional Court, we consider it necessary to amend the following rules concerning the Constitutional Court as a minimum:

1. The rules on the nomination of members of the Constitutional Court should be changed so that the ruling parties are not able to nominate and elect new judges on their own, without consulting the opposition parties in Parliament. One form of this could be to restore the pre-2010 nomination rule, where parliamentary parties were equally represented (on a parity basis) in the parliamentary committee nominating members of the Constitutional Court.
2. Effective protection of fundamental rights requires restoring the Constitutional Court's curtailed powers. It is therefore essential that the Constitutional Court should once again be able (and obliged) to fully examine the constitutionality of public finance laws. To this end, the rule that allows the review of laws relating to the central budget and taxes and contributions only in the context of certain fundamental rights and only if the public debt no longer exceeds half of the total gross domestic product should be repealed.¹⁵⁹ It is equally important that in the future the Fundamental Law should not preclude the Constitutional Court from reviewing the substance of amendments to the Fundamental Law.

¹⁵⁷ Article 24(2)(d) of the Fundamental Law.

¹⁵⁸ See Article 33 of the Proposal.

¹⁵⁹ Article 37(4) of the Fundamental Law

3. The independence of the Constitutional Court also requires the removal of unjustified constraints on the interpretation of the Fundamental Law. Therefore, the rules that limit the interpretative autonomy of the Constitutional Court, in particular the rule that provides for the expiry of the pre-2012 Constitutional Court decisions and that requires the Constitutional Court to take into account, *inter alia*, the Preamble of the Fundamental Law (National Creed) and the historical constitutional *acquis* when interpreting the Fundamental Law (Article R(3)), should be repealed.)
4. Its organisational autonomy is limited by the fact that its president is currently elected by Parliament, not by its members.¹⁶⁰ The rule that the members themselves can choose the President of the Constitutional Court should therefore be reinstated.
5. The enforcement of the right to a lawful judge requires that the Constitutional Court should also be subject to the requirement of automatic assignment of cases, or at least that the allocation of cases and the appointment of the judge to hear a particular case should be based on predetermined, objective and verifiable criteria. This system of safeguards is particularly important when the Constitutional Court reviews the decisions of ordinary courts.

VII.4. Further strengthening the status of members of the NJC

At present, the law only requires the approval of the NJC to **launch (as in actually begin)** disciplinary proceedings against an NJC member.¹⁶¹ However, there are other means that, if abused, could adversely affect the freedom of expression of judges. For example, the *initiation* of disciplinary proceedings, which can be done by the president of the court of an NJC member and can have a chilling effect¹⁶² without the NJC having to decide whether to *launch* disciplinary proceedings by the service court. In addition, Article 90(2)(a) of the Bszi. (no member of the NJC who is *subject to disciplinary proceedings* may be elected) may also be interpreted as meaning that a person against whom disciplinary proceedings have been initiated, but the disciplinary proceedings have not yet been launched by the service court is barred from being elected as a member of the NJC.

The requirement of a judge's evaluation is not a sufficiently objective criterion to demonstrate competence and may even be an opportunity for abuse, given that judges are not evaluated anonymously, and in a procedure and method that is not sufficiently transparent to the judge being evaluated. Therefore, an incompetence procedure following the evaluation of an NJC member,¹⁶³ or an extraordinary evaluation procedure¹⁶⁴ could be construed as punitive measures.

¹⁶⁰ Article 24 (8) of the Fundamental Law.

¹⁶¹ Article 110 (3) of the Bszi..

¹⁶² Amnesty International: Persistent Fear, 2020, section 3.3.1, https://www.amnesty.hu/wp-content/uploads/2020/12/V%C3%89GLEGES_Fort%C3%A9lyos-f%C3%A9lelem_Amnesty-Hungary_HU1.pdf

¹⁶³ Article 81. of the Bjt.

¹⁶⁴ Article 69. of the Bjt.

More effective rules are therefore needed to protect NJC members in relation to procedures affecting their integrity or professional competence, in line with the NJC's own legislative proposals.¹⁶⁵ The initiation of disciplinary proceedings, as well as the initiation of extraordinary evaluation procedures and professional incompetence proceedings against NJC members should be subject to the NJC's consent. These measures would aim to enable NJC members to exercise their statutory rights and fulfil their obligations to protect judicial independence and integrity, including by expressing criticism of the administration or opinions on judicial independence without interference.

We propose that Article 110(3) of the Bszi. should be amended as follows: "*Disciplinary proceedings against an elected member of the NJC may be initiated or launched only with the consent of the NJC, an examination leading to an extraordinary evaluation may be ordered only with the consent of the NJC, an incompetence procedure may be conducted only with the consent of the NJC, and the NOJ President may propose to waive the immunity of an NJC member only with the consent of the NJC.*"

VII.5. Strengthening the freedom of judicial expression

Recently, in several fora, including the NJC, the question of the limits to judges' freedom of expression and the meaning of the concept of "political activity" forbidden to judges has been raised - most recently in the context of the adoption of the Code of Ethics for Judges.¹⁶⁶ The Kúria President also argued in a Constitutional Court submission challenging the Code of Ethics for Judges that the Code represents a "significant extension of the right to express one's opinion", and that, in his view, "*the permissibility of criticising the judicial system is not in line with the provisions of Article 37(2) nor Article 43-44 of the Bjt.*". Although the Bjt. does not prohibit expressing an opinion on the laws, the legal system or the administration of courts, the current legislation creates uncertainty among judges as to the political quality of an action.¹⁶⁷ Judges' freedom of expression is greatly undermined by the chilling effect that affects judges.

Several international institutions have stated that judges have the right to speak out in defence of the rule of law and judicial independence.¹⁶⁸

In the not yet implemented *Baka v Hungary case*¹⁶⁹ under examination by the Council of Europe's Committee of Ministers, it would also be important if the legal environment clarified the situation and clearly stated that judges have the right to freedom of expression with regard to certain

¹⁶⁵ <https://orszagosbiroitanacs.hu/a-hataskoreit-es-mukodesi-felteteleit-erinto-torvenyek-modositasat-javasolja-az-orszagos-biroitanacs/>

¹⁶⁶ Article 39 (1) of the Bjt..

¹⁶⁷ An example is the NJC meeting of 5 January 2022, where the NJC members discussed whether it would be considered political activity for the NJC spokesperson to participate in a panel discussion after the screening of the Polish documentary film 'Judges Under Pressure', which was included in the programme of the Budapest International Documentary Film Festival and which deals with judicial independence in Poland. The NJC finally decided, with 8 votes against and 7 abstentions, that the NJC should not allow its Press Secretary to participate in the panel discussion.

¹⁶⁸ "Judges have the right to comment on issues that affect fundamental human rights, the rule of law, questions relating to the appointment or promotion of judges and the proper functioning of the judiciary, including judicial independence and the separation of powers. Where the case directly affects the functioning of the courts, judges are also free to comment on politically controversial issues, including legislative proposals or government policy." Consultative Council of European Judges (Council of Europe), CCJE Opinion No. 25 (2022) on freedom of expression for judges

¹⁶⁹ <https://www.amnesty.hu/renewed-smear-campaigns-against-judges-show-lack-of-guarantees%ef%bf%bc-%ef%bf%bc/>

fundamental pillars of the rule of law, and that the exercise of this right cannot be restricted by invoking the prohibition of political activity.

For this reason, we propose that **Article 39(1) of the Bjt.** should be amended as follows: '*Judges may not be members of political parties and may not engage in political activities. Among other things, expressing opinions on the rule of law, law, the legal system, human rights, judicial administration or judicial independence, on which a judge may freely express an opinion, in particular publish, lecture or teach, is not a political activity*".

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