

Compliance of the Hungarian Government's Draft Proposal¹ on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan with the milestones to be achieved by 31 March 2023 under Annex² to the European Commission's Proposal

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MILESTONE	DESCRIPTION	EVALUATION	PROBLEMS WITH IMPLEMENTATION
213.	ENTRY INTO FORCE OF LEGISLATIVE AMENDMENTS TO STRENGTHEN THE ROLE OF THE NATIONAL JUDICIAL COUNCIL WHILE SAFEGUARDING ITS INDEPENDENCE		
213. a)	<i>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.</i>	PARTIALLY	The Proposal fails to guarantee the independence of the NJC by implicitly allowing court presidents and vice-presidents to become members of the NJC [see Section III.6. of the Opinion] and by not excluding explicitly the possibility that the Kúria President (the only ex-officio member of the NJC) can be elected as president of the NJC [see Section III.6. of the Opinion]. This concern is relevant with respect to all milestones that require the strengthening of the status of the NJC.
	<i>Regarding individual decisions, the legislative amendments shall ensure that the NJC shall give a motivated binding opinion on the following matters:</i>	PARTIALLY	The Proposal fails (i) to oblige the NOJ President to state reasons for his/her decisions [see Section VII.1. of the Opinion] and (ii) to guarantee that the NJC has access to all documents and data relating to the administration of the courts, including personal data [see Section III.3. of the Opinion]. In lack of these, the NJC cannot effectively perform its supervisory function, because it will not be aware of the reasons and data underlying the NOJ President's decision. This

¹ As published on 18 January 2023 <https://cdn.kormany.hu/uploads/document/6/67/674/6749f8f4633ec8e09cc1f5558b48c544a3e3a1fe.pdf> (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:aaafco26-70cb-11ed-9887-01aa75ed71a1.0001.02/DOC_2&format=PDF

			concern is relevant with respect to all below elements of milestone 213. a) from (i) to (iv) and with respect to 214. c) (iv).
<i>(i) the annulment, by the President of the NOJ, 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;</i>	YES		Further guarantees are necessary. The law should establish strict deadlines for the NOJ President to launch a new application procedure [see Section IV.2. of the Opinion].
<i>(ii) the transfer of judges, including secondments, to another court by the President of the NOJ referred to in Sections 27, 27/A, 31 and 32 of Act CLXII of 2011, except for secondments to the NOJ;</i>	YES		Further guarantees are necessary. The law should establish objective criteria for the transfer and extend the right of consent of the NJC to the prolongation and termination of transfers [see Section IV.3. and Section IV.4. of the Opinion].
<i>(iii) the removal, by the President of the NOJ, of judges without their consent from the pool of judges that hear special cases, including administrative cases;</i>	YES		Further guarantees are necessary. The law should establish objective criteria for assignment and extend the right of consent of the NJC to cover the decision on assignment [see Section IV.5 of the Opinion]
<i>(iv) the suitability of candidates for the post of President and Vice-President of the NOJ, that can be proposed by the President of the Republic or the President of the NOJ, 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.</i>	No		None of the elements of the milestone is achieved. The milestone requires to establish stronger powers for the NJC while the Proposal in fact weakens the powers of the NJC, depriving the NJC of its right to hear the candidates and limiting the scope of the NJC's right to give an opinion [see Section III.2. (iii) of the Opinion]. Furthermore, the suitability criteria to be weighed by the NJC do not cover the elements required by the milestone (independence, impartiality, probity and integrity). In the case of the NOJ President, the new suitability criteria may weaken the independence of the candidate by requiring an "excellent rating" in judicial evaluations made by immediate superiors [see Section III.2. (i) of the Opinion]. In the case of the NOJ vice-president, the new suitability criteria allowing judicial staff to be selected for the position weaken the independence and integrity of candidates. [see Section III.2. (iii) of the Opinion]. Both the formally binding opinion of the NJC and the legal remedy against it is illusory. [see Section III.2. (iii) of the Opinion].
<i>Regarding regulations, the legislative amendments shall ensure that the NJC shall give a motivated binding opinion on the following matters:</i>	PARTIALLY		The Proposal fails to ensure the effective exercise of the powers of the NJC to give a motivated binding opinion on regulations. The Proposal should ensure the effective exercise of this power by providing, among the transitional provisions for a maximum initial period during which the NJC endowed with new powers, should be able to review the regulations in question and exercise its right to consent [see Section I.1. of the Opinion]. This concern is relevant with respect to all below elements of milestone 213. a) from (i) to (v).

	<i>(i) the points system for the assessment of applications for judicial posts within the legislative framework;</i>	PARTIALLY	The Proposal fails to guarantee the binding nature of the NJC's opinion. The points system for the assessment of applications for judicial posts is established through a Ministerial Decree, but the proposal only binds the NOJ President, not the Minister of Justice that issues the decree [see Section IV.1. of the Opinion].
	<i>(ii) the detailed conditions for the award of bonuses and other benefits to judges and court executives;</i>	YES	As a further guarantee it is suggested that the law provides for a closed list of the types of bonuses that can be rewarded to judges [see Section III.10. of the Opinion].
	<i>(iii) the rules relating to the training system for judges;</i>	YES	-
	<i>(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';</i>	YES	-
	<i>(v) the number of judicial posts in each court within the framework determined in the annual budget, including the Kúria, and their departments.</i>	YES	-
213. b)	<i>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.</i>	NO	The Proposal fails to guarantee access to all documents, information and data relating to the administration of courts leaving it to the jurisprudence of the Constitutional Court to establish the limits of the right. The Proposal expressly goes against the milestone by excluding personal data from the scope of data accessible for supervisory purposes. The Proposal should guarantee that the right to access to documents, information and data is granted to any and all members of the NJC [see Section III.3. of the Opinion].
	<i>In addition, the legislative amendments shall provide that the NJC shall determine the structure of the biannual report of the President of the NOJ;</i>	PARTIALLY	The Proposal fails to include provisions on the approval (acceptance or acknowledgement) of the NOJ President's biannual report. In lack of a provision requiring approval by the NJC, the NOJ President's obligation to report can be avoided without consequences [see Section III.9. of the Opinion].
213. c)	<i>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.</i>	PARTIALLY	The Proposal fails to guarantee the smooth transformation of the NJC into a budgetary entity. Transition provisions should be included in order to guarantee that the resources necessary for the NJC to become autonomous are available by 31 March 2023 at latest and also that the final organisation and staffing arrangement can be put in place safely and smoothly after an appropriate transition period of at least six months [see Section I.2. of the Opinion].

	<i>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.</i>	YES	-
	<i>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.</i>	No	The Proposal fails to ensure that the NJC members can elect a new NJC President from 31 March 2023. Proposed transitional rules make an exception from the general temporal scope of the new legislation without any meaningful justification [see Section I.1. of the Opinion].
213. d)	<i>Establish the right for the NJC to seize the competent court and the Constitutional Court to defend its prerogatives and enforce its rights</i>	PARTIALLY	The proposal establishes that the NJC can seize the Constitutional Court in case the President of the NOJ or the Kúria fail to discharge their duties vis-a-vis the NJC. However, the effectiveness of this is questionable unless the independence and impartiality of the Constitutional Court is strengthened [see Sections III.11. and VII.3. of the Opinion].
213. e)	<i>Establish an obligation to consult the NJC on legislative proposals affecting the justice system and the right to propose to the Government to initiate new legislation on the same matters</i>	YES	-
213. f)	<i>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 head of a department of judges with the longest tenure as a judge; (iii) in the absence of a head of department, the president's competences are exercised by the presiding judge with the longest tenure as a judge.</i>	YES	-

213. g)	<i>Prohibit the reintegration, by the President of the NOJ, of judges, following their secondment, to a court instance higher than the court in which they adjudicated before their secondment.</i>	PARTIALLY	The Proposal continues to allow the NOJ President to grant the position of presiding judge (' <i>tanácselnök</i> ') without an application procedure after the termination of the secondment allowing them to obtain a judicial leadership position circumventing the normal application system [see Section IV.4. of the Opinion].
214.	STRENGTHENING THE JUDICIAL INDEPENDENCE OF THE KÚRIA (SUPREME COURT)		
214. a)	<i>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;</i>	No	None of the requirements listed in milestone 214 a) are implemented. The Proposal does not require candidates for the Kúria President to have five years of actual experience as judge allowing to substitute judicial service at ordinary courts [see Section III.1. (i) of the Opinion]. The Proposal, while formally states that the Kúria President cannot be reelected, does not change the current rules that allow one-third minority of the Parliament to keep the Kúria President in office [see Section III.1. (ii) of the Opinion]. The milestone aims to establish stronger powers for the NJC while the Proposal in fact weakens the powers of the NJC, depriving the NJC of its right to hear the candidates and limiting the scope of the NJC's right to give an opinion [see Section III.1. (iii) of the Opinion]. The suitability criteria to be weighed by the NJC do not cover the elements required by the milestone (independence, impartiality, probity and integrity). Both the formally binding opinion of the NJC and the legal remedy against it is illusionary [see Section III.1. (iii) of the Opinion]. The Proposal further narrows the pool of potential candidates by modifications not required by the milestone [see Section III.1. (iii) of the Opinion].
214. b)	<i>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;</i>	PARTIALLY	The Proposal does not provide concrete guarantees of cases being assigned without human intervention because it does not specify the objective criteria based on which the automatic assignment should be carried out (e.g. the order of arrival as objective criteria). There are no objective criteria for the establishment of the chamber proceeding in the case (which is not <i>per se</i> the same as the bench hearing the case according to the Proposal) which enables manipulating the final composition of the bench hearing the case. The Proposal formally declares the right of parties to the proceeding to verify the application of the rules of case allocation, but does not create specific rules for the procedure of verification and the legal remedies available against it [see Section III.4. of the Opinion].

	<i>(v) the judicial council of the Kúria and the departments of judges ('kollégium') concerned give a binding opinion on the case allocation scheme;</i>		
214. c)	<i>Legislative amendments shall enter into force and start being applied, which shall amend the rules on the functioning of the Kúria by (i) 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 on: (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</i>	PARTIALLY	The Proposal does not grant the right to provide an opinion, (let alone a binding opinion) related to candidates for the post of chairs, vice-chairs of departments of judges and presiding judges to the judicial council of the Kúria. The Proposal does not grant the right to provide an opinion related to the Secretary General of the Kúria and secondments of the Kúria [see Section III.7. of the Opinion].
	<i>(ii) 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;</i>	No	The Proposal does not take genuine steps to strengthen the independence of the Kúria. It maintains the possibility for members of the Constitutional Court who have already been appointed as judges to retain their judicial appointment and become active judges at the Kúria even years after the amended legislation will have entered into force [see Section II.1. (i) of the Opinion]. Members of the Constitutional Court can be appointed to the Kúria without a call for application even after 31 March 2023 [see Section II.1. (ii) of the Opinion].
	<i>(iii) ensuring that the NJC gives a motivated binding opinion on the suitability of candidates for the post of Vice President of the Kúria that can be proposed by the Kúria President. The suitability criteria, including independence, impartiality, probity and integrity, shall be determined by the law. The legislative amendments shall ensure that candidates found unsuitable by the NJC shall have access to an accelerated judicial review before the competent court.</i>	No	The Proposal does not require candidates for the Kúria Vice-President to have five years of actual experience as a judge allowing to substitute the requirement of judicial service at ordinary courts [see Section III.1. (i) of the Opinion]. The Proposal does not grant powers to the NJC to hear the candidates and limits the scope of the NJC's right to give an opinion [see Section III.1. (iii) of the Opinion]. The suitability criteria to be weighed by the NJC do not cover the elements required by the milestone (independence, impartiality, probity and integrity). Both the formally binding opinion of the NJC and the legal remedy against it is illusory [see Section III.1. (iii) of the Opinion]. The Proposal narrows the pool of potential candidates by modifications not required by the milestone [see Section III.1. (iii) of the Opinion].
	<i>(iv) ensuring that the strengthened powers of the NJC referred to in Milestone 213 also apply in relation to the Kúria</i>	PARTIALLY	All relevant concerns raised above with respect to the fulfilment of Milestone 213 apply, especially that the Proposal fails (i) to oblige the NOJ President to state reasons for his/her decisions [see Section VII.1. of the Opinion] and (ii) to guarantee that the NJC has access to all documents and data relating to the

	<i>President when acting as appointing authority (in line with Act CLXII of 2011).</i>		administration of the courts, including personal data [see Section III.3. of the Opinion]. In lack of these, the NJC cannot effectively perform its supervisory function, because it will not be aware of the reasons and data underlying the NOJ President's decision.
215.	REMOVE OBSTACLES TO REFERENCES FOR PRELIMINARY RULINGS TO THE COURT OF JUSTICE OF THE EUROPEAN UNION		
	<i>(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.</i>	PARTIALLY	The Proposal amends the referred sections abolishing the procedural obstacles of making a preliminary reference, but fails to address the material obstacle leaving effective and applicable the binding precedential decision Bt.III.838/2019/11. of the Kúria which declares that a preliminary reference may be unlawful "if the request to initiate the preliminary ruling procedure does not concern the interpretation or validity of European Community norms" [see Section V.1. of the Opinion].
216.	REMOVE THE POSSIBILITY FOR PUBLIC AUTHORITIES TO CHALLENGE FINAL DECISIONS BEFORE THE CONSTITUTIONAL COURT		
	<i>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 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.</i>	No	The Proposal fails ensure that the possibility for public authorities to challenge final decisions before the Constitutional Court is fully removed. Merely repealing the legal provisions introduced in 2019 will not remove the possibility established in the case-law of the Constitutional Court [see Section II.2. of the Opinion].