



HUNGARIAN
HELSINKI
COMMITTEE

FUNDAMENTAL DEFICIENCIES OF THE HUNGARIAN JUDICIAL REFORM

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Hungary's access to EU funds under the Recovery and Resilience Facility (RRF)¹ and under ten operative programmes are connected to a complex set of benchmarks, amongst these, four so-called super milestones aimed at strengthening the independence of the Hungarian judiciary (Judicial Super Milestones). In May 2023, Hungary adopted a judicial package² (Judicial Reform) based on which the Hungarian government claims to have met all four of the Judicial Super Milestones and requests payment.

Our brief legal summary explains

- why compliance of the Judicial Reform is defective in [Section I.](#);
- why the remaining deficiencies must be considered as fundamental in [Section II.](#);
- which fundamental deficiencies require further legislative steps to achieve compliance in [Section III.](#);
- which fundamental deficiencies require further proof of their proper implementation in [Section IV.](#)

I. WHY COMPLIANCE OF THE JUDICIAL REFORM IS DEFECTIVE

The Hungarian government claims to have achieved all four Judicial Super Milestones by adopting and entering into force the Judicial Reform. This claim is false for two reasons.

First, because the Judicial Reform does not fully comply with the Judicial Super Milestones. **Three out of the four Judicial Super Milestones are implemented defectively.** Additional legislative provisions need to be adopted to achieve the proper implementation of

- [Super Milestone 213](#) requiring to strengthen the legal status and powers of the National Judicial Council (NJC) because the effective exercise of the right of the NJC to consent to regulations is not guaranteed by the Judicial Reform [see below under [Section III.1.](#)];
- [Super Milestone 214](#) requiring to strengthen the independence of the Kúria because while the Kúria President cannot be re-elected by a two-thirds majority of the Parliament as required by

¹ Annex to the Council Implementing Decision on the approval of the assessment of the Recovery and Resilience Plan (RRP) for Hungary (hereinafter: Annex); see:

<https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf>

² Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan was adopted by the Hungarian Parliament on 3 May 2023.

<https://magyarokzslony.hu/dokumentumok/a87dd6ba5bb31d10d132a3461d87b33650b38323/megtekintes>

the milestone, he can still be kept in office indefinitely by a one-third minority under the current legislation [see below under [Section III.2.](#)];

- [Super Milestone 215](#) requiring the removal of all obstacles to preliminary references to the Court of Justice of the European Union (CJEU), because it maintains the Kúria precedent which declares unlawful all preliminary references that are not deemed by the Kúria to be relevant to the legal dispute concerned [see below under [Section III.3.](#)].

Second, because the Judicial Reform has not yet been implemented completely. Full implementation is not only an inherent need for the proper assessment of compliance, but also an explicit requirement prescribed by the Judicial Super Milestones. According to the wording of the milestones “*legislative amendments shall enter into force and start being applied*”³ before submission of the first payment request. There are two milestones with respect to which the proper implementation, enforcement and execution is still pending, and therefore, it cannot be claimed that these have been achieved:

- [Super Milestone 213](#) requires strengthening the legal status and powers of the NJC, because the creation of the full legal and budgetary autonomy of the NJC is still in progress under the nine-months long incubation period lasting until the end of March 2024 [see below under [Section IV.1.](#)]. In addition to the above, elections for the next term of the NJC are ongoing and there is a high political pressure on the process. The risks that the NJC becomes captured are real, taking into account reports of undue interference taking place at several courts during the election procedure. This is all the more concerning exactly because the Judicial Reform has remarkably strengthened the supervisory powers of the NJC. Taking into account the election process in the assessment of compliance with the Super Milestones is essential in establishing whether the independence of the NJC is maintained (and not only its powers are strengthened), just as required by the milestone. At the same time, monitoring the election process could also have a deterrent effect against further undue interferences and may lower the probability of a capture. [see below under [Section IV.2.](#)];
- [Super Milestone 214](#) requires strengthening the independence of the Kúria by introducing an automated case allocation system. While the wording of the Judicial Reform complies with the requirements of the milestone, serious doubts persist regarding the proper implementation of the new rules [see below under [Section IV.3.](#)].

Without additional legislative amendments, the above defects cannot be corrected and compliance will not be achieved. Similarly, without a solid verification that the Judicial Reform was implemented fully and correctly, compliance with the Judicial Super Milestones cannot be established.

³ This requirement is included under both the Annex to the Council Implementing Decision on the approval of the assessment of the Recovery and Resilience Plan (RRP) for Hungary and in all the individual Commission Implementing Decisions regarding Hungary’s operative programmes. See 2022/0414 (NLE) <https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf> pp. 132-134, as well as e.g. C(2022)10011 recital (14) [https://ec.europa.eu/transparency/documents-register/api/files/C\(2022\)10011_0/de00000001050981?rendition=false](https://ec.europa.eu/transparency/documents-register/api/files/C(2022)10011_0/de00000001050981?rendition=false)

II. WHY THE DEFICIENCIES ARE FUNDAMENTAL

The remaining deficiencies might seem to be minor or technical in nature as compared to the adoption of the whole judicial package. In reality, the outstanding shortcomings are fundamental in their effects. It is for a reason that Hungary is reluctant to implement these requirements properly and seeks to avoid compliance.

- **All Judicial Super Milestones aim to restore severe persisting rule of law concerns related to the independence of the Hungarian judiciary.** Overlooking any form of non-conformity with the Super Milestones will necessarily result in the persistence of the severe rule of law problems.
- **The Judicial Super Milestones should be translated as a set of requirements that constitute an absolute legal minimum for restoring the independence of the Hungarian judiciary.** Each and every element of the Super Milestones is necessary for creating this legal minimum; deviating from these minimum requirements endangers the whole and risks a zero sum outcome in the end.

No Judicial Super Milestone should be deemed as achieved if the steps taken by Hungary do not adequately address the original rule of law problem⁴ that the given milestone was envisaged to resolve.

This is true in case of all remaining deficiencies:

- the lack of transitional rules that may deprive the NJC from exercising its new power to consent on crucial regulations;
- the rules allowing to keep the Kúria President in office after the expiry of his term, despite the *pro forma* exclusion of his re-election;
- the new provision keeping up the chilling effect of the Kúria precedential judgement that declares as unlawful certain types of preliminary questions;
- the pending incubation period of the NJC and the implications of a possible capture of the NJC in the course of the ongoing elections, and
- the inadequate implementation of the new rules of case-allocation which allow manipulation with the composition of adjudicating chambers at the Kúria.

The milestones were prescribed to strengthen the independence of the Hungarian judiciary. Their execution must be scrutinised with a view to whether the outcome achieves this goal. Performance of Hungary is compliant only if the Judicial Reform makes a difference with respect to all requirements.

⁴ There is one important example in the legislation, where the requirement of the milestone is formally met, yet the original core rule of law concern remains unaddressed: the possibility that certain Constitutional Court (CC) justices can be transferred into the ordinary court system. Under the new rules, CC justices cannot be appointed to be ordinary judges without going through the regular application process, nor can they get transferred to the Kúria, as expected by the milestone. However, those CC judges who were appointed to be ordinary judges before the Judicial Reform came into effect, can still get transferred to a Court of Appeal of their choice, which is the second highest court instance in Hungary. This solution raises the same problems as the potential transfer of CC judges to the Kúria did: these are judicial appointments by the legislative branch to a higher court via *ad hominem* legislation circumventing the normal application procedure and without the involvement of a judicial self-governing body. Even though it concerns a limited number of judges, and no similar appointments and transfers can be made in the future, the core problem that the milestone attempted to address is not resolved with regard to those that fall under these temporary provisions.

III. FUNDAMENTAL DEFICIENCIES THAT REQUIRE LEGISLATIVE STEPS

III.1. The NJC can be deprived of its new crucial power to consent to regulations

A) Description of the deficiency: According to Super Milestone 213, the NJC should be granted the power to give a motivated binding opinion on a number of matters, including the regulation of the points system for the assessment of applications for judicial posts. The Judicial Reform provides⁵ the NJC's right to give a binding opinion on a future draft ministerial decree regulating the points system, but it does not set a deadline for the submission of such a new draft decree. This means that if the currently effective ministerial decree (that is problematic in many respects) remains in force without any amendments, judges can continue to be appointed on the basis of a points system regarding which the NJC could not form a binding opinion. In the absence of transitional rules, nothing guarantees the effective exercise of this new power.

B) Consequence of the deficiency: The points system of applications for judicial posts is a crucial element affecting the career of judges. The current ministerial decree was adopted in 2017 without a meaningful consultation with the judiciary and has been widely criticised ever since,⁶ because it radically modified the points system in a way that favours experience gained in the public administration over experience gained within the judiciary. This means that the points system gives a preference to candidates for a judicial post who apply from the executive branch over candidates who apply from within the judiciary. By not introducing transitional rules that guarantee the effective application of the new powers of the NJC, the Hungarian government can keep up the distorted points system and favour candidates of the executive branch for an indefinite period, emptying out the powers of the NJC and leaving the Judicial Reform meaningless.

C) Solution of the deficiency: The Judicial Reform must be supplemented with new transitional rules obliging the Ministry of Justice to submit a new draft decree within a well-defined period of time, e.g. by the end of December 2023, thereby obtaining binding opinion of the NJC as prescribed by the milestone.

III.2. The Kúria President can be kept in office despite excluding re-election

A) Description of the deficiency: According to Super Milestone 214, the Judicial Reform must ensure that the Kúria President cannot be re-elected. While the adopted legislation expressly excludes the possibility of re-election, it keeps in effect the rule that allows a one-third parliamentary minority to keep the Kúria President in office without a time limit by stipulating that the Kúria President remains in office until their successor is elected by the Parliament (with a two-thirds majority).

B) Consequence of the deficiency: As long as the underlying rules governing the possibility to prolong the mandate of the Kúria President remain in force, the new rule introduced by the Judicial Reform will not make a difference in the status of the Kúria President. Confirming compliance would empty out the requirement of the milestone, allowing the *de facto* re-election of the Kúria President by a parliamentary minority. This could cement the current Kúria President in his position, despite the fact

⁵ New Section 103 (3) q) of Act CLXI of 2011 on the Organisation and Administration of Courts.

⁶ Magyar Bírói Egyesület [Hungarian Association of Judges], 14 November 2017, <https://www.mabie.hu/index.php/kozlemenyek/339-a-mabie-allasfoglalasa-a-biroi-allaspalyazatok-elbiralasanak-reszletes-szabalyairol-es-a-palyazati-rangsor-kialakitasa-soran-adhato-pontszamokrol-szolo-7-2011-iii-4-kim-rendelet-modositasarol>

that he was elected to the top judicial post without the involvement of a judicial body, and not in line with European standards as confirmed by the 2021 Rule of Law Report of the European Commission.⁷

C) Solution of the deficiency: In order to fully comply with this requirement of Super Milestone 214, it is necessary to amend the law and delete the provisions of Section 115 (4) of the Act CLXI of 2011 on the Organisation and Administration of Courts.

III.3. Block on preliminary questions remain

A) Description of the deficiency: According to Super Milestone 215, the essential right of Hungarian judges to make preliminary references to the CJEU must be restored as established by the judgment in case C-564/19. While the Judicial Reform fully abolished the procedural obstacles to making a preliminary reference, it failed to address the effects of the binding precedential decision by the Kúria,⁸ the content of which was found contrary to EU law by the CJEU. Even after the CJEU delivered its judgment, the Kúria upheld its position taken in the precedential decision⁹ according to which referring a question to the CJEU is unlawful if the question referred is not relevant to and necessary for the resolution of the dispute concerned. Instead of terminating the precedential effect of the decision, the modification introduced by the Judicial Reform expressly confirmed the interpretation provided by it, ensuring that its legal force remains.¹⁰

B) Consequence of the deficiency: The total restoration of this right is essential to strengthen the independence of the Hungarian judiciary. When a Hungarian judge is not free to make use of this procedure because their request to the CJEU may be deemed as unlawful under the precedential judgement, the application of EU law is impeded. The most problematic aspect of the fact that the precedential decision has remained a part of the legal system and is one of the Kúria decisions that Hungarian judges are bound to follow is that if they do not do so and submit a preliminary reference that may be regarded as not relevant to and necessary for the resolution of the dispute concerned, it may be detrimental for them in the course of their regular evaluation that is prescribed by Hungarian laws. This kind of chilling effect may be particularly strong regarding judges whose positions are not finalised (in the Hungarian system, judges are first appointed for a three-year period, and are finalised on the basis of an evaluation performed at the end of that period.)

C) Solution of the deficiency: In order to comply with Super Milestone 215, it is necessary to exclude the direct effect of the precedential decision of the Kúria, which was found contrary to EU law. All relevant procedural codes should expressly declare that a request for a preliminary ruling submitted by a court can under no circumstances be deemed unlawful.

⁷ 2021 Rule of Law Report, country chapter Hungary <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0714> p. 6.

⁸ Decision Bt.III.838/2019/11. of the Kúria. See the decision in Hungarian here: https://helsinki.hu/wp-content/uploads/2022/11/Bt.838_2019_11.pdf

⁹ See: <https://kuria-birosag.hu/hu/sajto/kuria-kozlemenye-az-europai-unio-birosaga-c-56419-szamu-ugyben-hozott-itelete-vonatkozasaban>

¹⁰ See more https://helsinki.hu/wp-content/uploads/2023/05/Super_Milestone_215_QA_20230516.pdf pp. 6-7.

IV. FUNDAMENTAL DEFICIENCIES THAT REQUIRE PROOF OF PROPER IMPLEMENTATION

IV.1. The incubation period of the NJC

A) The fact that needs verification: According to Super Milestone 213, the NJC should be endowed 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. The Judicial Reform established a transitional period of nine months for the establishment of the separate legal and budgetary entity of the NJC, which will lapse at the end of March 2024. The completion of this element of Super Milestone 213 is still in progress, and can only be verified with the lapse of the incubation period and the successful transition of the NJC into a separate and fully independent legal and budgetary entity.

B) The risk of approving the fulfilment of the Super Milestone without verification of implementation: The incubation period is still in progress. During the incubation period, the NJC is partly dependent on the National Office for the Judiciary (NOJ) and the process of transformation into a separate legal and budgetary entity can be hindered by several means. According to the latest public information available, important steps towards the NJC becoming an autonomous entity are still pending, e.g. the asset management agreement of the NJC has not yet been concluded with the Hungarian National Asset Management Ltd., despite the fact that the NJC has been urging its conclusion for a while. Currently, the NJC is fully dependent on the NOJ in undertaking obligations as it cannot acquire any assets on its own, only via the NOJ.¹¹ In order to confirm compliance with establishing the legal and budgetary autonomy of the NJC, it is necessary to wait until the lapse of the incubation period and the successful transition of the NJC into a separate legal and budgetary entity.

IV.2. The election process of the NJC

A) The fact that needs verification: According to Super Milestone 213, the legislative amendments should be effected “while maintaining the Council’s independence based on its members being elected by judges.” Parallel to the incubation period, elections for the next six-year term of the NJC started in September 2023. The two-tier election process¹² is still ongoing and is expected to be concluded by the end of 2023. In order to declare compliance with the requirements of the milestones, it is essential to verify that the election process was not compromised by internal and external political pressure.

B) The risk of approving the fulfilment of the Super Milestone without verification of implementation: Several factors prove that significant political pressure is exerted on the election process. Undue interference began even before the first round of the elections was held, coming both from within the judiciary and from outside. Gross examples of undue interferences include public statements of the Minister of the Prime Minister's Office, Gergely Gulyás aimed at discrediting current members of the NJC and dissuading them from running for the elections.¹³ Another reported example is the top-down

¹¹ See: the Minutes of the meeting of the National Judicial Council of 4 October 2023 <https://orszagosbiroitanacs.hu/download/az-obt-2023-oktober-4-i-ulesenek-jegyzokonyve/> p. 38.

¹² See a flowchart of the election process of the NJC here: https://helsinki.hu/wp-content/uploads/2023/10/NJC_elections_flowchart.pdf

¹³ Gergely Gulyás said at a press conference held on 6 July 2023: "It is particularly regrettable that some members of the NJC, who, as judges, have also been keen on negotiating with foreign governments during the past months and have denounced their own government in Brussels in order to achieve the adoption of an ad hominem legislation securing that they can be re-elected. They do not seem to have terminated this activity. And what is particularly ridiculous is that these people used to say that ad hominem legislation was unacceptable, and even saw it where it did not exist, and then when the legislation was tailor-made to fit them and their needs, they said that they did not wish to make use of it and they do not want to become candidates again for the elections [for the next term of the NJC]. Watch them all run!" https://www.youtube.com/watch?v=ww9y2SeLa_E

interference of the court president of Hungary's largest regional court in Budapest, who instructed court leaders to convene open plenary "consultations" at their judicial departments to choose the electors.¹⁴ This is problematic because the law prescribes full secrecy of the voting process. To convene judges for openly discussing whom they (or their superiors) would like to see as electors compromises this principle, puts a pressure on the judges regarding whom to vote for, and can have a serious chilling effect on those who contemplate becoming candidates. Despite concerns publicly raised by current members of the NJC, the "consultations" were held, breaching the rules of the election process. Smear campaigns discrediting judges who are members of the NJC continue, also putting pressure on potential candidates of the NJC.¹⁵ Considering the above examples, monitoring the election process as part of the assessment of compliance could also have a deterrent effect against further undue interferences and may lower the probability of a capture. The risks that the NJC becomes captured are real, therefore taking into account the election process in the assessment of compliance with the Super Milestones is essential in establishing whether the independence of the NJC has been maintained (and not only its powers strengthened), as required by the milestone.

IV.3. Proper implementation of the case allocation scheme of the Kúria is pending

A) The fact that needs verification: Super Milestone 214 requires strengthening the independence of the Kúria by introducing "an automated case allocation without human interference and with the use of an electronic system". While the wording of the Judicial Reform complies with the requirements of the milestone, serious doubts persist regarding the proper implementation of the new rules. Amongst others, concerns remain with respect to the existence of an electronic system guaranteeing the automated case allocation without human intervention. Based on the answers provided by the Kúria and the NOJ to the freedom of information requests of the Hungarian Helsinki Committee (HHC),¹⁶ neither the Kúria nor the NOJ could provide proof that a proper IT system guarantees the due application of the new rules on case allocation at the Kúria. Confirming the doubts around the functioning of the new case allocation system, the Kúria President publicly claimed in a radio interview that the Judicial Reform that was externally driven and imposed on Hungarians, is unimplementable, causing legal instability in the operation of the Kúria and was ultimately "ordered" to petrify the Hungarian judicial system.¹⁷

Although the Kúria President did not mention that the claimed impossibility to implement the Judicial Reform affected the case allocation system, this is the only element that needs to be applied in the everyday operation of the Kúria. The analysis of the case allocation scheme of the Kúria shows that not even its updated version establishes a pure, fixed and automatable allocation order, but a system in which the allocation of cases is subject to individual variation in essentially all its elements on the basis of competing parallel rules, leaving wide margin for manipulation. The final composition of the adjudicating chamber can be varied under a number of main and exceptional rules allowing to change the presiding judge, the judge-rapporteur and the number of members of the adjudicating chamber in practically any case. The abundance of exceptional rules built into the case allocation scheme

¹⁴ See the detailed report from 23 August 2023: <https://444.hu/2023/08/23/maris-megkezdodott-a-kuzdelem-a-birosagokert>

¹⁵ On 7 July 2023, the government aligned propaganda media released an article claiming that the NJC should be abolished for being biased. The title of the article suggested that members of the NJC are old guttersnipes. (See the article here:

<https://magyarnemzet.hu/tollhegyen/2023/07/regi-csibeszek-6?fbclid=IwAR183cd9dHW957kE-SMkLzxcntu2XmAM6OISx4PkiYHKCZU2rzHVvHbF44>)

On October 5 2023, another smear article claimed that members of the NJC are "service staff of the emperor" (hinting at the Ambassador of the US). (See the article here:

<https://magyarnemzet.hu/velemeney/2023/10/a-jurisztokracia-mar-a-spaizban-van>)

¹⁶ See: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/09/case_allocation_system_of_Kuria_20230926.pdf

¹⁷ See the interview at <https://www.youtube.com/watch?v=EspkKuhO4Zo> see an outline of the interview here: https://helsinki.hu/wp-content/uploads/2023/10/Baka_v_Hungary_NGO_Communication_under_Rule_9_2-20231005.pdf Section III.2.

narrows the application of the special rules restricting the possibility of deviating from the case allocation scheme while leaving wide margins for manipulating with the assignment of cases.

Special concerns can be raised with respect to chambers dealing with electoral cases. In all electoral cases, the adjudicating chambers shall consist of three judges. Instead of establishing fix three-member chambers for electoral matters with a transparent and foreseeable case allocation system between them, the current case allocation scheme defines the composition of electoral chambers applying exceptional rules (under which the three-member panel can be established out of a five-member chamber) from which further derogation is allowed (in case the first exceptional rule cannot be applied for any reason). The fact that electoral chambers are not fix chambers, but are established applying exceptional rules, from which further derogation is allowed, makes it difficult for parties to a case to track back whether the chamber was established in accordance with the case allocation scheme. In addition to the above, in case of electoral matters, submissions can be filed not only electronically (but also on paper). When a case is not filed electronically, nothing guarantees the application of the newly established automated system, as the pertaining legal provision only prescribes the use of the automated scheme for electronically initiated cases.

In order to declare compliance with the requirements of the milestones, it is essential to verify that the case allocation system operates at the Kúria as expected by the law, and exceptional rules are not built in the operation of the Kúria, but only applied in accordance with the provisions governing the possibilities to deviate from the case allocation scheme.

B) The risk of approving the fulfilment of the Super Milestone without verification of implementation:

Non-implementation of the new rules of case-allocation allow manipulation with the composition of adjudicating chambers at the Kúria. This is especially concerning due to the upcoming European Parliamentary and municipal elections in 2024, with respect to which the Kúria holds exclusive powers to adjudicate. The fact that the case allocation scheme fails to require fix-member adjudicating chambers to be established for electoral cases undermines the transparency and foreseeability of which judges will sit on a particular case.

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