



HUNGARIAN
HELSINKI
COMMITTEE

AMNESTY
INTERNATIONAL



EÖTVÖS KÁROLY
INTÉZET

QUESTIONS AND ANSWERS

concerning the reform expected under Component Cg.R18 of the Annex¹

requiring Hungary to remove the possibility for public authorities to challenge final judicial decisions before the Constitutional Court

17 April 2023

Component Cg.R18 of the Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary² [hereinafter referred to as **Super Milestone 216**] is one of the so-called super milestones set by the Council of the European Union, a precondition to access frozen EU funds under Hungary's Recovery and Resilience Fund. In total, the EU has set 27 super milestones that the government must fully implement to receive any payments. Four of these concern the judiciary, out of which one is Super Milestone 216.

Q: What reform is expected under Super Milestone 216?

A: According to Super Milestone 216: "*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.*" It is clear from the wording of Super Milestone 216 that **the goal to be achieved by the expected reform is to fully remove the possibility for public authorities to challenge final judicial decisions before the Constitutional Court.**³ Even though the wording of the super milestone contains a reference to a specific Section of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as **Abtv.**), compliance with the super milestone should not only be examined on the surface (namely, whether the Section referred to was modified or reverted to its original wording), but rather on the merits, whether the possibility was fully removed from the Hungarian legal system.

¹ Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, see: <https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf>

² Section 216 of Table I.2. of the Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, see: <https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf> p. 134.

³ https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15447_2022_INIT&from=EN p. 16.

Q: Does the Hungarian Government dispute the above interpretation of Super Milestone 216?

A: No. The Hungarian Government practically confirmed the above interpretation when stating in the explanatory memorandum attached to the draft law (hereinafter referred to as **Draft**) published by the Hungarian Government on 18 January 2023 for public consultation⁴ that *"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."*⁵

Q: Does the proper implementation of Super Milestone 216 require full deprivation of public authorities' right to submit constitutional complaints?

A: No. Super Milestone 216 exclusively relates to cases in which public authorities lodge a constitutional complaint to the Constitutional Court in their capacity as public authorities. This practically means, on one hand, that in case Super Milestone 216 is implemented properly, it should cover all court cases where (i) public authority relationships are assessed by ordinary courts; and (ii) one of the parties of the court proceeding is a public authority and (iii) the other party is an individual (or private entity) vis-à-vis whom the public authority has exercised its public power. On the other hand, this also means that the proper implementation of the super milestone does not require the removal of the possibility for public authorities to turn to the Constitutional Court in cases where they appear in a private-law relationship (i.e. not exercising their public power). There is a clear distinction between the two capacities of public authorities in the jurisprudence of the Hungarian Constitutional Court, based on which the aim of Super Milestone 216 can be achieved with the required restricted scope: fully and exclusively covering cases where public authorities act in their capacities as such, exercising public power vis-à-vis private entities.

Q: How is the reform proposed to be implemented by Hungary?

A: According to the Draft published by the Government, the relevant Sections of the Abtv.⁶ are planned to be amended to revert to the original text of the law effective before the modifications introduced in 2019. Nevertheless, this solution will not be enough to fully implement Super Milestone 216.

Q: Would the offered implementation achieve the reform expected?

A: No. Reverting the original text of the Abtv. will not fully implement Super Milestone 216. The eligibility of public authorities as complainants was recognised by the Constitutional Court already before the impugned 2019 amendment, based on the original text of the Abtv. (in force before the modifications introduced in 2019).

⁴ See: <https://cdn.kormany.hu/uploads/document/6/67/674/6749f8f4633ec8e09cc1f5558b48c544a3e3a1fe.pdf>

⁵ See: <https://cdn.kormany.hu/uploads/document/6/67/674/6749f8f4633ec8e09cc1f5558b48c544a3e3a1fe.pdf> pp. 25. and 27.

⁶ Section 27 of the Abtv. is planned to be restored to its original text and Section 55 (4a) of the Abtv. is planned to be repealed.

In 2018, the Constitutional Court interpreted Section 27 of the Abtv. in a manner that widened the scope of complainants, including public authorities. Extending the right to submit constitutional complaints beyond private parties (individuals or organisations) originated in the Hungarian Constitutional Court's practice, in particular Decision 23/2018. (XII. 28.) of the Constitutional Court, which the law codified, at least partially. The constitutional complaint underlying Decision 23/2018. (XII. 28.) was submitted by the Hungarian National Bank, which claimed that its right to a fair trial had been violated by a decision of the Kúria (Hungary's supreme court). The Constitutional Court agreed and annulled the Kúria's decision. Four Constitutional Court justices out of the 15 wrote dissenting opinions on this issue, pointing at the decade-long case law of the Constitutional Court according to which state bodies vested with public authority do not have constitutionally protected fundamental rights that would entitle them to submit a constitutional complaint. As put by one of the dissenting judges, if public authorities such as the Hungarian National Bank had fundamental rights when they act in their public capacity, the protection of their fundamental rights would mean that "*the state defends itself from itself*" in constitutional complaint procedures launched by state authorities against ordinary court decisions, which would raise serious questions in terms of both logic and procedure.

It was this jurisprudence that was subsequently incorporated in the Abtv. in 2019. This means that merely reinstating the rules effective before the 2019 modifications will not fully remove the legal possibility of admitting complaints lodged by public authorities.

Q: Does the Hungarian Government admit that reverting to the original text of Abtv. will not fully implement Super Milestone 216?

A: Yes. In their joint assessment, Amnesty International Hungary, the Eötvös Károly Institute and the Hungarian Helsinki Committee (hereinafter: **CSOs**) called attention to the fact that reinstating the pre-2019 rules will not abolish the right to submit a complaint by public authorities.⁷ During the meeting held between the civil society organisations and the Hungarian Government as part of the consultation on draft legislation, the representatives of the Ministry of Justice explicitly admitted that in case of adopting the planned Draft, the possibility of public authorities to turn to the Constitutional Court would remain on the basis of the Constitutional Court's pre-2019 jurisprudence.⁸

Q: Is it true that the proper implementation of the expected reforms would fully remove the right of authorities to go to court in case of a breach of the right to a fair trial?

A: No. During the meeting held with CSOs, the Hungarian Government argued that in case of full implementation of Super Milestone 216 "*the amendment would also remove the right of the authorities to go to court in case of a breach of the right to a fair trial, which is guaranteed to all.*"⁹ This is not true, as in case Super Milestone 216 is implemented properly, public authorities can retain their right to turn to the Constitutional Court in all court cases where they do not exercise their public power *vis-à-vis* individuals (or private entities) but appear as parties under private law.

⁷ See: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/2023judicial_package_assessment_AIHU_EKINT_HHC.pdf p. 10-11.

⁸ See: https://helsinki.hu/wp-content/uploads/2023/02/Emlekezteto_civil_egyeztetes_egyes_igazsagugyi_targyu_torvenyek_20220208.pdf p. 2.

⁹ See: https://helsinki.hu/wp-content/uploads/2023/02/Emlekezteto_civil_egyeztetes_egyes_igazsagugyi_targyu_torvenyek_20220208.pdf p. 2.

Q: Is it problematic from the perspective of the Charter of Fundamental Rights of the European Union to maintain the right of fair trial of public authorities in cases where they exercise their public authority?

A: Yes. The right of public authorities to lodge a constitutional complaint with the Constitutional Court requesting the protection of their fundamental rights diverts radically from the approach according to which constitutional complaints aim to protect the fundamental rights of individuals and non-governmental entities against unconstitutional court decisions and unconstitutional actions of bodies exercising public power. Such an extended scope of constitutional complaints as introduced in 2019 is unique; no similar is available in any other country of the world, although there are examples where state bodies can turn to the Constitutional Court if a clash of competencies arises. Also, the German system recognises the right of municipalities to request the constitutional protection of some of their specific rights. However, nowhere have public authorities the right to file a constitutional complaint on the basis that their fundamental rights have been violated.

As a result, constitutional complaints can be used not only to protect people's rights against state powers but also to provide constitutional protection to public authorities in their lawsuits vis-à-vis individuals, contrary to the idea that the primary function of fundamental rights is to protect private actors from the arbitrariness and abuses of actors exercising public power. Thus, the possibility that "organisations exercising public authority", such as the Government itself, can bring cases before the Constitutional Court opens a way for judgments delivered in politically sensitive court cases to be overruled by the Constitutional Court in a way that is favourable for the executive power. This practice is particularly concerning as the Constitutional Court has been captured by the government and no longer acts as an independent constitutional body.¹⁰

Since the modifications entered into force in 2019, the Constitutional Court has typically dealt with constitutional complaints submitted by public authorities in the context of the right to a fair trial. Examples show that the Constitutional Court ruled in favour of the Government in these politically important cases, quoting the right to a fair trial, but in fact, overriding the ordinary courts' decisions on a substantive basis. (Research by the Hungarian Helsinki Committee shows that until 1 June 2022, in all three cases where the Government itself was the complainant, the Constitutional Court ruled in its favour.¹¹)

In contrast to this approach, in other instances, the Constitutional Court, as a rule, refrains from substantively assessing the court decisions, arguing that the Constitutional Court is not a fourth instance or "super appellate court", and the interpretation of laws is primarily the task of the ordinary courts. As summarized by the European Commission in several Commission implementing decisions that approved the Operative Programmes of Hungary in 2022: *"The award to the Constitutional Court of a general power to review final decisions rendered by ordinary courts raises concerns if such review may be exercised on broad grounds turning it into a new adjudication of the merits of the case. That is the case where public authorities are allowed to seek such review in case of a breach of the Constitution leading to a violation of their rights, which, in cases affecting public authorities' interests, risk to undermine the right to an effective remedy of other parties whose rights and freedoms guaranteed by the law of the Union are violated, including in cases regarding the interpretation and the*

¹⁰ See also: Kazai, Viktor Z.: *Constitutional Complaint as Orbán's Tool: Judicial assistance for the reinforcement of the government's interests*, *VerfBlog*, 2022/3/01, <https://verfassungsblog.de/constitutional-complaint-as-orbans-tool/>

¹¹ These cases were the following: (i) the decision where the Constitutional Court allowed one question of the homophobic and transphobic referendum initiated by the Government in the summer of 2021, aimed at further stigmatizing LGBTQI people annulling the decision of the Kúria; (ii) the two decisions where the Constitutional Court allowed the use of private email addresses provided for receiving information on COVID-19 vaccination for campaign purposes during the 2022 national parliamentary election campaign.

*application of the Charter in the implementation of this programme, which includes the right for respect of the res judicata character of the final ruling.*¹²

Q: Can the expected reform be achieved without modifying the Fundamental Law?

A: Yes. In their joint assessment, the CSOs suggested implementing the reform expected by Super Milestone 216 via modification of the Fundamental Law regarding the scope of fundamental rights. During the meeting held in the framework of the public consultation of the Draft, the representatives of the government expressly claimed that *"during the negotiations with the European Commission, the Commission did not impose the requirement to amend the Fundamental Law in order to meet the milestones, and the commitments should be interpreted in this spirit."*¹³

In case the Hungarian Government does not intend to modify the Fundamental Law, the expected reform should be implemented via a modification of the relevant cardinal law, the Abtv. The fact that Super Milestone 216 can be fully and sufficiently implemented on the level of a cardinal law is confirmed by the circumstance that (i) the Constitutional Court itself deducted public authorities' right to complain by interpreting the pre-2019 text of Section 27 of the Abtv.; and that (ii) the legislator considered it sufficient to introduce the right to complain for public authorities via a cardinal law, without the modification of the Fundamental Law. If the modification of the relevant cardinal law¹⁴ was sufficient to introduce the legal possibility, it should also be sufficient to remove it from the legal system as well. In the course of the proper implementation of Super Milestone 216, instead of codifying the erroneous practice, the legislature must explicitly state that state bodies vested with public authority do not have the right to submit a constitutional complaint.

Q: How should the expected reform be implemented?

A: In addition to the modifications suggested by the Hungarian Government in the Draft proposal (i.e. restoring the original wording of the Abtv. in force before the 2019 modifications), the Abtv. should *expressis verbis* exclude the possibility of public authorities acting in their capacity as such, to submit a constitutional complaint before the Constitutional Court. For example, Section 27 of the Abtv. should be supplemented with the following paragraph (3): *"Bodies exercising public authority acting in their capacity as such shall not be entitled to submit a constitutional complaint under the present Section."*

¹² See for example: Commission Implementing Decision of 22.12.2022 approving the programme of Hungary for support from the Internal Security Fund for the period from 2021 to 2027 [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10019&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10019&lang=en) p. 3.

¹³ See: https://helsinki.hu/wp-content/uploads/2023/02/Emlékezteto_civil_egyeztetes_egyes_igazsagugyi_targyu_torvenyek_20220208.pdf p. 2.

¹⁴ State/public authorities and bodies were granted the right to challenge final and binding judicial decisions by Act CXXVII of 2019, a substantial omnibus act adopted by the Parliament on 17 December 2019, which contained several new rules regarding, among others, the judiciary (hereafter Omnibus Act).

Q: Which EU decisions require the proper execution of the expected reform?

A: The proper execution of the required reform is expected under several decisions:

- (i) the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary;¹⁵ and
- (ii) ten different Commission Implementing Decisions approving Hungary's operative programmes from union funds.¹⁶ Concerning all operative programmes, the proper execution of the expected reform is an enabling condition.

* * *

¹⁵ Section 216 of the Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, see: <https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf> p. 134.

¹⁶ See:

1. Commission Implementing Decision C(2022)10004 on the Environmental and Energy Efficiency Operational Programme Plus [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10004&lang=hu](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10004&lang=hu) ;
2. Commission Implementing Decision C(2022)10007 on the Digital Renewal Operational Programme Plus [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10007&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10007&lang=en) ;
3. Commission Implementing Decision C(2022)10008 on the Territorial and Settlement Development Operational Programme Plus [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10008&lang=hu](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10008&lang=hu) ;
4. Commission Implementing Decision C(2022)10009 on the Economic Development and Innovation Operational Programme Plus [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10009&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10009&lang=en) ;
5. Commission Implementing Decision C(2022)10010 on the Human Resources Development Operational Programme Plus [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10010&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10010&lang=en) ;
6. Commission Implementing Decision C(2022)10011 on the Integrated Transport Development Operational Programme Plus [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10011&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10011&lang=en) ;
7. Commission Implementing Decision C(2022)10018 on the Hungarian Fisheries Programme Plus (HFP Plus) [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10018&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10018&lang=en) ;
8. Commission Implementing Decision C(2022)10019 on the Internal Security Fund [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10019&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10019&lang=en) ;
9. Commission Implementing Decision C(2022)10020 on the Instrument for Financial support for Border Management and Visa Policy [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10019&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10019&lang=en) ;
10. Commission Implementing Decision C(2022)10022 on the Asylum, Migration and Integration Fund [Article 3 (2) d)]
[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10022&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10022&lang=en) ;