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INTÉZET

ASSESSMENT

of Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan

in light of the super milestones set out in
the Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary¹

22 May 2023

EXECUTIVE SUMMARY

On 3 May 2023, the Hungarian Parliament adopted Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan (**Reform**).² The Hungarian government claims to have achieved all four of the so-called super milestones aimed at restoring the independence of the judiciary set by the Council of the European Union as a precondition for accessing frozen EU funds under Hungary's Recovery and Resilience Fund (RRF).

The Reform is a remarkable step forward compared to the draft proposal (**Proposal**)³ published by the Hungarian government for public consultation in January 2023 as assessed⁴ by the Hungarian Helsinki Committee, Amnesty International Hungary, and the Eötvös Károly Institute (**CSOs**). While as a whole, the Proposal reflected the Hungarian government's intention to avoid compliance with those super milestones that demand core changes in the judicial system, the adopted Reform in general shows a willingness to fulfill these conditions.

Nevertheless, compliance with the super milestones is still deficient under the Reform.

These remaining deficiencies cannot be deemed as minor in any case. The judicial reform expected by the super milestones is of exceptional importance as it is rooted in long-standing rule of law concerns and forms a legal minimum for the restoration of the independence of the Hungarian judiciary [see [Section I.](#) below]. Thus, compliance with the super milestones -- constituting minimum standards for the restoration of the independence of the Hungarian judiciary -- should be assessed with particular care and without compromise, no matter their technical nature.

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 The official text of the Reform was published on 10 May 2023 in the National Gazette: <https://magyarkozlony.hu/dokumentumok/a87dd6ba5bb31d10d132a3461d87b33650b38323/megtekintes>

³ See in Hungarian: https://helsinki.hu/wp-content/uploads/2023/02/kormanyzati_javaslat_20230118.pdf

⁴ See the Assessment of the Proposal by the CSOs of 3 February 2023 (CSOs' Assessment of the Proposal) here: <https://helsinki.hu/en/joint-assessment-of-the-governments-judicial-package-aimed-at-unblocking-eu-funds/>

The main shortcomings of the Reform signal that the Hungarian government's willingness to comply with the conditions for union funds is not paired with a true commitment to restoring the rule of law.

1. The way the Reform was passed abused the lawmaking process, circumvented the public consultation and parliamentary debate, and is in clear breach of the Hungarian Parliament's Rules of Procedure. While the adoption of the Reform is expected to strengthen respect for the rule of law, the process leading to it does not comply with the principle of legality, which requires a transparent, accountable, democratic, and pluralistic law-making process. These shortcomings should be evaluated by the European Commission, taking due care not to legitimise the abuse of the lawmaking process [see [Section II.](#) below].
2. Three out of the four judicial super milestones are implemented defectively, concerning (i) the removal of all obstacles to preliminary references to the Court of Justice of the European Union (CJEU) (because a Kúria precedent which declares unlawful all preliminary references that are not relevant to the legal dispute concerned still stands); (ii) the new 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 any transitional rules; and (iii) the independence of the Kúria, because the Kúria President can be kept in office indefinitely by a one-third parliamentary minority. The Reform also leaves open the possibility that Constitutional Court (CC) justices (who have already been appointed judges without an application procedure) may be transferred to the ordinary court system (although not to the Kúria), maintaining the serious rule of law concerns raised by *ad hominem* judicial appointments by the ruling majority. The Reform cements the composition of the uniformity complaint chamber without providing adequate guarantees for its autonomy and professionalism in decision-making [see [Section III.](#) below].
3. The Reform duly complies with several core requirements set out in the super milestones: it (i) strengthens the legal status and powers of the NJC, grants legal personality and budgetary autonomy to the NJC with a proper transitional period, allows access to all relevant data and information by the NJC, and establishes a system of legal remedy available to the NJC to enforce its powers; (ii) strengthens the independence of the Kúria by amending the eligibility rules for the Kúria President and Vice-President; and (iii) fully implements the super milestone that requires stripping state authorities of the ability to submit constitutional complaints [see [Section IV.](#) below].
4. Even if all above deficiencies are corrected in the future, several factors can pose an inherent risk to the functioning of the new legal framework. The minimum standards established by the milestones may prove to be insufficient without addressing other, strongly interconnected rule of law concerns. The five most urgent concerns include (i) the limitlessly renewable state of danger that allows the government to rule by decree and override basically any act of Parliament through emergency government decrees; (ii) the captured CC, which is vested with powers to review the constitutionality of final judicial decisions and to decide legal disputes between the NJC and other authorities; (iii) the captured Kúria, which can determine the compulsory interpretation of the laws through uniformity decisions; (iv) the lack of guarantees for the freedom of expression of judges; and (v) the risk of the capture of the NJC [see [Section V.](#) below].

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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
lasz.	Act LXVIII of 1997 on the Service Relationship of Judicial Employees

I. THE EXCEPTIONAL IMPORTANCE OF THE REFORM LEAVES NO ROOM FOR BARGAINING

The relevance of the Reform is exceptional for three reasons. First, from the perspective of access to union funds: besides being a precondition to RRF funds, the judicial reform is an enabling condition with respect to ten different Commission Implementing Decisions approving Hungary's operative programmes from union funds.⁵ This means that the proper implementation of the milestones is attached to the access to altogether EUR 27 billion in union funds. Second, from the perspective of the rule of law: all judicial super milestones are rooted in long-standing rule of law concerns and can be traced back to a series of rule of law-related recommendations released in the framework of different mechanisms of the union, such as the country specific recommendations of the European Semester, the recommendations of the yearly Rule of Law Review Cycle, and the Article 7 proceeding initiated against Hungary. In addition, one of the four super milestones executes a judgment of the Court of Justice of the European Union (CJEU), which has not been implemented since 2021. Tracing back the rule of law concerns behind the super milestones is essential in order to assess due compliance and avoid compromising core rule of law values. Third, the Reform is a vital first step toward restoring the independence of the judiciary. For over a decade, the ruling majority has progressed in dismantling the guarantees of the independence of the judicial system. The super milestones prescribed by the European Commission create minimum standards for a regulatory framework that can form a solid foundation for reconstructing judicial independence in Hungary. Therefore, it is essential to require compliance without compromises, even if deviations seem to be minor or technical in nature.

II. SHORTCOMINGS OF THE PUBLIC CONSULTATION AND THE LAWMAKING PROCESS

Despite its utmost importance and the fact that the super milestones expressly required the Hungarian government to consult with the public on the proposed legislation,⁶ the bill on the judicial

⁵ 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) ;

⁶ According to Components C9.R15-18. "Before tabling the draft laws required for the implementation of this reform, a stakeholder consultation shall be organised, allowing at least the NJC, judicial associations, the Hungarian Bar Association, civil society organisations, the

reform was submitted to the Parliament in breach of the laws governing the lawmaking process, precluding any meaningful public and professional consultation on the content of the proposal finally tabled for adoption. This circumvented public consultation and full parliamentary debate on the laws and was in clear breach of the Hungarian Parliament's Rules of Procedure.

The Reform was adopted within 3 working days of the Parliament (see the timeline attached hereto as Annex I.) and under the name of another act. The bill that became the Reform was originally submitted on 3 March 2023, as Bill T/3131 on "*the modification of rules related to asset declarations in order to reach an agreement with the European Commission*" (Bill on Rules of Asset Declarations). It proposed the modification of several laws with respect to rules on asset declarations. Neither its title nor its content were related to the expected judicial reform. It did, however, contain several paragraphs that proposed minor and unnecessary amendments⁷ to certain provisions of all the laws to be amended in the context of the judicial reform. The bill was discussed in a general debate, an in-depth debate, and by the Justice Committee of the Parliament. All discussions were conducted on the basis of the original text of the bill, which did not contain any provisions of the Reform. By 14 March 2023, all discussions were closed, and the bill was scheduled for adoption on 3 May 2023.

Three working days before the scheduled adoption, however, the Bill on Rules of Asset Declarations was suddenly transformed into the judicial package implementing the four super milestones.

On 27 April 2023, ruling party MPs in the Legislative Committee (in Hungarian "Törvényalkotási Bizottság") submitted the Reform *as their own amendment* to the bill (even though the original judicial reform was drafted by the Ministry of Justice, not individual ruling party MPs). The text of the amendment only became available on the Parliament's website at 16:36 on 27 April 2023, just one working day before the plenary discussion of the bill on 2 May 2023. Absurdly, the Reform went through the rest of the legislative process as the Bill on the Rules of Asset Declarations (while in fact, its content no longer affected asset declarations). Even days after its adoption on 3 May 2023, the explanatory notes appended to the Reform were formally still attached to rules of asset declarations.⁸ This way, the text of the Reform was adopted without time for proper parliamentary debate regarding its content.

This bait-and-switch has already been used by the ruling majority on several occasions, even in cases of important judicial reforms,⁹ with the deliberate aim of circumventing meaningful public debate on legislation. Yet this time, the abusive practice went further, constituting a breach of the Parliament's Rules of Procedure on two separate legal bases. On the one hand, Section 40 (3) of the Parliamentary Decision 10/2014 (II. 24.) of the Rules of Procedure of the Hungarian Parliament clearly states that "*an amendment proposal that seeks to delete the entire bill shall not be discussed and shall not be put to the vote.*" In this case, the original Bill on the Rules of Asset Declarations was fully deleted and replaced

Kúria, the National Office for the Judiciary (NOJ), the Constitutional Court, and the Prosecutor General to give comments within no less than 15 days."

⁷ Sections 2, 9, 10 and 23 of the Bill proposed fully redundant modifications to four laws to be amended in compliance with the super milestones.

⁸ See: <https://www.parlament.hu/irom42/03131/03131indo3.pdf>

⁹ See for example the extra speedy legislative process leading to the establishment of a completely new Administrative Court of Appeal, which took less than 23 calendar days from the first draft of the bill until entry into force, leaving no chance to any meaningful consultation with the public or with judges (see: <https://helsinki.hu/wp-content/uploads/2022/06/Annex-II-Legislative-Process-of-Establishing-a-New-Administrative-Court.pdf>)

with fully new content, including a new title. Not even a small part of the original text remained. On the other hand, the modification also breached Section 42(b) of the Rules of Procedure, according to which a proposed amendment may not alter the scope of the original bill. This was precisely the case here, as the original bill dealing with asset declarations only covered a few irrelevant parts of the laws relating to the judiciary.

Although the Hungarian government published a draft version of the proposal in January 2023 for consultation, this was never formally submitted to the Parliament, and the proposal actually submitted to the Parliament (as an amendment of the Bill on the Rules of Asset Declarations) remarkably differs from the draft published in January. Therefore, the text proposed to be adopted by the Parliament contains extensive parts that have not been consulted by or discussed with the public or with professional stakeholders as requested by the milestone.

Because the Reform was tabled by individual ruling party MPs, Hungarian legislation¹⁰ does not require the Ministry of Justice to publish the results of the public consultation procedure conducted with respect to the first draft published in January, but the results of the public consultation were nevertheless shared with the public.¹¹ The feedback that the Ministry of Justice publicly provided is extremely formal, containing just one sentence as an explanation for its rejection of the recommendations provided by the public.

All in all, though the adoption of the Reform is expected to strengthen respect for the rule of law, the process leading to it manifestly breached the principle of legality, which requires a transparent, accountable, democratic and pluralistic law-making process. The shortcomings of the legislative process should be evaluated by the European Commission, taking due care not to legitimise the long-standing abusive practices of the Hungarian government.

III. DEFICIENCY IN COMPLIANCE WITH SUPER MILESTONES

III.1. Entry into force of legislative amendments to strengthen the role of the NJC while safeguarding its independence [Super Milestone 213]

(i) Lack of transitional rules guaranteeing the effective application of the new powers of the NJC

The selection of judges is crucial for the independence of the judiciary. Meeting one of the requirements set forth by Milestone 213.a), the Reform¹² provides that the NJC shall give a binding opinion on the draft ministerial decree on the points-based system for the assessment of applications for judicial positions. The NJC will be able to turn to the CC if its binding opinion is not obtained in the law-making process. However, the Reform does not set a deadline for amending the current ministerial decree¹³ that has been in effect since 2011. The intention of this milestone and an approach in line with rule of law principles require the Minister of Justice (MoJ) to pass a new decree, the draft of which would be shared with the NJC for its binding opinion.

¹⁰ Act CXXXI of 2010 on Public Participation in the Preparation of Legislation.

¹¹ See: <https://cdn.kormany.hu/uploads/document/7/74/749/749c744d84e31ef6fa2875418df2f6deedob7ff1.pdf>

¹² New Section 103 (3) q) of Act Bszi.

¹³ Decree No. 7/2011 (III. 4.) of the Ministry of Public Administration and Justice.

In the past, the NOJ President and the NJC have proposed amendments to the decree, but the MoJ has not taken up these proposals. Because the decision lies in the hands of the MoJ, there is a risk that the MoJ will not amend the decree, thus preventing the NJC from influencing the points-based system for judicial applications.

A further risk is that the MoJ may argue that the law only requires obtaining the NJC's binding opinion when a draft of a completely new decree on the points-based system is put forward and not in the case of an amendment to the current one, effectively emptying out the new NJC prerogative.

(ii) Transfer as a tool to circumvent the normal application system

Implementing Milestone 213.g), the Reform changed the law to prevent the NOJ President from reinstating judges, following their transfer to an administrative organ, to a court instance *higher* than that of the court on which they sat before their transfer (so that judges may only be reinstated to a court instance at the same level as that of the court on which they sat previously). It is a step in the right direction that any such transfer is subject to NJC consent.

However, *termination* of such transfer is not subject to NJC consent, and there are no objective criteria of such transfers, paving the way for non-transparent transfers to administrative organs. Moreover, the Reform¹⁴ continues to allow the NOJ President to appoint the transferred judge after the termination of the transfer as presiding judge without an application proceeding. This in the future still allows for the possibility of obtaining a judicial leadership position by circumventing the normal application system and curtailing the merit-based promotion of judges.

III.2. Strengthening the judicial independence of the Kúria [Super Milestone 214]

(i) Rules excluding the re-election of the Kúria President have an illusory effect

The Reform formally complies with Super Milestone 214.a),¹⁵ which requires the Kúria President to be ineligible for re-election, by expressly excluding¹⁶ the possibility of the Kúria President's re-election by a two-thirds parliamentary majority. Nevertheless, compliance with this requirement remains illusory in light of the underlying legislative provisions allowing the Kúria President to keep his mandate without a time limit -- and even irrespective of the mandatory retirement age -- until the election of his successor by a two-thirds majority. Thus, while it is true that the Kúria President cannot be re-elected, he can be kept in office by a one-third parliamentary minority, practically until the end of his life, because he is also exempt from the mandatory retirement age for judges.¹⁷ As long as the current rules remain in force, this aspect of the Reform does not prevent a parliamentary minority from *de facto* re-electing the Kúria President. In order to fully comply with

¹⁴ Sections 27/A (2), 58 (3), 62/C (3) of the Bjt.

¹⁵ According to Section 214 a) (ii) of Super Milestone 214 "legislative amendments shall enter into force and start being applied, which amend the rules on the election of the Kúria President in order to ensure that: [...] (ii) the Kúria President cannot be re-elected."

¹⁶ Section 36 (1) of the Reform.

¹⁷ According to Article 26(2) of the Fundamental Law: "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."

this super milestone, it is necessary to delete the provisions of Section 115 (4) of the Bszi, as suggested in the CSOs' Assessment of the Proposal.¹⁸

(ii) New rules unjustifiably limit the pool of candidates for the office of the Kúria President

The Reform introduces new rules for the election of the Kúria President, partially as required by the super milestones. However, one new eligibility condition -- not set out in the relevant super milestone -- radically narrows the pool of possible candidates for this office. This new condition requires that the Kúria President "*have at least two years of experience as a Kúria judge.*" It cannot be linked to the eligibility criteria required by the relevant milestone (independence, impartiality, integrity, and probity). At the same time, it significantly narrows the pool of potential candidates as compared to the current rules, which permit any judge appointed for an indefinite period having at least five years experience as a judge to stand for the office of Kúria President, creating a pool of approximately 2000-2500 judge candidates. Thanks to the introduction of the new eligibility criterion, this pool will comprise approximately 100 judges, a reduction without any reasonable explanation. This change also raises concerns in light of the court capture process carried out with respect to the Kúria in the past years [see below under Section V.3.].

(iii) The possibility that members of the Constitutional Court may be appointed to higher courts without following the normal application procedure has not been eliminated

The Reform provides a compromise solution with respect to the possibility that members of the Constitutional Court may be appointed to the ordinary court system without following the normal application procedure. Those members of the Constitutional Court who were appointed as judges under the objectionable regulatory framework introduced in December 2019, the Reform does not eliminate the possibility that they may be transferred to a higher court. Under the Reform, these members of the CC cannot be directly appointed to the Kúria, but they can choose to be transferred to any Court of Appeal (Ítéltábla), the second highest court instance within the four-tier ordinary court system of Hungary. This solution is still concerning from the perspective of the rule of law and the independence of the judiciary. It raises the same problems as judicial appointments by the legislative branch via *ad hominem* legislation circumventing the normal application procedure and without the involvement of judicial self-governing bodies. Thus, "*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.*"¹⁹

(iv) Concerns with respect to the new rules on case allocation

Regarding the rules on case allocation in the Kúria, only the *general wording* of the relevant milestone has been transplanted into the Reform at several points; therefore, the *aims* of Super Milestone 214 have not been fully met. For instance, in line with the text of the relevant milestone, the Reform states that cases must be allocated to judicial chambers on pre-established, objective criteria; however, it fails to define what these objective criteria are. Also, it provides several vaguely defined grounds for deviating from the general rules for case allocation (e.g., to ensure a balanced workload or in a

¹⁸ https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/2023judicial_package_assessment_AIHU_EKINT_HHC.pdf p. 13.

¹⁹ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SCo316&from=EN> page 8.

standby situation). Deviation is explicitly allowed in electoral cases²⁰ as a typical standby situation when the Kúria must decide on a large number of cases within a 3-day deadline. Furthermore, by distinguishing between “chambers” and “adjudicating chambers,” it allows the composition of judicial chambers to be manipulated, notwithstanding the new case allocation rules. The Reform fails to require fix-member adjudicating chambers to be established in the case allocation scheme of the Kúria which undermines the transparency and foreseeability of which judges will sit on a particular case.²¹ Therefore, the new rules still have serious shortcomings which can put the standards of a fair trial at great risk. This risk cannot fully be counterbalanced by newly introduced guarantees, namely that (1) the judicial council of the Kúria and the departments of judges (“*kollégiumok*”) must provide binding opinions on the case allocation rules, and that (2) litigating parties can verify on a case-by-case basis compliance with the rules for case allocation and the grounds for any deviation from them.

(v) Cementing the composition of uniformity complaint chambers in accordance with the rules arbitrarily established by the Kúria President

The Reform revises the current regulation on the uniformity complaint chamber providing new rules governing its size, quorum, composition, and the chamber’s case allocation. When assessing these rules, it should be taken into consideration that being a member of the uniformity complaint chamber practically means the highest possible professional position within the ordinary court system due to the fact that the legislation entitles the Kúria’s uniformity complaint chamber to review and overrule the final and binding decisions of other chambers of the Kúria and issue uniformity decisions establishing mandatory interpretations of the law. After being published in the National Gazette, the application of these uniformity decisions is compulsory for all ordinary courts. This means that the uniformity complaint chamber functions as a supreme court within the supreme court of Hungary. Thus, its composition is of high importance both from the perspective of the outcome of individual cases and the jurisprudence of all Hungarian courts. As the Venice Commission underlined on several occasions, a system of uniformity procedures may raise concerns regarding the internal independence of the judiciary.²²

The rules introduced by the Reform *in fact* convert into cardinal law the currently applicable rules set out in the case allocation scheme as arbitrarily established and introduced by the Kúria President. The composition of the uniformity complaint chamber was formerly criticised by the Venice Commission on the basis that the Kúria President “*comes to play a central role that could influence in a decisive manner the uniformity complaint chamber and consequently the overall jurisprudence on a relevant matter.*”²³ While uniformity decisions are a very powerful tool to control the content of adjudication and may even serve to “*balance external judicial influences*”²⁴ as explained by the Kúria President, the new rules introduced by the Reform do not adequately guarantee the required level of autonomy and professionalism in decision-making, for several reasons. First, the size of the chamber

²⁰ New Section 10 (5) d) of the Bszi., for example based on Section 6 f) of Annex 9 of NOJ President Instruction No. 5/2013. (VI. 25.).

²¹ The problems of the text differentiating between “*chambers hearing the case*” and “*adjudicating chambers*” have been addressed in detail by the CSOs’ Assessment of the Proposal. See: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/2023judicial_package_assessment_AIHU_EKINT_HHC.pdf, pp. 19-20.

²² 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, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)036-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)036-e) p. 10-13.

²³ *Ibid*, p. 13., para 48.

²⁴ As highlighted by the Kúria President in his speech held at a working breakfast of 2 March 2023 https://kuria-birosag.hu/sites/default/files/sajto/dr._varga_zs._andras_elnok_eloadasa.pdf

is not defined with sufficient clarity, leaving a wide margin for manoeuvre in practice. As a main rule, it is a 40-judge chamber, but alternatively it can adjudicate in two 20-judge sub-chambers as well. The legislation fully leaves it to the decision of departments of judges (although not quite clear whether their agreement should be unanimous in this matter) to decide on the application of the main rule, or the exception. The rules do not address the situation where the number of these senior officials exceeds 40 or is less than 40.²⁵ Second, the Kúria President has a central role in the uniformity complaint process: he has the right to become the presiding judge in a uniformity complaint case,²⁶ and because this chamber is composed solely of senior court officials (the Kúria Secretary General, chairs and vice-chairs of departments, presiding judges), he holds the administrative powers to appoint judges who may become members of the chamber. Through this privileged role, the Kúria President holds a strong formal and informal power in the adjudication of individual cases and in shaping the mandatory interpretation of the law. Third, the *rules on the composition of the chamber* do not ensure professionalism in decision-making. The judge rapporteur is not automatically appointed, and the rules do not require any adjustment of the chamber's composition depending on the subject matter of the case.

As decisions of the uniformity complaint chamber may overrule the final and binding decision of any other chamber of the Kúria and their interpretation is mandatory to all courts, appropriate rules should be introduced to mitigate the potential risks of a top-down control over individual judicial decisions inherent in the uniformity complaint procedure.²⁷

III.3. Obstacles to references for preliminary rulings to the Court of Justice of the European Union are not removed [Super Milestone 215]

One of the four super milestones requires the amendment of two specific Sections of Be. "*in order to remove any obstacle to a court to make a preliminary reference in line with Article 267 TFEU.*" When assessing compliance with this particular super milestone, it is important to see that it is rooted in Judgment C-564/19 of the CJEU, which was delivered on 23 November 2021 and has not been executed by the Hungarian government.

The Reform amends the referred sections of the Be. by abolishing the procedural obstacles to making a preliminary reference, but it fails to address a substantive obstacle in the form of the binding precedential decision Bt.III.838/2019/11. of the Kúria (**Precedential Decision**),²⁸ which declares with a general scope, covering all branches of adjudication (criminal, civil, and administrative) that 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. As a consequence of its precedential force and the fact

²⁵ According to the currently effective case allocation scheme, 41 judges of the Kúria are eligible for becoming members of the uniformity complaint chamber.

²⁶ This is the case regarding the current case allocation scheme of the Kúria that is in force since 2023. According to it, both uniformity complaint chambers are presided over by the Kúria President. See: https://kuria-kozadatok.birosag.hu/sites/default/files/field_attachment/ur_2023_marcius_27_am.pdf, pp. 24-25

²⁷ The Venice Commission has already raised concerns about the central role of the Kúria President in determining the composition of the uniformity complaint chamber. Even though the Reform provides new guarantees for selecting senior court officials in the top court and for determining the case allocation scheme in the Kúria, considering the decisive role of the Kúria President in the make-up as well as in the functioning of the uniformity complaint chamber, "*the risk of politicization*" regarding uniformity complaint procedures maintains. 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, para 48.

²⁸ The decision was originally published as a decision in principle of court under no. EBH2019.B.22. Later, as a consequence of the introduction of the semi-precedential system in 2020, it gained precedential force. See the decision in Hungarian here: https://helsinki.hu/wp-content/uploads/2022/11/Bt.838_2019_11.pdf

that it was delivered based on an “appeal in the interest of the law,” the Precedential Decision is applicable to and obligatory for all Hungarian judges.

The Reform does not exclude the applicability of the Precedential Decision. The adopted modification of Section 490 (1) of the Be. is not capable of neutralizing the compulsory requirements set out in the Precedential Decision, because it does not allow for a new interpretation of the law. The only element that can be considered “new” in the text of the law is a supplement, according to which a court should turn to the CJEU for a preliminary ruling “*where it finds that it is necessary with respect to any legal act or legislation of the European Union applicable in the criminal proceeding.*” This newly added element does not run counter to the Precedential Decision. It actually strengthens the restrictive interpretation formulated by the Precedential Decision, according to which any reference to the CJEU containing questions not relevant to the dispute concerned can be unlawful.

As long as the Precedential Decision remains in force, there is no need for the Prosecutor General (PG) to initiate new appeals in order to declare that a reference for a preliminary ruling is unlawful. It is enough to establish -- for example, in the framework of a suitability proceeding, or a disciplinary proceeding initiated against the judge -- that a preliminary reference contains questions not relevant to the dispute concerned, and the unlawfulness of the preliminary reference will then necessarily be established by the force of the Precedential Decision. This prospect undermines the mechanism of references to the CJEU and judicial independence.

In order to implement Super Milestone 215 properly and to execute Judgment C-564/19 fully, it is not enough to modify the Be. to exclude the ability of the PG to challenge a judicial order requesting a preliminary ruling from the CJEU via “an appeal in the interests of the law” (as provided for by the Reform). In addition to the above (i) all relevant procedural codes should be modified to prohibit litigants from challenging a judicial order requesting a preliminary ruling from the CJEU (on the basis of the Precedential Decision or on any other basis); (ii) 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; and (iii) the newly added text according to which a court should only turn to the CJEU with a preliminary ruling “*where it finds that it is necessary with respect to any legal act or legislation of the European Union applicable in the criminal proceeding*” should be deleted, so as not to maintain a restrictive interpretation of the right of judges to refer questions to the CJEU.²⁹

IV. DUE COMPLIANCE

The Reform implements several essential elements of the super milestones in a satisfactory manner and represents a major step forward compared to the Proposal. Notably, it did not contain modifications originally proposed by the Hungarian government that would have further undermined the independence of the judiciary.

(i) Strengthening the status and powers of the NJC

The Reform not only grants legal personality and budgetary autonomy to the NJC, but also provides for a 9-month transition period to incubate the transition of the NJC into an autonomous legal entity,

²⁹ For more details see the Q&A on the implementation of super milestone 215 here: https://helsinki.hu/wp-content/uploads/2023/05/Super_Milestone_215_QA_20230516.pdf

during which the NOJ will provide support and infrastructure for the secretarial and administrative tasks related to the establishment of the NJC. It also provides the NJC greater budgetary autonomy by entrusting the NJC. The Reform allows for the election of a new NJC President immediately after the entry into force of the legislation and does not preclude the re-election of the President and the Vice-president of the NJC. The Reform grants the NJC full right to access all documents, information, and data relating to the administration of the courts, including personal data, within 15 days of filing a request. The NJC retains its effective right to hear the candidates for the positions of Kúria President and Vice-President and NOJ President and Vice-President as part of the selection process, while the Reform includes independence, impartiality, integrity, and probity among the objective criteria for the election of the NOJ President, the Kúria President, and their vice-presidents, as required by the relevant milestone. In a significant positive development, the Reform finally meets the requirement of good governance by partially requiring the NOJ President to state reasons for their administrative decisions, albeit only for decisions subject to the agreement or binding opinion of the NJC. Where the NOJ President exercises the right of assent over administrative decisions of the Kúria President, the Kúria President must provide reasons for their decisions. The NJC may give a binding opinion to the Minister of Justice when the MoJ establishes new rules of ranking candidates during judicial appointment procedures. The Reform also provides for a complex and stronger system of legal remedies safeguarding the new, strengthened powers of the NJC.

(ii) Strengthening the independence of the Kúria.

The Reform properly complies with the super milestone requiring stronger powers for judicial bodies within the Kúria by giving the judicial council of the Kúria and the departments of judges the right to consent to secondments, the case allocation scheme, and the appointment of most judicial leaders of the Kúria. As a result of the Reform, litigating parties will be able to review the legality of case allocations. A major achievement of the Reform is that the NJC is now empowered to give a binding opinion on the eligibility of candidates for President and Vice-President of the Kúria and will be able to exclude those candidates who fail to meet the requirements of independence, impartiality, probity, and integrity. Also, in the future, only those candidates can be elected as Kúria President and Vice-President who have served at least five years as judges in the ordinary court system.

(iii) Removing the possibility for public authorities to challenge final judicial decisions before the Constitutional Court

The Reform properly complies with the super milestone that requires the removal of the ability of public authorities to challenge final judicial decisions before the Constitutional Court.³⁰

V. FUTURE RISKS AND PROSPECTS

V.1. The state of danger

The Hungarian government has been maintaining a “rule by decree” system since 2020 and continues to possess excessive regulatory powers under a limitlessly renewable state of danger, which has

³⁰ For more details see the Q&A on the implementation of super milestone 216 here: <https://helsinki.hu/en/qa-on-super-milestone-216/>

recently been extended until 25 November 2023.³¹ The legal framework allows the Government to override basically any Act of Parliament via emergency government decrees during the state of danger due to the excessive, *carte blanche* mandate it has been granted by law in terms of the scope and subject matter of these decrees. In addition, in a state of danger, the Fundamental Law allows for the emergency government decrees to suspend or restrict most fundamental rights beyond the extent permissible under ordinary circumstances. There is no automatic and regular parliamentary oversight over individual emergency decrees, also depriving the opposition of the opportunity to contest government decrees publicly in the Parliament. Emergency decrees are not subject to obligatory public consultation, and their effective constitutional review is not ensured, in part because demands by the opposition and independent NGOs that the CC should review their constitutionality in an accelerated procedure have been neglected by the ruling majority. As also raised by European Commission's 2022 Rule of Law Report,³² the Government has been issuing emergency decrees extensively and in an abusive manner, for purposes not related to the ground for the state of danger – previously the pandemic, presently the war in Ukraine. Thus, the current constitutional and statutory framework pertaining to the state of danger makes the Government capable of overriding Acts of Parliament concerning the judiciary, including the Reform, via emergency decrees.³³

V.2. The captured Constitutional Court

The Act confers jurisdiction on the CC to protect the newly established rights of the NJC. The NJC can turn to the CC if its right to give an opinion on justice-related draft laws, including a decree of the Minister of Justice on the points-based evaluation of judicial candidates, on which the NJC's opinion is binding, has been violated. The NJC can also challenge any law violating its rights before the CC.

In order that the CC can provide an effective remedy for the NJC, the independence of the CC must be ensured. Also, the independence of the CC is of key importance for the entire ordinary court system as the CC can review the constitutionality of final judicial decisions in constitutional complaint procedures. However, since 2010, the Government has constantly sought to undermine the independence of the CC and extend control over it. The political capture of the CC has taken place gradually, by replacing the consensual rule of nominating justices to the CC with a politically motivated selection procedure, extending the size of the body, curtailing its power to review legislation, limiting access to it by abolishing "actio popularis" complaints, and deploying various tools that restrict the CC's autonomy in decision-making. As a result, the CC today operates not as an institutional check on political power rather as an agent of the current government.

To strengthen the independence of the CC, the following steps must be taken, at the very least: (1) the process of selecting new justices to the CC must be transparent and ensure the involvement of the opposition, for instance, by reinstating the pre-2010 rule of parity in the parliamentary committee nominating CC justices; (2) the CC must regain its powers to review tax-related laws and amendments to the Fundamental Law on substance; (3) case allocation in the CC must be based on transparent,

³¹ Government Decree 167/2023. (V. 11.)

³² European Commission, 2022 Rule of Law Report – Country Chapter on the rule of law situation in Hungary, https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf, p. 25.

³³ For more information on the legal framework, the main concerns, and examples of the inappropriate use of emergency decrees, see: Hungarian Helsinki Committee, *Government gains excessive powers from forever renewable state of danger*, 24 February 2023, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/HHC_Hungary_state_of_danger_24022023.pdf.

pre-established, and objective criteria, (4) the President of the CC must be selected by the CC justices themselves; and (5) the autonomy of judicial decision-making must be guaranteed, for instance, by repealing the current restrictions on constitutional interpretation.

V.3. The captured Kúria and the obligatory interpretation of the law as a tool to control the decisions of lower courts

Undermining the independence of the judiciary in Hungary has been a constant endeavour of the ruling majority since it gained constitutional power in 2010. After 2018, legislative and court administration measures focused on turning the Kúria into an apex court that is characterised by a highly increased likelihood of adjudicating politically sensitive cases in a manner that is favourable to the government.

Legislative acts increased the weight of the Kúria within the court system and concentrated the most important judicial powers in the apex court, which also provided a logistical reason and legal basis to increase the number of judges at the Kúria. To ensure the court-packing process succeeded, several legislative changes were introduced to replace sitting judges. Under these changes, (i) judicial leaders could reselect judges who may handle administrative cases (i.e., lawsuits in which state authorities are involved); (ii) CC justices could request to be transferred to the Kúria, providing a direct gateway for political appointees to the top tier of the ordinary court system; and (iii) a new Kúria President was elected based via *ad hominem* legislative measures introduced just a couple of months before the new Kúria President's election became due.

The court-packing process was furthered by court administration measures taken by the two powerful political appointees holding excessive powers within the judiciary (the NOJ President and the Kúria President) through arbitrary secondments, unlawful judicial appointments, informal promotions, and the manipulation of the case allocation system.

As a result, since the election of András Zs. Varga as Kúria President, the composition of the Kúria has significantly changed. In less than two years, the new Kúria President filled altogether 18 judicial positions and at least 10 leadership positions (including the Vice-President, the Secretary, the Deputy Secretary, and 3 Chairs and 4 Vice-Chairs of the departments of judges) at the Kúria. By the end of October 2022, in total 94 judges served at the Kúria, out of which at least (i) 2 judges -- the Kúria President and the Kúria Vice-President -- were appointed by *ad hominem* legislation, without an ordinary application procedure; (ii) 1 judge was transferred to the Kúria, circumventing the application procedure, by the NOJ President; (iii) 5 judges were appointed in breach of the laws, circumventing the NJC's right to consent, and (iv) 10 judges were appointed after being seconded to the Kúria, of whom at least 3 judges directly benefited from their secondment during the application procedure.³⁴

The capture of the Kúria is not only problematic because it takes the final decisions in almost all legal disputes but also because of its recently gained powers to influence the outcome of court decisions

³⁴ See Hungarian Helsinki Committee, Court Capture Project Completed, 26 October 2022, <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/11/Court-Capture-Project-Completed-20221026-.pdf>

by determining the mandatory interpretation of laws through uniformity decisions. [See above at [Section III.](#)]

V.4. The NJC as next target of capture

Super milestone 213 was aimed at “[e]stablish[ing] stronger powers for the NJC so that it can effectively exercise its constitutional role in supervising the central administration of courts”. It is therefore extremely important to safeguard the future composition of the NJC by ensuring that the election of its members represents the will of the judges and is free from any formal or informal pressure. Only an independent NJC may fulfill its constitutional role in line with its newly strengthened powers.

The mandate of the current NJC expires on the day when the new NJC convenes, but 30 January 2024 at the latest.³⁵ By law, at the latest by 30 September 2023, judges’ plenary meetings at courts should be convened to elect delegates (electors) to the NJC’s Assembly of Delegates, where these delegates will vote upon the 14 new members and 14 substitute members of the next NJC amongst themselves. This means that the timing of the whole election procedure depends on the date on which judge’s plenary meetings are convened by court presidents; therefore, the current NJC’s mandate may even expire before the end of 2023.

The Reform fails to establish a conflict-of-interest rule whereby judicial leaders appointed by the NOJ President (i.e., court presidents, court vice-presidents, chairs of the departments of judges) and with respect to whom the NOJ President exercises the employer’s rights are excluded from becoming members of the NJC.³⁶ The lack of such conflict-of-interest rule is problematic for the future election and operation of the new NJC, as:

- (i) judicial leader NJC members have significant and extensive powers in the selection, promotion and evaluation of judges, and they exercise employer’s rights over them; therefore, other NJC members **may not dare to challenge them on issues** within the NJC decision-making processes;
- (ii) it is **questionable** whether judicial leaders appointed by the NOJ President, and against whom the NOJ President may open disciplinary and administrative investigations, are able to **exercise independent and impartial supervision** over the NOJ President; and
- (iii) judicial leaders’ formal and informal influence at courts makes it **easier for them to be elected** as NJC members at the NJC's Assembly of Delegates.³⁷

These risks are only partially mitigated by the new rule introduced by the Reform³⁸ providing that “[t]he court president members of the NJC, including the Kúria President, and court vice-president members of the NJC shall not participate in deliberations and decisions relating to their administrative

³⁵ Section 102 of the Bszi.

³⁶ Controversially, the current legislation does not allow close relatives of the presidents and vice-presidents of any court of appeal or any regional court to be eligible as members of the NJC [Section 90 (2) e) of the Bszi.]. At the same time, the legislation does not exclude presidents and vice-president of a court of appeal or regional court to become member of the NJC.

³⁷ An example of this is the 9 October 2018 by-election Assembly of Delegates, where court presidents and other judges prevented the Assembly of Delegates from electing new NJC members

³⁸ Section 105 (5) of the Bszi.

activities.” What constitutes judicial leaders’ “*administrative activities*” will be open to interpretation and debate.

Furthermore, the administrative activities of the Kúria President are subject to the same supervision by the NJC as those of the NOJ President. The law does not prevent the Kúria President from being elected as the NJC President. It would be a serious conflict of interest if the NJC were to be headed by a person who is subject to the supervision of the NJC. This risk is especially tangible when the NJC would need to launch a lawsuit against the Kúria should the latter not fulfil an obligation vis-à-vis the NJC.

We note that the above concerns were not addressed by Super Milestone 213, however, their mitigation is necessary to safeguard the future independent operation of the NJC; our recommendations regarding these and other concerns e.g. around the election process of the NJC were included in the CSOs’ Assessment of the Proposal and are still relevant.

V.5. Freedom of expression of judges

It is of utmost importance that judges may express their opinion on laws, especially on draft legislation affecting the administration or operation of the courts or the legal system.

It is a positive development that, based on Milestone 213. e), the Act³⁹ explicitly allows the NJC to propose laws regarding courts and makes obtaining the NJC’s opinion regarding draft laws affecting the justice system a legal obligation.

The new Code of Ethics for judges adopted by the NJC effective from 15 July 2022⁴⁰ also states that judges are free to express their opinions on “*laws, the legal system and the administration of justice*”, which had been previously at least doubtful.

However, it is concerning that the Kúria President challenged the constitutionality of the Code before the CC, requesting the annulment of the NJC’s decision adopting the Code (and thus the Code itself) along with the legal provision allowing its adoption, on the basis that they are unconstitutional. In his submission, the Kúria President claims that the Code’s “*significant extension of the right to freedom of expression, the permissibility of criticising legislation and the judicial system*” is not in line with the current regulations.

The Kúria President’s challenge must be interpreted in a context where freedom of expression of judges is constantly undermined and stigmatized by government-oriented media attacks against judges, a situation compounded by a lack of support from judicial leaders along with ambiguous legal provisions and administrative rules. The chilling effect of these attacks, again and again reported by Hungarian NGOs in the execution of the *Baka v. Hungary* case,⁴¹ has prevented the Committee of Ministers from closing the case since 2016.

³⁹ Section 103 (1) b) of the Bszi.

⁴⁰ NJC Resolution No. 16/2022. (III. 2.) on the Judges’ Code of Ethics, available at: <https://birosag.hu/birosagi-kozlonnyok/2022/2022-evi-3-szam>

⁴¹ [https://hudoc.exec.coe.int/eng#f%22EXEIdentifier%22:%5B%22DH-DD\(2023\)157E%22%5D](https://hudoc.exec.coe.int/eng#f%22EXEIdentifier%22:%5B%22DH-DD(2023)157E%22%5D)

In sum, although the Reform is a positive development regarding strengthening the NJC's role in the lawmaking process, judges are still likely to refrain from expressing their opinions, and potentially, from defending judicial independence in the public sphere. Consequently, many more steps must be taken to ensure judges' freedom of expression.⁴²

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Annex I. ~ Timeline of the lawmaking process of Act X of 2023 on the Amendment of Certain Laws in Justice related to the Hungarian Recovery and Resilience Plan

⁴² Hungarian NGOs' recommendations are available at: [https://hudoc.exec.coe.int/eng#f%22EXEIdentifier%22:%22DH-DD\(2022\)158E%22](https://hudoc.exec.coe.int/eng#f%22EXEIdentifier%22:%22DH-DD(2022)158E%22)]

ANNEX I. ~ TIMELINE

of the lawmaking process of Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan

18 January 2023 ~	The Hungarian government published the Proposal of the legislation on the judicial reform on its website and invited the public to submit their opinion by 3 February 2023, as had been required by the RRP Annex.
by 3 February 2023 ~	Several stakeholders have submitted their proposal, including the NJC, the Hungarian Association of Judges (MABIE), the Kúria, the National Office for the Judiciary (NOJ) and the CSOs, however, the opinion of the Kúria and the NOJ was not shared with the public.
1 March 2023 ~	The representative of the Ministry of Justice informed the members of the NJC that the bill will be submitted to the Parliament on 3 March 2023.
3 March 2023 ~	Bill T/3131. on the Act on Asset Declarations was tabled at the Parliament, containing several paragraphs that proposed minor and completely unnecessary amendments to certain provisions of all the laws to be amended in the context of the judicial reform.
7-14 March 2023 ~	The bill was discussed in a general debate and in an in-depth debate and was also discussed by the Justice Committee of the Parliament. The judicial reform was not included in the bill during the debate.
26 April 2023 ~	Three working days before the planned date of adoption (and one and a half months after closing discussions in the Parliament), Zsolt Semjén, the Deputy-Prime Minister of Hungary initiated the procedure of the Legislative Committee (in Hungarian "Törvényalkotási Bizottság").
27 April 2023 ~	Government party MPs as members of the Legislative Committee submitted the whole judicial reform as their own proposal for the modification of the Bill on Rules of Asset Declarations. The Legislative Committee adopted the judicial reform replacing the original bill to a completely new one.
2 May 2023 ~	Closing plenary discussion of the bill at the Parliament (the first time the public and the MPs can deal with the text of the proposed legislation at the Parliament).
3 May 2023 ~	The bill was adopted by the Parliament.
6 May 2023 ~	The Parliament issued the adopted version of the law.
8 May 2023 ~	The explanatory memorandum was published on the website of the Parliament; formally still attached to the Act on Asset Declarations. At the same time, the Ministry of Justice published its formal feedback on the public consultation procedure conducted with respect to the first draft Proposal.
10 May 2023 ~	The Reform was published in the National Gazette as Act X of 2023.
11 May 2023 ~	The explanatory memorandum of the Reform was published in the National Gazette.