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COMMISSION IMPLEMENTING DECISION

of 22.12.2022

approving the programme of Hungary for support from the Instrument for Financial support for Border Management and Visa Policy for the period from 2021 to 2027

ONLY THE HUNGARIAN TEXT IS AUTHENTIC

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy¹, and in particular Article 23(4) thereof,

Whereas:

- (1) On 19 April 2022, Hungary submitted, through the electronic data exchange system of the Commission, the programme for support from the Instrument for Financial Support for Border Management and Visa Policy (BMVI) for the period from 2021 to 2027.
- (2) The programme was prepared by Hungary in cooperation with the partners referred to in Article 8(1) of Regulation (EU) 2021/1060.
- (3) The programme contains all the elements referred to in Article 22(3), (4) and (5) of Regulation (EU) 2021/1060 and was prepared in accordance with the model set out in Annex VI to Regulation (EU) 2021/1060.
- (4) In accordance with Article 15(2) of Regulation (EU) 2021/1060, the programme sets out Hungary's assessment of the fulfilment of the horizontal enabling conditions linked to the selected specific objectives for this programme.
- (5) Hungary concludes that all horizontal enabling conditions, including the horizontal enabling condition on the 'Effective application and implementation of the Charter of Fundamental Rights' are fulfilled. Hungary provided further information on 30 November 2022 (Ares(2022)8290867) and on 13 December 2022 (Ares(2022)8660917).
- (6) When they are implementing Union law, Member States must respect the provisions of the Charter of Fundamental Rights. Pursuant to Article 47 of the Charter of Fundamental Rights, national courts must thus ensure the right to an effective remedy and to a fair trial for everyone whose rights and freedoms guaranteed by the law of the Union are violated. Access to an independent and impartial tribunal previously established by law is a prerequisite for an effective remedy, which guarantees

¹ OJ L 231, 30.6.2021, p. 159.

compliance with EU law, including the effective application and implementation of the Charter of Fundamental Rights. The independence of national courts and tribunals is also essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU.

- (7) In accordance with the principle of separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive. In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence, which requires rules such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned. While contributing to efficiency, the administration of courts should preserve the independence and impartiality of judges, both in judicial decision making and in the conduct of court hearings. Furthermore, the substantive conditions and detailed procedural rules governing the adoption of key decisions in the career of judges, in particular their appointments, should be such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them.
- (8) Repeated concerns have been raised within the framework of the European Semester and the Rule of Law Mechanism with regard to judicial independence in Hungary. Limitations of checks and balances in the judicial appointment process and the administration of courts put at risk the protection of judicial functions against direct or indirect external interventions or pressure coming from the executive or legislature liable to impair the independent judgment of its members and to influence their decisions, in particular in cases affecting the interests of public authorities.
- (9) First, since the creation of the Hungarian National Office for the Judiciary (NOJ), whose President is entrusted with extensive powers relating to the administration of the court system, judges in Hungary have been exposed to a clear risk of decisions regarding their career being taken by an authority controlled by political organs, without adequate supervision capable of preserving judicial independence. Elected by the Parliament upon a nomination by the President of the Republic, the NOJ President has been supervised by the National Judicial Council (NJC) which is however facing structural limitations preventing it from exercising effective oversight regarding the actions of the NOJ President, in particular given its limited advisory powers, inadequate resources, lack of access to information and insufficient budgetary and functional autonomy. The absence of effective control over the NOJ President has thus exposed the judges to a risk of arbitrary decisions by that President in the management of the judicial system, notably with regard to appointments to executive functions, transfers and removals from certain chambers of judges, including the removal from the pool of judges hearing administrative cases. In addition, since judges' prospects for permanent appointment and further career progress as well as entitlement to bonuses and training, depend on decisions taken by their court's president, sometimes based on legislation adopted without adequate involvement of the judiciary's representatives, their independence has also been threatened by the insufficiently controlled action of the NOJ President in the selection of courts' presidents, in particular the discretionary cancellation of selection procedures for court presidents and other court managers and the filling of posts on a temporary basis through decisions of the NOJ President.
- (10) Second, judicial independence has been particularly undermined as regards judges sitting in the Supreme Court (Kúria), given the extensive discretionary powers

attributed to the Kúria President in terms of appointment of judges in managerial functions and case allocation in a context where, following recent developments, guarantees for judicial independence provided by the substantive conditions and procedural requirements for appointments to the Kúria have been weakened. A legislative amendment has allowed for members of the Constitutional Court, who are elected by Parliament, to be appointed to the Kúria after the termination of their mandate, without the need to follow the normal appointment procedure, which entails the involvement of a body drawn in substantial part from the judiciary. Guarantees for judicial independence are particularly weak as regards the person appointed as Kúria President, who may be elected by Parliament, without the involvement of a judicial body, following a proposal from the President of the Republic, from among any persons having at least five years' experience as a judge, without any suitable eligibility criteria circumscribing the discretion of the President of the Republic in this regard. In that context, the Kúria President exercises its extensive powers, in particular with regard to the case allocation scheme among chambers, the appointment of chairs and vice-chairs of departments and secondments, without the effective involvement of the judicial bodies of the Kúria. The inadequate transparency of the case allocation scheme does not allow parties to verify whether any undue discretion has been applied. The limited involvement of the NJC in decisions affecting the functioning of Kúria increases the risk of arbitrary decisions affecting parties' right to an independent and impartial tribunal previously established by law.

- (11) Third, the deficiencies in judicial independence at the level of the Kúria and the impact of its functioning of decisions taken by the Kúria President are liable to affect the independence which ordinary courts must enjoy under the Treaties to ensure the uniform and effective application of EU law, including the Charter of Fundamental Rights in the implementation of the present programme. The procedural rules in place allow the Kúria to examine a reference for a preliminary ruling to the Court of Justice of the European Union submitted by a lower court and declare that submission unlawful. Those rules establish limitations on the freedom of national courts to exercise the jurisdiction conferred on them by Article 267 TFEU, which is a guarantee essential to judicial independence. It is solely for the national court before which the dispute has been brought to determine in the light of the particular circumstances of the case both the need and the relevance of the questions which it submits to the Court of Justice of the European Union. Those limitations are liable to weaken both the authority of the answers that the Court is to provide to the referring judge and the decision that the latter will give in the light of those answers. Those limitations thus also endanger the right to an effective judicial remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated, as guaranteed by Article 47 of the Charter of Fundamental Rights, including in cases concerning the actions implemented under the present programme.
- (12) Fourth, in cases affecting the interests of public authorities, the undermining of judicial independence of Hungarian courts when applying or interpreting EU law is aggravated by the right for administrative authorities to challenge before the Constitutional Court a judicial decision that has already become final. 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 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.

- (13) In its letter of observations to this programme of 1 August 2022, the Commission invited Hungary to explain whether the concerns related to judicial independence expressed inter alia in the Commission's Rule of Law Reports may impact the effectiveness of judicial remedies in cases of breaches of the Charter in the implementation of the programme. Hungary did not provide any information in this respect. The recovery and resilience plan ('RRP') submitted by Hungary in accordance with Regulation (EU) 2021/241 includes reforms aiming at the strengthening of judicial independence, by strengthening the independence and impartiality of courts and judges established by law in accordance with Article 19 of the TEU and the relevant EU acquis, thus raising the standard of judicial protection. The plan includes measures to strengthen the relative role and powers of the NJC in relation to the powers of the President of the NOJ. The exercise of effective control over the President of the NOJ by the NJC is expected to reduce the possibility of arbitrary decisions in the central administration of courts, including in relation to judicial appointments, and, therefore, strengthen judicial independence. According to the RRP, this should be achieved notably by introducing the requirement for a motivated binding opinion of the NJC on individual decisions, such as the suitability of candidates for the posts of President and Vice-President of the NOJ, based on suitability criteria; the annulment of appointment procedures for judicial and court executive positions; transfer of judges; and the removal of judges from the pool of judges that hear special, including administrative, cases. In accordance with the RRP, the NJC is also to give a motivated binding opinion on regulations such as the points system for judicial posts, the conditions for the award of bonuses, the training of judges, the national workload, and the number of judicial posts. Finally, judges-members of the NJC are to have the possibility to be re-elected for the next term of office, and the NJC to have access to all documents, legal capacity and autonomy in disbursement of its budget, and right to seize the competent court and the Constitutional Court to defend its prerogatives. Non-discretionary rules on designation of ad interim court presidents and a prohibition for the reintegration of judges to a higher court instance following their secondment is also to be introduced. Another reform is expected to strengthen the judicial independence of the Supreme Court (Kúria), notably by amending the rules on the election of the Kúria president, who should have at least five years' experience as a judge and should not have the possibility to be re-elected. The NJC is to give a motivated binding opinion on the suitability of candidates for President and Vice-President of the Kúria. The reform should also remove the possibility for members of the Constitutional Court to be appointed to the Kúria outside of the normal application procedure, improve the case allocation scheme, and ensure stronger powers for the judicial bodies of the Kúria. Further reforms are expected to remove obstacles to references for preliminary rulings to the Court of Justice of the European Union and to remove the possibility, introduced in 2019, for public authorities to challenge before the Constitutional Court final judicial decisions in order to ensure that final judgments are taken by the competent independent courts.
- (14) For those reasons, the Commission considers that Hungary is committed to remedy the deficiencies relating to judicial independence. As regards these deficiencies, the horizontal enabling condition on the 'Effective application and implementation of the

Charter of Fundamental Rights' conditions is considered as fulfilled, once Hungary has adopted legislative amendments to address those issues and those amendments have entered into force and are being applied. Once Hungary has informed the Commission that these measures are in place and being applied, a new assessment should take place.

- (15) In accordance with Article 15(5) of Regulation (EU) 2021/1060, expenditure related to operations linked to the specific objectives concerned by an unfulfilled enabling condition may be included in payment applications but cannot be reimbursed by the Commission until the Commission has informed the Member State that it agrees with the fulfilment of the enabling condition pursuant to the first subparagraph of Article 15(4) of Regulation (EU) 2021/1060. Amounts paid as pre-financing for the years 2021 and 2022 are to be cleared from the Commission accounts each year in accordance with Article 90(5) of Regulation (EU) 2021/1060 and may thus be recovered. In addition, pursuant to Article 15(6) of Regulation (EU) 2021/1060, it is recalled that Member States have to ensure that enabling conditions remain fulfilled and respected throughout the programming period. In this regard, it is appropriate to recall that Hungary is expected to ensure effective arrangements for compliance of this programme with the Charter. Hungary has indicated the Commissioner for Fundamental Rights as a body which will provide assistance and expertise on fundamental rights matters. In that respect, the Commission referred in its exchanges with Hungary to concerns about the Commissioner's mandate and independence, as raised in the Rule of Law Reports². The Monitoring Committee will examine the fulfilment of enabling conditions and their application throughout the programming period.
- (16) In accordance with Article 23 of Regulation (EU) 2021/1060, the Commission assessed the programme and made observations pursuant to paragraph 2 of that Article on 1 August 2022 (Ares(2022)5510761). Hungary provided supplementary information and provided a revised programme on 7 December 2022 (Ares(2022)8503671).
- (17) Article 15(3) of Regulation (EU) 2021/1060 requires the Commission to approve the programmes also where not all enabling conditions are fulfilled. The Commission concluded that the programme complies with Regulation (EU) 2021/1060 and with Regulation (EU) 2021/1148 of the European Parliament and of the Council³, is consistent with the Partnership Agreement of Hungary, as regards aspects of complementarity and synergies with the Funds covered by the Partnership Agreement, and takes into account relevant country-specific recommendations, relevant challenges identified in the integrated national energy and climate plan, and the principles of the European Pillar of Social Rights, or other relevant Union recommendations addressed to the Member State.
- (18) Pursuant to the first subparagraph of Article 86(1) of Regulation (EU) 2021/1060, this Decision constitutes a financing decision within the meaning of Article 110(1) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council⁴.

² 2020, 2021 and 2022 Rule of Law Reports

³ Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy (OJ L 251, 15.7.2021, p. 48).

⁴ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No

It is nevertheless necessary to specify the elements needed to make the budgetary commitments with respect to the programme in this Decision.

- (19) Pursuant to Article 12(8) and (9) of Regulation (EU) 2021/1148, it is necessary to set the co-financing rate and the maximum amount of support from the BMVI. It is also necessary to set out for each type of action whether the co-financing rate applies in respect of the total contribution, including the public and private contributions, or of the public contribution only.
- (20) This Decision is without prejudice to the Commission's position regarding compliance of any operation supported under the programme with the State aid rules applicable at the time when the support is granted.
- (21) The proposed programme should therefore be adopted.

HAS ADOPTED THIS DECISION:

Article 1

The programme of Hungary for support from the Instrument for Financial Support for Border Management and Visa Policy for the period from 1 January 2021 to 31 December 2027, submitted in its final version on 7 December 2022, is hereby approved.

Article 2

- 1. The maximum amount of support from the Instrument for Financial Support for Border Management and Visa Policy and its composition is set out in Annex I.

The maximum amount of support for the programme is set at EUR 80 600 699, to be financed from budget line 11 02 01 in accordance with the nomenclature of the General Budget of the European Union for 2021-2027.
- 2. The co-financing rate for each type of action is set out in Annex II. The co-financing rate for each type of action shall apply to public contribution.

Article 3

- 1. Without prejudice to paragraph 2, the horizontal enabling conditions are fulfilled.
- 2. As regards the horizontal enabling condition '3. Effective application and implementation of the Charter of Fundamental Rights', the following shall apply:

In regard of the deficiencies in judicial independence, the enabling condition is fulfilled once Hungary has put in place the following amendments and those amendments are being applied:
 - (a) legislative amendments strengthening the role and powers of the National Judicial Council (NJC) to effectively counterbalance the powers of the President of the National Office for the Judiciary (NOJ), as set out in paragraph 3;
 - (b) legislative amendments amending the rules on the election of the Kúria President, legislative amendments and other amendments to the rules on the case allocation

1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

scheme of the Kúria, and legislative rules amending the rules on the functioning of the Kúria, as set out in paragraph 4;

(c) legislative amendments amending:

(i) Sections 666 et seq. of the Hungarian Criminal Procedure Code, in order to remove the possibility for the Kúria to review the legality of the decision of a judge to make a preliminary reference to the Court of Justice of the European Union;

(ii) Section 490 of the Hungarian Criminal Procedure Code on staying the proceedings, in order to remove any obstacle to a court to make a preliminary reference in line with Article 267 TFEU;

(d) legislative amendments removing the possibility, introduced in 2019 by amending Section 27 of Act CLI of 2011, for public authorities to challenge final judicial decisions before the Constitutional Court.

3. The legislative amendments referred to in paragraph 2, point (a) must establish stronger powers for the NJC so that it can effectively exercise its constitutional role in supervising the central administration of courts, while maintaining the Council's independence based on its members being elected by judges.

As regards individual decisions, those legislative amendments must ensure that the NJC is required to give a motivated binding opinion on the following matters:

- (a) the annulment, by the President of the NOJ, of appointment procedures for judicial and court executive positions where there is at least one eligible candidate who has been supported by the judges of the given court;
- (b) the transfer of judges, including secondments, to another court by the President of the NOJ referred to in Sections 27, 27/A, 31 and 32 of Act CLXII of 2011, except for secondments to the NOJ;
- (c) the removal, by the President of the NOJ, of judges without their consent from the pool of judges that hear special cases, including administrative cases;
- (d) the suitability of candidates for the post of President and Vice President of the NOJ, that can be proposed by the President of the Republic or the President of the NOJ, respectively; the suitability criteria, including independence, impartiality, probity and integrity, must be determined by the law. Candidates found unsuitable by the NJC must have access to an accelerated judicial review before the competent court.

As regards regulations, the legislative amendments must ensure that the NJC is required to give a motivated binding opinion on the following matters:

- (a) the points system for the assessment of applications for judicial posts within the legislative framework;
- (b) the detailed conditions for the award of bonuses and other benefits to judges and court executives;
- (c) the rules relating to the training system for judges;
- (d) the data sheet and methods for the assessment of the workload of judges, as well as the determination of the 'national workload for contentious and non-contentious proceedings broken down according to judicial level and case types';

- (e) the number of judicial posts in each court within the framework determined in the annual budget, including the Kúria, and their departments.

The legislative amendments must establish the right of the NJC to have access to all documents, information and data (including personal data) related to the administration of the courts.

The legislative amendments referred to in paragraph 2, point (a) must also fulfil the following conditions:

- (a) they must provide that the NJC is to determine the structure of the biannual report of the President of the NOJ;
- (b) they must endow the NJC with legal capacity and autonomy in disbursement of its budget, and ensure that the NJC has adequate resources, including staff and offices, to carry out its tasks in an effective manner;
- (c) they must provide that, in order to carry out their tasks in the NJC, judges-members are entitled to be relieved from their adjudicating duties to the extent regional court (törvényszék) presidents are relieved from their adjudicating duties;
- (d) they must provide that judges-members of the NJC cannot be re-elected except for the next term of office, that judges-members of the NJC are to elect from among themselves the chairperson of the NJC, and that court presidents and vice-presidents as members of the NJC are not to participate in the deliberation and vote on matters relating to their administrative activities;
- (e) they must establish the right for the NJC to seize the competent court and the Constitutional Court to defend its prerogatives and enforce its rights and establish an obligation to consult the NJC on legislative proposals affecting the justice system and the right to propose to the Government to initiate new legislation on the same matters;
- (f) they must establish in the law non-discretionary rules on the designation of ad interim court presidents through a pre-set order of positions within a court as follows:
 - (i) in the absence of a court president, the president's competences are exercised by the vice-president;
 - (ii) in the absence of a vice-president, the president's competences are exercised by the head of a department of judges with the longest tenure as a judge;
 - (iii) in the absence of a head of department, the president's competences are exercised by the presiding judge with the longest tenure as a judge;
- (g) they must prohibit the reintegration, by the President of the NOJ, of judges, following their secondment, to a court instance higher than the court in which they adjudicated before their secondment.

4. Legislative amendments referred to in paragraph 2, point (b), concerning the amendment of the rules on the election of the Kúria President must ensure that:

- (a) the candidates have at least five years' experience as a judge;
- (b) the Kúria President cannot be re-elected;

- (c) the NJC gives a motivated binding opinion on the suitability of the candidates for the post of Kúria President that can be proposed by the President of the Republic.

The suitability criteria, including independence, impartiality, probity and integrity, must be determined by the law.

The legislative amendments must ensure that the candidates found unsuitable by the NJC have access to an accelerated judicial review before the competent court.

The amendments to the rules on the case allocation scheme of the Kúria must ensure that:

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

The legislative amendments amending the rules on the functioning of the Kúria referred to in paragraph 2, point (b) must:

- (a) establish stronger powers for the judicial council of the Kúria and the departments of judges ('kollégium') concerned, ensuring, in particular, that they give a binding opinion on:
 - (i) candidates for the post of chairs and vice-chairs of departments of judges, presiding judges and the Secretary General of the Kúria;
 - (ii) secondments to the Kúria;
- (b) remove the possibility for members of the Constitutional Court to become judges and then be appointed to the Kúria without following the normal application procedure;
- (c) ensuring that the NJC gives a reasoned binding opinion on the suitability of candidates for the post of Vice President of the Kúria that can be proposed by the Kúria President. The suitability criteria, including independence, impartiality, probity and integrity, must be determined by the law. Candidates found unsuitable by the NJC must have access to an accelerated judicial review before the competent court;
- (d) ensuring that the strengthened powers of the NJC described in point (a) also apply in relation to the Kúria President when acting as appointing authority (in line with Act CLXII of 2011).

5. Once Hungary has informed the Commission that the measures remedying the deficiencies as regards judicial independence referred to in paragraphs 2, 3, and 4 are in place and being applied, a new assessment will take place.

Article 4

This Decision is addressed to Hungary.

Done at Brussels, 22.12.2022

For the Commission

Ylva JOHANSSON

Member of the Commission