



Date of acceptance : 08/06/2023



Published ID	: T-138/23
Document number	: 21
Register number	: 1129483
Date of lodgment	: 30/05/2023
Date of entry in the register	: 06/06/2023
Type of document	: Plea of inadmissibility
<hr/>	
e-Curia lodgment reference	: Document DT188384
File number	: 1
Person lodging document	: Emanuele Rebasti (R249587) Conseil



Council of the European Union

Brussels, 30 May 2023
SGS 23 / 2376

TO THE PRESIDENT AND THE MEMBERS
OF THE GENERAL COURT OF THE EUROPEAN UNION

PLEA OF INADMISSIBILITY

lodged by the Council of the European Union, pursuant to Article 130 (1)
of the Rules of Procedure of the General Court

in Case T-138/23

University of Semmelweis v. Council of the European Union

UNIVERSITY OF SEMMELWEIS (Semmelweis Egyetem),
represented by Dr Péter P. NAGY and Dr Balázs KARSAI, lawyers,

Applicant

against

COUNCIL OF THE EUROPEAN UNION,
represented by Emanuele REBASTI, Mr Giacomo RUGGE and Ms Lucie VETILLARD, legal
advisers in the Council Legal Service, as Agents, having agreed that service may be effected
on them via e-Curia,

Defendant

in proceedings brought for annulment, pursuant to Article 263 TFEU, of Article 2(2)
of Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for
the protection of the Union budget against breaches of the principles of the rule of law in
Hungary.¹

¹ OJ L 325, 20.12.2022, p. 94.

I. INTRODUCTION

1. By application lodged with the General Court on 13 March 2023 and notified to the Council on 20 March 2023, the University of Semmelweis has brought an individual action under Article 263 TFEU for the annulment of Article 2(2) of Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget (hereinafter: the ‘contested Decision’).
2. For the reasons set out below, the Council submits that this action manifestly does not comply with the conditions for admissibility set out in Article 263, fourth paragraph, TFEU and, therefore, the Applicant does not enjoy legal standing to bring proceedings against the contested Decision.
3. Consequently, the Council respectfully requests that the General Court rule on the inadmissibility of the action in case T-138/23 without adjudicating on its substance, as provided for in Article 130(1) and (7) of the Rules of Procedure of the General Court, and dismiss that action as manifestly inadmissible.

II. LEGAL FRAMEWORK AND BACKGROUND

4. The Council considers that the present action for annulment is based on a wrong assumption as regards the nature and effects of the contested Decision. As these observations will show, the contested Decision neither concerns the Applicant directly and individually nor meets the criteria to be considered an act within the meaning of the third limb of Article 263, fourth paragraph, TFEU, namely “*a regulatory act which is of direct concern to them and does not entail implementing measures*”.
5. The contested Decision is based on Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (hereinafter: the ‘*Rule of Law Conditionality Regulation*’ or ‘RLCR’), whose compatibility with the EU legal order was confirmed by the Court of Justice in two recent judgments.² The RLCR provides for the adoption of measures for the protection of the Union budget in case of breaches of the principles of the rule of law in a Member State that affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.³ Those measures shall be adopted by following the procedure set out in Article 6 RLCR.
6. In accordance with that procedure, on 27 April 2022 the Commission sent a written notification to Hungary in relation to a number of systemic issues as regards public procurement procedures, effective investigation and prosecution of alleged criminal activity and the absence of an effective anti-corruption framework in Hungary which posed a serious risk for the sound financial management of the Union budget.

² Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97; Judgment of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98.

³ Article 4 RLCR.

7. Despite a number of remedial measures proposed by Hungary in the bilateral exchanges provided for by Article 6(5) to (7) RLCR, the Commission found that such remedial measures were not adequate to address the findings set out in the notification and to protect the Union budget. It therefore decided to submit on 18 September 2022 a proposal for a Council implementing Decision pursuant to Article 6(9) RLCR.
8. On 15 December 2022, the Council adopted ‘the contested Decision’. The contested Decision is addressed to Hungary⁴ and thus took effect on 16 December 2022, i.e., the day of its notification to that Member State. With the contested Decision, based on the thorough assessment carried out by the Commission,⁵ the Council found that the Hungarian public procurement system and the functioning of the Hungarian “public interest trusts” were affected by several irregularities, deficiencies and weaknesses that demonstrated the failure or unwillingness, on the part of the Hungarian authorities, to prevent decisions that are in breach of the applicable law and to adequately tackle the risks of corruption. The Council found that those irregularities, deficiencies and weaknesses amounted to breaches of the principle of the rule of law, notably the principles of legal certainty and prohibition of arbitrariness and posed a significant risk for the sound financial management of the EU budget.⁶ The Council also found that the remedial measures already undertaken by Hungary during the procedure had not resolved the situation. The Council concluded that the conditions set out in Article 4(1) of Regulation 2020/2092 were met and adopted measures for the protection of the Union budget.
9. Among the different issues raised in the contested Decision, the Council addressed the risks for the EU budget posed by the implementation of the EU funds by ‘*public interest trusts*’ (hereinafter: PITs) established by Hungarian law and the entities maintained by them. As a consequence, the Council included a specific measure⁷ aimed at protecting the EU budget in Article 2(2) of the contested Decision. This provision stipulates that
- ‘where the Commission implements the Union budget in direct or indirect management pursuant to Article 62(1) points (a) and (c), of Regulation (EU, Euratom) 2018/1046, no legal commitments shall be entered into with any public interest trust established on the basis of the Hungarian Act IX of 2021 or any entity maintained by such a public interest trust’.*

⁴ See Article 5 of the contested Decision.

⁵ Explanatory Memorandum attached to the Proposal of the Commission for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, of 18 September 2022, COM(2022) 485 Final.

⁶ Recital 19 of the contested Decision.

⁷ Recital 62 of the contested Decision.

10. The rationale of this provision can be inferred from both the explanatory memorandum of the Commission's original proposal⁸ and the recitals of the contested Decision.⁹ As regards PITs, Recital (43) highlights that *"the regulatory framework still does not prevent top-level officials, including senior political executives from the National Assembly and Hungary's autonomous bodies, from sitting on boards of public interest asset management foundations, as repeatedly requested by the Commission"*.

The measures set out in Article 2(2) of the contested Decision therefore seek to protect the Union budget against the risk of conflict of interest affecting the functioning and governance of PITs, as well as their lack of transparency in the use of Union support, which in turn risks affecting the sound financial management of the Union budget and the protection of the financial interests of the Union.

11. Unlike other mechanisms set out in sector-specific legislation, the contested Decision aims to achieve a general and systemic protection of the Union budget against breaches of the principles of the rule of law with an impact on the budget and the financial interests of the Union. To that end, it addresses deficiencies, weaknesses, limits and risks that are widespread and intertwined, as stated by the Commission in the explanatory memorandum to its proposal. It also addresses, as confirmed by the Court, *'cases where the effects [on the Union budget or on its financial interests], although not yet proven, can nevertheless be reasonably foreseen'*.¹⁰
12. It is worth highlighting that while its primary aim is the protection of the Union budget, the Rule of Law Conditionality Regulation favours solutions aimed at remedying the breaches of the rule of law that affect the sound financial management of the Union budget. In that regard, the measures provided for in the contested Decision are meant to be temporary, in that the Member State concerned may at any time remedy the situation and request their lifting. For its part, the Commission has an obligation to continue monitoring the situation and swiftly assess any development in the implementation of the remedial measures proposed by Hungary.¹¹
13. Moreover, the Rule of Law Conditionality Regulation requires that when implementing measures for the protection of the Union budget, the Member State concerned (as the addressee of those measures) and the Commission (as the principal responsible for the implementation of the EU budget) ensure that the legitimate interests of the final recipients and beneficiaries are properly safeguarded.¹² This obligation, which directly flows from Article 5(2) RLCR, is explicitly recalled in the contested Decision, so that the Member State (as addressee of the contested Decision) and the Commission (as the institution having primary responsibility for the implementation of the EU budget) take the necessary steps to ensure the full respect of the rights and legitimate interests of final recipients and beneficiaries.¹³

⁸ Commission's proposal, paras. 27-33.

⁹ Recitals 11, 42 and 43 of the contested Decision.

¹⁰ C-156/21, para. 262.

¹¹ Recital 65 of the contested Decision.

¹² Recital 19 RLCR.

¹³ Recital 63 of the contested Decision.

14. As the Council will show in detail, the contested Decision, far from concerning the Applicant directly and individually, is addressed to Hungary and leaves a margin of appreciation as regards its implementation, notably for the definition of its scope and for the determination of its legal effects in individual cases, in view of the concurring obligation to safeguard the position of final recipients and beneficiaries.

III. LACK OF STANDING

15. As clarified in Article 5 and acknowledged by the Applicant,¹⁴ the contested Decision is addressed to Hungary. Article 263, fourth paragraph, TFEU provides for two situations in which natural or legal persons are granted standing to bring an action for annulment against an act not addressed to them. First, such proceedings may be instituted if the act is of direct and individual concern to them. The conditions of direct and individual concern are cumulative. Secondly, such person may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them.
16. The Applicant in the present case does not claim to be directly and individually concerned by the contested Decision. It claims, instead, that the contested Decision is of direct concern to it and qualifies as a regulatory act that does not entail implementing measures. In other terms, in its view, the admissibility of its action is solely based on the third limb of Article 263, fourth paragraph, TFEU.
17. In what follows, the Council will show that the applicant lacks standing both in relation to the third limb of Article 263 and in all other situations in which a legal person is entitled to bring an action against an act not addressed to it. the Council will in particular elaborate on the lack of direct concern (A.) and demonstrate the absence of individual concern (B.). Finally, it will show that the contested Decision cannot be considered a regulatory act which does not entail implementing measures (C.).

A. No direct concern

18. According to established case law, the concept of direct concern requires the presence of two conditions. A measure is of direct concern if, first, the measure has a direct effect on the person's legal situation and, secondly, leaves no discretionary power to those to whom it is addressed and who are charged with putting it into effect, and, thereby, has a purely automatic nature deriving solely from the rules of the Union without the application of intermediate rules¹⁵. These two conditions are cumulative¹⁶.
19. In the present case, the Applicant submits that *'the possibility that legal commitments will be entered into with the Applicant contrary to the prohibition set forth in Article 2(2) Decision is purely theoretical, and there is no doubt that those persons who are prohibited from entering into such legal commitments with the Applicant will refrain from entering into such commitments. In this context, it shall be emphasized*

¹⁴ Application, paragraph 91.

¹⁵ Judgment of 5 May 1998, *Glencore Grain v Commission*, C-404/96 P, EU:C:1998:196, paragraph 41; Order of 7 July 2014, *Group Hygiène v Commission*, T-202/13, EU:T:2014:664, paragraph 29.

¹⁶ Orders of 3 April 2009, *VDH Projektentwicklung and Edeka Rhein-Ruhr v Commission*, C-387/08 P, EU:C:2009:235, paragraph 21 and of 21 May 2010, *ICO Services v Parliament and Council*, T-441/08, EU:T:2010:217, paragraph 56.

*that the prohibition set forth in Article 2(2) Decision is absolute and unconditional (...), that is, it leaves no room for any discretionary adjustment.*¹⁷

20. As for the first condition, a person may be considered as directly affected by a measure when that measure directly affects its legal situation.
21. In that regard, it shall be stressed that Article 2(2) of the contested Decision lays down the obligation for the Commission and Hungary (notably when its national authorities are entrusted with tasks in the implementation of the EU budget) not to enter into legal commitments with certain entities. Contrary to what the Applicant claims,¹⁸ such an obligation, however, does not in itself affect the legal situation of the Applicant.
22. Indeed, as the second condition requires, a contested measure can directly concern a natural or legal person despite requiring implementing measures, provided that the addressee of the measure does not enjoy any margin of discretion as regards its application to an individual situation. The test therefore requires that there be no autonomous exercise of will between the original decision and its implementation.
23. In the present case, however, such an exercise of will is required in order to implement the contested Decision in three key areas.

1. The determination of the scope of application of the contested Decision requires an individual assessment

24. Article 2(2) of the contested Decision stipulates that when *implementing* the budget in situations of direct or indirect management, the Commission shall not enter into legal commitments with *'any public interest trust established on the basis of the Hungarian Act IX of 2021 or any entity maintained by such a public interest trust'*. It follows that the provision covers two sets of cases. First, it covers those cases in which an entity has the legal form of a PIT pursuant to the Hungarian Act IX of 2021. Secondly, it covers those cases in which an entity is *'maintained'* by a PIT. It shall be stressed that the Applicant is not a PIT under Hungarian law.
25. Depending on whether a situation falls within the first or the second set of cases, the provision envisages different consequences. In the first set of cases, the provision prevents the Commission from entering into any legal commitments with an entity established in accordance with the Hungarian Act IX of 2021. In the second set of cases, instead, the provision prevents the Commission (in case of direct management) and the national agencies (in case of indirect management) from entering into any legal commitments with an entity if they satisfy themselves that that entity is *'maintained'* by a PIT. This of course presupposes that the Commission and the national agencies be able to carry out an assessment *in concreto*.

¹⁷ Application, paragraph 90.

¹⁸ Application, paragraph 95, where the Applicant goes as far as to maintain that Article 2(2) of the contested Decision sets forth a prohibition *'which became applicable towards the Applicant immediately upon publication of the Decision'*

26. Unlike the notion of ‘public interest trust established on the basis of the Hungarian Act IX of 2021’, the notion of entity ‘*maintained*’ by a PIT has to be considered as an autonomous concept of EU law. According to settled case law, ‘*the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope normally [are] to be given an independent and uniform interpretation throughout the European Union*’.¹⁹
27. This reading finds support in the wording of Article 2(2) of the contested Decision. As highlighted by the careful choice of words, the reference to the Hungarian Act IX of 2021 is only relevant to identify the PITs themselves (“*any public interest trust established on the basis of the Hungarian Act IX of 2021*”) and not the broader category of entity maintained by PITs.²⁰ In this spirit, the reference to the entities maintained by PITs is clearly an autonomous concept of EU law of an open-ended nature.
28. The Council notes that it is the responsibility of the Commission, as the primary institution entrusted by the Treaties with the implementation of the EU budget, and of the national agencies, in case they have been entrusted with tasks for the implementation of the Union budget under direct management, to apply the contested Decision in relation to individual cases and in so doing to interpret the notion of entity ‘*maintained*’ by a PIT. However, for the sake of the present plea, the following remarks need to be made.
29. When determining the content of an autonomous notion of EU law, the interpreter needs to refer to the context in which the notion is inserted as well as to the objective pursued by the relevant provision. Moreover, the notion has to be interpreted in a sense that preserves the effectiveness of and does not conflict with the legal framework in which it is inserted.
30. It follows that when interpreting the notion of entity ‘*maintained*’ by a PIT, attention shall be paid to the fact that this notion was introduced by the Council in the context of a Decision adopted on the basis of the RLCR in order to protect the Union budget from situations of conflict of interests not sufficiently addressed by the Member State concerned.
31. In that regard, the *raison d’être* for the inclusion of the concept of an entity ‘*maintained*’ by a PIT in Article 2(2) of the contested Decision is to go beyond the notion of PIT according to the Hungarian Act IX of 2021, and to capture those cases in which the situation of conflict of interests affecting a PIT further spreads to entities having a qualified link to it. The criteria, on which such a qualified link is to be determined, need to be identified in light of the purpose of the RLCR, which is to offer an effective protection to the EU budget while respecting the conditions set out in its Article 4 for the adoption of the measures, including the need to ensure at all times that a sufficient direct link exists between the contested breach and the implementation of the EU budget.

¹⁹ Judgment of 16 July 2015, *Abcur*, C-544/13, EU:C:2015:481, paragraph 45.

²⁰ Otherwise, Article 2(2) would read along the following lines: “no legal commitments shall be entered into with any public interest trust or any entity maintained by such a public interest trust, as established by the Hungarian Act IX of 2021”.

32. In light of the foregoing considerations, an entity could be qualified as '*maintained by a PIT*' only if it is subject to such a decisive influence and control, so that its actions are affected by the same risk of conflict of interests that is proper to the PIT. In the view of the Council, such a qualification necessarily entails a case-by-case, evidence-based assessment on the part of the Commission and/or the national agencies so as to avoid that those entities that are not under the actual influence and control of a PIT (yet have a formal link to it), and therefore do not pose a risk for the Union budget, could be affected by the contested Decision.
33. In other terms, the Commission and/or national agencies can only capture those situations in which a PIT exercises decisive influence and control over another entity if they are able to carry out an assessment of individual situations before deciding to make disbursements from the EU budget (be it in direct or indirect management). The contested Decision presupposes the existence of further acts, at the Union or national level, that give concrete expression to the general and abstract concept of '*entity maintained by a public interest trust*'. These acts will be those decisions through which the Commission or the competent national agency, after evaluating the situation of entities akin to the Applicant, will decide in favour of or against entering into a legal commitment for the disbursement of EU funds.
34. With reference to the Applicant, the obligation in Article 2(2) of the contested Decision requires to verify if the entity at stake is under the decisive influence and control of a PIT. Only then, the Commission and/or the national agencies will be under an obligation not to enter into legal commitments with that entity. Depending on the case, this obligation might translate into a decision to suspend funds previously granted, to reject an application for funding, etc. At that point, a natural or legal person might decide to initiate proceedings pursuant to the first limb of Article 263, fourth paragraph, TFEU, as that decision will be an '*act addressed to that person*'.
35. One last specification is in order. Even if an entity is identified by name in the Hungarian Act IX of 2021 as maintained by a PIT (as is the case with the Applicant), the autonomous character of the notion of '*entity maintained*' will always request an independent assessment and the Commission and/or the national agencies will always have to interpose, between the contested Decision and its implementation, an autonomous exercise of will. And such an exercise will in itself exclude that the Applicant be directly concerned by the contested Decision.

2. The effects of the contested Decision on the Applicant depend on the concurring obligation to protect recipients and final beneficiaries of EU funds

36. The obligations that the contested Decision lays down for the Member State concerned and the Commission do not operate in a void but have to be implemented in light of the other relevant provisions of the RLCR, and in particular its Article 5(2).

37. Article 5(2) RLCR establishes that the imposition of measures for the protection of the budget *'shall not affect the obligations of government entities [where the Commission implements the Union budget in direct or indirect management] or of Member States [where the Commission implements the Union budget under shared management] to implement the programme or fund affected by the measures, and in particular the obligations they have towards final recipients or beneficiaries, including the obligation to make payments'*. The Court of Justice has already had the occasion to clarify that this *'provision is intended (...) to safeguard the legitimate interests of final recipients or beneficiaries when appropriate measures are adopted under that regulation against a Member State. That provision thus sets out the consequences of such measures with regard to third parties.'*²¹
38. It follows that the Member State concerned remains under the obligation to implement the relevant EU programmes, to the extent there is such an obligation, regardless of the availability of financing from the EU budget. Without prejudice to the Commission's responsibility in the implementation of the EU budget, Article 5(2) RLCR requires the Member State concerned to interpret and apply the legal frameworks of the relevant EU spending programmes so as to ensure the protection of recipients and final beneficiaries in line with the purpose of the Rule of Law Conditionality Regulation which is not punitive but aims at remedying the situation.
39. In case of Erasmus+, this may entail allowing students of entities which qualify as 'maintained by public interest trusts' to still have access to mobility grants in a way that duly protects the financial interests of the Union. In case of Horizon Europe, this may entail that the Member State provides beneficiary universities with national funding to allow their continued participation in the programme.
40. In any event, when implementing the contested Decision, the Member State concerned and the Commission will have to define the specific modalities for the protection of recipients and final beneficiaries, depending on the features of each programme and of the applicable modality of budget implementation.
41. It results from the above that the legal position of individual recipients of EU funds is not finally and automatically determined by the measure laid down in the contested Decision, but it is rather the result of the additional policy choices which are required by the concurring obligation to protect recipients and final beneficiaries as imposed by the RLCR on the Member State concerned.

3. The effects of the contested Decision on the Applicant depend on the adoption of implementing measures which apply it to individual situations

42. Even besides the considerations developed in sections 1 and 2 of present part A, the fact remains that the contested Decision is not suitable to be applied directly to the situations of individuals and requires to be implemented through the adoption of further implementing measures.

²¹ Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 115.

43. More specifically, the prohibition to enter into legal commitments will apply to different authorities (Commission, EU executive agencies or national authorities that are entrusted with tasks of implementation of the EU budget) depending on the modality of direct or indirect management chosen for the implementation of the spending programmes concerned. Moreover, the responsible authority either at the EU or the national level will have to implement the prohibition in relation to individual cases and taking into account the specific features of the spending programme concerned.
44. For instance, the Commission has clarified that in relation to Erasmus + actions, the contested Decision does not entail a cause of exclusion from the selection procedure, but only precludes the very final step of such procedures, namely the signature of a grant agreement.
45. All these further actions of budget implementation require the exercise of additional discretionary powers that complement the prohibition laid down in the contested Decision and allows it to be applied to individual situations and to the specificities of the spending programmes concerned.
46. It is only at that point in time, and in relation to the concrete act of budget implementation, that the legal situation of the Applicant will be affected and that the appropriate jurisdictional remedy – at the EU or national level depending on the nature the implementing decision will have – will be available.
47. In conclusion, for all the arguments developed above, the Council is of the view that the contested Decision is not of direct concern to the Applicant.

B. No individual concern

48. With regard to the second limb of Article 263, fourth paragraph, TFEU, third parties may be individually concerned by a decision addressed to another person only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.²²
49. As Applicant itself acknowledges, it is not individually concerned by the contested Decision. First, the contested Decision does not mention individually the Applicant, nor any other individual entity. Second, the contested provision only refers in general to the notion of ‘*any public interest trust established on the basis of the Hungarian Act IX of 2021*’ and to ‘*any entity maintained by such a public interest trust*’.

²² Judgment of 15 July 1963, *Plaumann v Commission of the EEC*, C-25/62, EU:C:1963:17, page 107; Judgment of 29 April 2004, *Italy v Commission*, C-298/00, EU:C:2004:240, paragraph 36; Judgment of 13 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 72; Judgment of 19 December 2013, *Telefónica v Commission*, C-274/12 P, EU:C:2013:852, paragraph 46.

50. It is settled case law that the mere possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to those persons as long as that measure is applied in accordance with an objective legal or factual situation defined by the act in question.²³
51. In this case, the objective situation that the Council relied on is the fact that the entities concerned are maintained by PITs. This provision does not identify individually the Applicant or any circumstance that would allow to single it out among the undistinguished number of entities that fall within that objective category.
52. As it has been shown in points 24 to 35 above, such an identification depends on a case-by-case, evidence-based assessment on the part of the Commission and/or national agencies which need to be satisfied in relation to the individual situation of a given entity that it is subject to a decisive influence and control by a PIT and thus is affected by the same situation of conflict of interest which poses a risk for the sound implementation of the EU budget.
53. In that regard, the present case is different from the one in *Piraiki-Patraiki*, where the applicants were part of a limited class of economic operators which cannot be extended after the adoption of the act.²⁴ As explained above,²⁵ the notion of “entity maintained by PIT” is an open ended category, since the situation and number of entities maintained by the PIT may evolve over time after the adoption of the contested measure. It follows that the Applicant cannot be considered as forming part of a closed class of operators.
54. The case at hand has also to be distinguished from the case in *Stichting Woonpunt*,²⁶ where the applicants belonged to a closed circle of operators affected by a Commission State aid Decision amending an existing State aid scheme from which they benefitted, in a way which was less favourable for them. In this judgment, the Court accepted that the applicants were individually concerned because they held previously acquired rights conferred under Union law that individualised them in relation to any other users who enjoyed the same rights.
55. By way of comparison, an undertaking cannot, in principle, contest a Commission Decision prohibiting a sectoral aid scheme if it is concerned by that Decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a Decision is, vis-à-vis the undertaking should it seek to contest the Decision, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner.²⁷

²³ Judgment of 19 December 2013, *Telefónica v Commission*, C-274/12 P, EU:C:2013:852, paragraph 47.

²⁴ See for example judgment 17 January 1985, SA Piraiki-Patraiki and others v Commission of the European Communities, Case 11/82, EU:C:1985:18, where the applicants, contrary to any other importer of cotton yarn, had entered into specific contracts which could not be performed as a consequence of the contested measure.

²⁵ See in particular paragraph 27.

²⁶ Judgment of 27 February 2014, *Stichting Woonpunt and Other v Commission*, C-132/12 P, EU:C:2014:100.

²⁷ Judgment of 29 April 2004; *Italy v Commission*, C-298/00, EU:C:2004:240, paragraph 36 and case law cited.

56. In the present case, the fact that the Applicant is part – or intends to be part - of different projects to be funded at Union level, as submitted by the Applicant in section III.C of the Application, does not show that it belongs to a limited class of economic operators. It is to be noted that the Applicant does not actually show any effect of the contested Decision for its participation in specific Erasmus+ grants, since it only generally refers to the consequences of its possible future exclusion from the programme. No reference to specific ongoing procedure is made. In that regard, the Applicant’s situation in relation to the Decision is therefore not different from the open class of the entities that may have a general interest in participating in present and future selection procedures under Erasmus+ and that may be qualified as “maintained by a PIT” in the sense indicated above.
57. In relation to the specific Horizon Europe projects referred to in paragraph 61 of the application, the Applicant claims to have been “*excluded from all these projects as a result of the Decision*”. It is unclear from the application, and the annexes to it, whether such an “exclusion” is actually a refusal of a EU entity to enter into a grant agreement with the Applicant or rather a choice unilaterally taken by the consortia participating in ongoing selection procedures, ahead of a future hypothetical award.²⁸
58. In any event, even if the Applicant had been refused the signature of a grant agreements in one of those projects, this does not entail that the Applicant was clearly identifiable at the moment of adoption of the contested Decision. As shown in section A of the present plea, the application of the contested Decision to a specific situation would always depend on the adoption of the further acts of implementation for which a degree of discretion is required.
59. It follows from the above, that the Applicant cannot therefore be considered as individually concerned.

C. The contested Decision is not a regulatory act not entailing implementing measures

60. With regard to the third limb of Article 263, fourth paragraph, TFEU, the Council recalls that the notion of regulatory act refers to acts of general application other than legislative acts.²⁹ An act of general application applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in general and in the abstract.³⁰

²⁸ For instance correspondence included in Annex A.3 refers to the fact that the “signing of the Grant Agreement is not foreseen to happen very soon”.

²⁹ Judgment of 4 May 2022, *China Rubber Instustry Association (CRIA) and China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (CCCMC) v Commission*, T-30/19 and T-72/19, EU:T:2022:266, paragraph 56; Judgment of 13 October 2013, *Inuit Taipiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 61; Judgment of 5 May 2021, *Pharmaceutical Works Polpharma S.A. v European Medicines Agency (EMA)*, T-611/18, EU:C:2021:241, paragraph 122.

³⁰ Judgment of 15 January 2022, *Libéros v Commission*, C-171/00 P, EU:C:2002:17, paragraph 28; judgment of 17 March 2011, *AJD Tuna*, C-221/09, EU:C:2011:153, paragraph 51.

61. According to Article 263 TFEU, an individual can bring an action for the annulment of a regulatory act only if this is of direct concern to it and does not entail implementing measures. An act entails implementing measures when it is only liable to produce real and definitive legal effects through the intervention of enforcement measures.³¹
62. The cumulative condition linked to the absence of implementing measures aims at limiting the situations where non-privileged applicants may enjoy a right of action to those where there is no other means of recourse and hence no effective judicial protection without such a right. In the absence of implementing measures, natural or legal persons, although directly concerned by the act in question, would be able to obtain a judicial review of that act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national courts.³²
63. The Court has held that the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the third limb of Article 263, fourth paragraph, TFEU.³³ In order to determine whether the measure being challenged entails implementing measures, reference should be made exclusively to the subject-matter of the action.
64. Moreover, having regard to the objective of the provision – namely to ensure effective judicial protection – the Court has also clarified that it is irrelevant whether the addressee of the contested Decision has discretion in implementing it, or whether the application is purely automatic.³⁴ To the extent that the application of an act of the EU requires the existence of an implementing measure whatsoever, a natural or legal person is in no position to initiate proceedings on the basis of the third limb of Article 263, fourth paragraph, TFEU.
65. In the case at hand, the Council has already demonstrated in sections 1 to 3 of part A above, that the contested Decision is not of direct concern for the Applicant.
66. In addition, as the Council has already shown in the same paragraphs, the prohibition laid down in the contested Decision is not of automatic application but may only take effect through actual decisions of the Commission or of national agencies affecting the situation of a concerned individual (in this case, the Applicant) in relation to a specific budgetary action carried out in application of a Union spending programme, e.g. concretely rejecting the conclusion of a grant agreement in the framework of an Erasmus or Horizon call.
67. It is in relation to these further and necessary implementing measures adopted at the EU or national level that the right to effective judicial protection of the Applicant could be fully exercised in the appropriate jurisdiction. In that regard it shall be stressed that the Applicant has failed to identify in relation to the projects listed in the Application individual decisions addressed to it that are susceptible to affect its individual situation and therefore to be subject to the legality review of the General Court.

³¹ Judgment of 10 December 2015, *Canon Europa v Commission*, C-552/14 P, EU:C:2015:804, paragraph 56; Order of 10 February 2017, *Acerga v Council*, T-153/16, EU:T:2017:73, paragraph 41.

³² Judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission*, C-456/13, EU:C:2015:284, paragraphs 29 and 30.

³³ Judgment of 19 December 2013, *Telefónica v Commission*, C-274/12 P, EU:C:2013:852, paragraph 30.

³⁴ Judgment of 7 July 2015, *Federcoopesca and Others v Commission*, T-312/14, EU:T:2015:472, paragraph 41; Judgment of 19 December 2013, *Telefónica v Commission*, C-274/12 P, EU:C:2013:852, paragraph 35.

68. In conclusion, the finding that the contested Decision cannot alter the Applicant's legal situation in the absence of implementing measures, is sufficient to conclude that the conditions set out in the third limb of Article 263, fourth paragraph, TFEU are not met.

IV. CONCLUSION

69. For the above-mentioned reasons the Council respectfully invites the General Court to:

- dismiss the application as manifestly inadmissible;
- order the Applicant to pay the costs.

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