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

APPLICATION FOR PARTIAL ANNULMENT

Lodged on 13 March 2023, pursuant to Article 263 of the Treaty on the Functioning of the European Union, and Article 72 of the General Court's Rules of Procedure, by

SEMMELWEIS EGYETEM

Applicant

of 26 Üllői út, Budapest 1085, Hungary, represented by Dr. Péter P. Nagy ügyvéd of the Budapest Bar and by Dr. Balázs Karsai ügyvéd of the Budapest Bar, both of the law firm Nagy és Trócsányi registered with the Budapest Bar Association at 217, with an address at 4/B Ugocsa utca, Budapest 1126, telephone: +36 1 487-8700, email: nagy.peter@nt.hu (with service to be effected in these proceedings at the eCuria account associated with that email address)

v.

COUNCIL OF THE EUROPEAN UNION

Defendant

Application for partial annulment in respect 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, insofar as it concerns the Applicant.

I. INTRODUCTION

1. The Applicant applies, pursuant to Article 263(4) of the Treaty on the Functioning of the European Union ("**TFEU**"), to annul Article 2(2) of Council Implementing Decision (EU) 2022/2506 of 15 December 2022[1].

2. The grounds for annulment are summarized below (¶100).

3. In accordance with Article 45(1) of the Rules of Procedure of the General Court, the Applicant requests that the language of the case be English.

4. All references to annexes to this Application are in the form: "Annex A.[annex number]"[2].

II. PARTIES

Applicant:	Semmelweis Egyetem
Address:	26 Üllői út, Budapest 1085, Hungary
Representatives:	Dr. Péter P. Nagy and Dr. Balázs Karsai of Nagy és Trócsányi Ügyvédi Iroda, 4/B Ugocsa utca, Budapest 1126, Hungary
Defendant:	Council of the European Union

III. SUBJECT-MATTER

A. Background:

5. The pleas in law and the basis for those pleas summarized in this Application, and the evidence in the Annexes to this Application, need to be considered by the Court in light of the historical, legal and business background to the imposition of restrictive measures.

(1) The University

6. The Applicant, Semmelweis Egyetem (also referred to as the "**University**") is a medical and health sciences research university, a civil law entity, founded in 1769. Currently the University has more than 12,000 students from 109 countries enrolled in its six faculties and doctoral school. The proportion of its non-Hungarian students is 32% and 55% in the Faculty of Medicine.

7. The University is prominent also in the field of research, development and innovation (R&DI) with a particular emphasis on medical sciences. Currently, there are more

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[1] OJ L 325, 20.12.2022

[2] In accordance with Art. 83(a) Practice Rules for the Implementation of the Rules of Procedure of the General Court.

than 300 research groups within the University, most of them actively imbedded in the international academic network within the Union and beyond.

8. In addition to education and R&DI, the University provides a comprehensive suite of specialist healthcare services in almost all specialties including transplantation and oncology in 40 departments at four main clinical centres handling 2.5 million cases a year.

9. The University is a leading university in the Central-European region vigorously competing with other academic players for students and researchers alike. A key to success in this competition is Europeanization, a part of which is active networking with European universities. The Union's Erasmus+ Programme[3] to support education, and the Horizon Europe Programme[4] for research and innovation are two of the most important tools for the University community to maintain academic freedom and means by which to become involved in new ideas expressed elsewhere.

(2) Control over the University

10. Since breaking ground 250 years ago through to 2021, the University was owned, controlled and in part financed by the State of Hungary as a public university. As a result of transferring the founding and management rights of the University to an asset management foundation, the University was removed from the scope of directly state-maintained and funded institutions as of 1 August 2021.These rights and duties, together with resources, have been transferred by Act IX of 2021 to the National Foundation for Healthcare and Medical Education (the "**Foundation**", in Hungarian: *Nemzeti Egészségügyi és Orvosképzésért Alapítvány*), a self-governing public interest asset management foundation performing a public task.

11. The legal entity form "*public interest asset management foundation performing a public task*"[5] is imprecisely translated into English as "*public interest trust*".

12. The Foundation is managed by a curatorium of five curators[6], four of them are internationally renowned medical professors and the fifth is the CEO of a multinational pharmaceutical and biotechnology company headquartered in

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[3] https://erasmus-plus.ec.europa.eu/

[4] https://research-and-innovation.ec.europa.eu/funding/funding-opportunities/funding-programmes-and-open-calls/horizon-europe_en

[5] Such foundations are governed by sections 3:378-3:404 of the Hungarian Civil Code as *lex generalis*, and by Act XIII of 2019 on Asset Management Foundations and Act IX of 2021 on Public Interest Asset Management Foundations Performing a Public Task as *lex specialis*. Concerning property titles not being transferred to it, the Foundation shall act as a trustee.

[6] The five curators are: Gábor Orbán (chair), Prof.Dr. Jonathán Róbert Bedros, Prof.Dr. Péter Gloviczki, Prof.Dr. Béla Merkely and Prof.Dr. Miklós Szócska. See CVs of curators at https://semmelweis.hu/neoa/en/about-the-foundation

Budapest. None of those curators is a member of the government and none of them is an active politician.

13. The curatorium is in charge of

- the adoption of the framework of the budget of the University (the budget of the institution is one of the Senate's competences[7]);
- the approval of the University's yearly financial statements (balance sheet, profit & loss account and notes);
- acceptance of the University's By-laws;
- upon proposal of the Senate, election and discharge of the rector and appointment of the chancellor;
- preliminary assessment of the University's institutional development plan;
- preliminary approval of setting-up and winding-up business entities, and participation in other entities;
- preliminary approval of asset management plans concerning properties.

14. The Foundation, like the Hungarian state before, is not involved in the executive management of the University, which is independently run by the Senate, headed by the rector.

15. As provided for in section 22 of the University's By-laws[8], the Senate is made up of 45 members, among them, *ex officio*, the rector and the chancellor. The rest of the 43 members are elected

- 27 directly by professors, researchers and educators by secret ballot;
- 2 directly by other University employees by secret ballot;
- 11 delegated by the students' union;
- 1 delegated by the organisation of PhD students' union; and
- 2 delegated by the trade unions.

16. The Senate's competences (section 19 By-laws) are general, i.e., they extend to all matters not reserved for the curatorium and not delegated to officers of the University. The Senate elects the rector-nominee to be appointed by the curatorium.

17. The rector is the chief executive officer of the University, a full-time university professor, elected by the Senate[9] upon an open tender and mandated by the curatorium for 5 years, which can only be extended twice (section 28(1) By-laws).

18. Over the past 30 years, the field of medicine and health sciences has been the most dynamically changing market sector in the world. The provision of health care, the

[7] Section 2.2.1 Deed of Foundation of the University. See attached as Annex A.7.
[8] See at https://semmelweis.hu/jogigfoig/dokumentumtar/szabalyzattar/szervezeti-es-mukodesi-szabalyzat (trilingual)
[9] The sitting rector was re-elected in January 2023 by 36 votes for and 8 votes against.

health industry, the pharmaceutical industry, and various related fringe sectors requires the building of relationships with external, and primarily international players which demands considerable flexibility, speed and dynamic adaption to change. The purpose of the change of control was to create business-like, efficient and flexible operations, in order for the University to play a central role in research, development and innovation, to further strengthen its corporate and international relations, as well as to achieve the distinct goal of becoming one of the world's leading universities. The University has a definite, forward-looking goal and vision in terms of providing quality higher education, improving its international reputation and providing students with the widest possible access to education and scientific research.

(3) The change in business model

19. The change in ownership model provides, instead of being uniformly governed, the possibility for

- the State of Hungary to become a customer of the services provided by the University, therefore the financing contracts established between the State and the Foundation make the Foundation and the University interested in improving efficiency and quality by defining objectively measurable performance expectations;
- the infrastructure required to perform the tasks specified above, to become the property of the University or the Foundation. The change in business model therefore means that there is a broader right over property, and based on the mid-term financial contract between the State of Hungary and the Foundation, developments can be planned based on longer-term concepts rather than tied to budget years.

20. The Foundation acts principally like a general meeting of a corporation (elects supervisory board and auditor, and accepts the University's annual financial statements prepared on the basis of the accounting provisions). With respect to making decisions, proposals, opinions, and control rights, the supreme governing body of the University is the Senate, which is chaired by the rector. The University's autonomy is entrusted to the Senate which determines the training and research tasks of the institution and monitors their implementation.

21. The change in business model did not in fact affect the internal controls and decision-making of the Senate of the University and the rest of the organisation. It was the quasi-shareholders' functions that were moved from the government in charge for higher education in general, to a civil law foundation dedicated specifically to manage and develop the University.

(4) The business of the University

22. The University is the most significant and international institution dedicated to medicine and health sciences in Hungary and Central Europe. During the last four years, the University has moved from 491st place in the Times Higher Education (THE) world ranking, to the top 1% of 28,000 universities in the world. It is the first time that a Hungarian university has been included in THE's top 250. The University has improved on last year's result by moving up another 41 places, currently positioned at 236th place in the world. While the University has been able to improve in most of the required indicators, its biggest task is to improve the reputation of the University, the mainstay of which is its constant presence in the international ebb and flow of the sector itself:

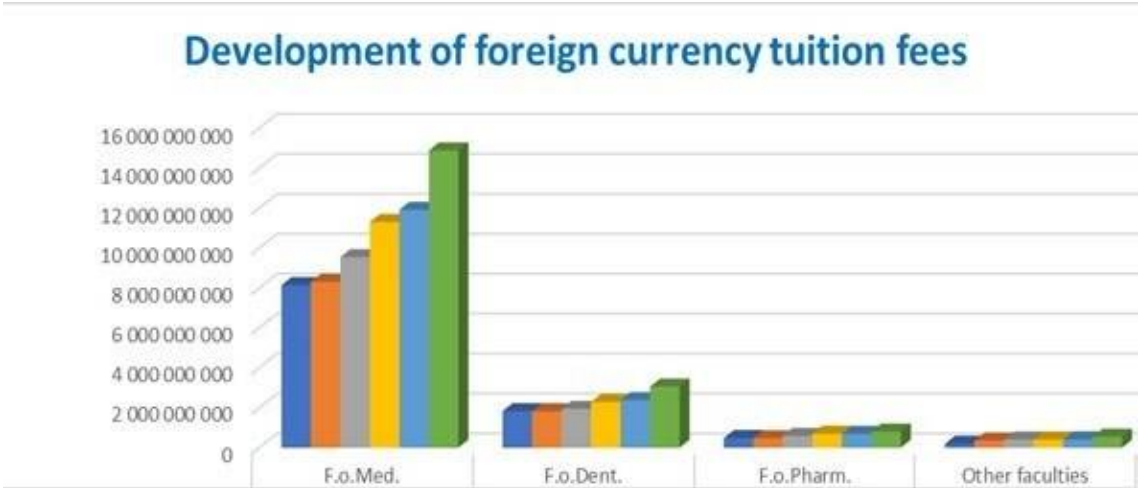
Ranking	2019	2020	2021	2022	2023
THE World University Ranking	491	457	426	277	201-250
THE - Clinical & Health	379	318	231	186	
US News - Cardiac and Cardiovascular Systems	Started in 2020	112	87	55	
US News - Endocrinology and Metabolism	Started in 2021		155	121	
QS Life Sciences and Medicine	308	295	272	262	
ShanghaiRanking ARWU (global ranking)	901-1000	901-1000	701-800	601-700	
ShanghaiRanking Dentistry and Oral Sciences	-	-	151-200	201-300	

23. During the last four years, the total number of students has increased by 19.7%, and the rate of increase for newly admitted students was 36.9%. A total of about 12,000 active students attend the University, of which more than 3,700 are foreign students who come from over 109 countries spanning 5 continents.

24. The University's main export product is medical education in foreign languages, which generates significant income. The University has become a major university providing medical education in the Union and has simultaneously become accessible to students from developing nations through its *Stipendium Hungaricum* scholarship programme.

25. The University's income from tuition fees in 2022 is as follows:

	HUF	%
Non-Hungarian students' tuition	19,295,206,301	35.9
Tuition covered by Hungarian government	33,703,650,000	62.6
Hungarian students' tuition	822,943,399	1.5
t o t a l:	53,821,799,700	100.0



	F.o.Med.	F.o.Dent.	F.o.Pharm.	Other faculties
2017	8 138 762 538	1 831 897 102	480 344 488	195 205 473
2018	8 303 892 538	1 820 301 868	470 865 176	358 776 117
2019	9 542 557 796	1 944 259 489	590 115 220	408 606 056
2020	11 299 521 944	2 291 090 010	701 745 013	405 447 527
2021	11 914 096 841	2 383 053 115	693 241 164	414 553 784
2022 (estimated revenue)	14 885 835 990	3 057 187 401	807 265 159	544 917 750

26. The R&DI activities of the University take place in the fields of natural sciences and to some extent, in the field of social sciences. Within this, life science research and development and innovation dominate. There has been a significant increase in the effectiveness of R&DI applications, which is due to the proactive application strategy of the University and the availability of domestic and European R&DI funds. As a result of this, the University's research and innovation base began the implementation of health and pharmaceutical developments that are prioritized from a national strategic point of view, prioritizing national industrial collaborations and involving resources in cooperation with the international corporate sector.

27. As with the rest of the world, Covid-19 presented considerable challenges to the University. The University played an integral part during this time, in particular it procured personal protective equipment (PPE), continuously facilitated reliable public communication, participated in national screening and vaccination programmes, treated the highest number of outpatients and inpatients in Hungary, and contributed to the development of new forms of diagnostic and therapeutic treatments through new research programmes.

B. The imposition of measures

28. Nothing in this Application or its associated evidence is or should be taken as dealing with 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 referred to as the "**Conditionality Regulation**")[10] *per se*.

29. However, following two years of communication[11] between Hungary and the Commission, in which the Applicant did not and could not participate and was not given the opportunity to have a say, in reliance on the assessment of the Commission, the Defendant adopted 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 (the "**Decision**").

30. Article 2 of the Decision reads, as follows:

"*1. 55 % of the budgetary commitments under the following operational programmes in Cohesion Policy, once approved, shall be suspended:*
(a) Environmental and Energy Efficiency Operational Programme Plus;
(b) Integrated Transport Operational Programme Plus;
(c) Territorial and Settlement Development Operational Programme Plus.

2. Where the Commission implements the Union budget in direct or indirect management pursuant to of 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.".

31. The Applicant falls under the definition of 'maintained entity' with whom, pursuant to Article 2(2), no future business can be conducted with.

32. The Decision imposed certain measures on Hungary (Art. 2(1)) and, simultaneously, extended even more restrictive measures addressed to Union instrumentalities directly affecting the businesses of the Applicant (Art. 2(2)). Nothing in this Application or its associated evidence is or should be taken as dealing with Article 2(1) of the Decision, insofar as it does not concern the Applicant.

33. The Decision was published in the Official Journal of the European Union on 20 December 2022[12].

34. The Decision has already had a significant impact[13] on ongoing and future projects of the University. The long-term repercussions of being excluded from ongoing and

[10] OJ L 433I, 22.12.2020
[11] For details, see the recitals to the Decision.
[12] OJ L 325, 20.12.2022
[13] See the rejections and the notification of protection measures attached as Annex A.2, A.3, A.4 and A.5.

existing projects will have, and to a certain extend already have had, a detrimental effect on several fronts.

35. Due to the way in which higher education, and specifically higher education in medicine and the health sciences has been structured internationally, the impact of the Decision may adversely affect the University and subsequently its students, faculty, and R&DI initiatives for a considerable number of years.

36. Students will no longer be able to participate in the intensive international learning environments in which innovative thinking and collaboration can develop. This will, quite obviously, disproportionately affect those students who are at a financial disadvantage. The repercussions of limiting access to education to a potentially large cohort in this way will have a knock-on effect on national and international health care provisions and developments in the very near future.

37. Researchers and lecturers will similarly be affected by the Decision, considerably limiting their access to training and the chance to contribute to strong research networks such as Erasmus+ and the Horizon Europe Programmes. Restricting access in this way will negatively impact students, universities, potential research projects, and the health care sector as a whole with potentially immediate effect.

38. And finally, the position of the University in the international higher education sector of medicine and health sciences will be negatively impacted also. Its hitherto rich contribution to international projects will be placed on hold, its committed internationalization projects will become less viable, and the strong research networks in which it invested considerable resources in building and cultivating will deteriorate. The position of the University as the primary source for training and providing the new generation of healthcare professionals both internationally, and more importantly nationally, demands a responsible approach, a duty which the University has always honoured.

C. Current and future activities and processes adversely affected by the Decision

39. The international student body has grown exponentially over the past five years. Quite apart from providing qualified medical colleagues to Europe and across the world, international education promotes the embeddedness of universities and professional policies amongst countries, develops expertise, and provides considerable income for the sector.

40. Currently, the six faculties of the University maintain formal relationships with 198 foreign higher education institutions covering various areas of cooperation. Most of these collaborations (169) are agreements supporting the Erasmus+ mobility programme, but there are 112 bilateral collaborations mainly aimed at teacher and student exchanges, joint research and development, and scientific collaborations.

The University is a member of several academic and professional organizations, such as the EUA[14], IAU[15], and DRC[16].

41. Recently, the University's membership in international programmes have continued to expand, most notably membership to UNICA (Network of Universities from the Capitals of Europe), and EUniWell (European University for Well-being) consortia cooperation.

42. Between 2018 and 2022 the University received more than 100 delegations and also visited international partners more than 110 times in order to develop professional relationships. In the intervening period, the University signed 82 new inter-university agreements with institutions from 30 countries.

43. As the best medical university in Central and Eastern Europe, the goal is to be at the forefront of the alliance of universities offering medical and health sciences training in the region. To that end, a recently signed three-year contract with Harvard University creates the possibility of cooperation with the world's best university in education, research, and patient care.

44. It is an important goal of the University to use the grants awarded for the development of international educational cooperation in accordance with the strategic goals of the University, and supporting its core activities.

45. The Decision, which was published on 20 December 2022, suspended all new legal commitments with the Foundation and, consequently, the University alike, such as

    - direct European Union research projects,
    - those regarding the conclusion of support contracts in operational programmes, and
    - those regarding the conclusion of new support contracts within the framework of the Erasmus+ programmes.

46. Based on the above, the Decision directly affects the University's research projects (Horizon 2020/Europe and the EU4Health programmes), in respect of which positive decisions have already been made, and for which the preparation of the support contracts – as new legal commitments – is currently underway by the project consortium leaders.

47. Most of the projects were planned to be implemented by the participants in the form of a consortium, with the cooperation of several well-known universities, so that the consortium begins as a candidate for the EU tender, and the participants take the position of beneficiary or associate partner in the project, depending on whether

[14] European University Association, see https://eua.eu/.
[15] International Association of Universities, see https://www.iau-aiu.net/.
[16] Danube Rector's Conference, see https://www.drc-danube.org/.

they finance their costs with EU support or not. During the application procedure, a distinction is made between beneficiaries (those who receive EU support in the event of a successful application) and associated partners (those who finance their costs from their own resources). However, prior to the application procedure, this distinction is recorded during the creation of the consortium, in order so that the roles, obligations, and amount of the grant is allocated in advance.

48. As a result of the Decision, this structured system has begun to break down as member universities have had to decide whether to accept that the implementation of the entire research project would be in jeopardy, or to modify the University's role in the project. The University has received letters[17] from consortium leaders and EU agencies to inform it of the following:

- That the Hungarian partner cannot be a beneficiary of the support contract. It must leave the consortium and the remaining consortium members are to allocate the tasks among themselves, or the University can put forward another partner who will take its place in the consortium and the tender; or
- If the Hungarian partner wishes to participate in the project, it can do so as an associate partner. In this case, the University must finance all of its costs from its own budget or through another supporting organization; and
- As a consortium leader can only be a beneficiary, any Hungarian partner who is currently participating in the project as a consortium leader must resign his role in favour of another beneficiary.

49. The University, on its part, does not find the above options acceptable. Stopping the programmes will understandably have far reaching consequences and a significant negative effect on students, teachers and the institution. These effects have been summarized below (the following is also supported by regularly conducted surveys) for three projects: Erasmus+ KA131, KA171 and the European University Association (EUniWell) project[18].

50. Neither the Defendant nor the Commission scrutinised, let alone analysed, who exactly the ultimate beneficiaries of those programmes were. The Article 2(2) measures, in actual fact, penalise those ultimate beneficiaries, the students and researchers alike.

(1) ERASMUS+ programme

51. The Erasmus+ programme (the "**Programme**") is a Union programme managed by the Commission and its European Education and Culture Executive Agency[19]

[17] See attached as Annex A.2, A.3 and A.4 and A.5.
[18] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European strategy for universities (COM(2022) 16 final).
[19] https://www.eacea.ec.europa.eu/index_en

("**EACEA**") through national agencies, i.e., in Hungary, the Tempus Public Foundation[20] ("**Tempus**"). Pursuant to its Program Guide[21], Tempus and the Applicant entered into a grant agreement for the ultimate benefit of students (the KA131 and KA171 projects) and professional staff.

52. In terms of these exchange programmes, the ultimate beneficiaries, the sending institution, and the receiving institution shall enter into tripartite agreements; in case of a student a learning agreement, or in case of a staff member a mobility agreement. These three-party agreements form mandatory parts of any application. The Applicant itself participates in the programmes in both capacities, i.e., as a sending and also as a receiving institution.

53. In terms of the grants provided under the grant agreement, the Applicant serves only as a pass-through entity under the auspices and control of EACEA and Tempus. The whole process is fully transparent and the details and data for each project is accessible on the Commission's website[22]. The Applicant itself receives no fees, no reimbursements, in short, not a penny for its cooperation and organization work or otherwise. It should also be noted, that the Applicant's role in selecting students and staff is limited; first, because it is a condition of the third-party foreign institution's agreement, and second, because each penny derived from the grants are to be accounted for and not utilised to cover costs.

54. Financially, in sum, the Applicant is not and structurally cannot be an interested party in the dissemination of the grants, therefore protection of the Union budget cannot be the purpose of measures applied against it. Nevertheless, given that the ultimate beneficiaries of those grants are members of the University community, participation in the Erasmus+ programme is of utmost importance for the business of the University.

55. In order to gain a more comprehensive picture of the impact of the termination of the Erasmus+ programme, it is important to examine the effects of the programme on the University.

56. Impact on the institution:

    - For more than 15 years, the University has been successfully supporting the Erasmus+ programme through its development strategy, which is aimed at preserving and improving the health of individuals at an overall societal level. An essential condition for this is quality training, research and patient care activities,

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[20] http://www.tpf.hu
[21] https://erasmus-plus.ec.europa.eu/sites/default/files/2023-01/ErasmusplusProgramme-Guide2023-v2_en.pdf
[22] https://erasmus-plus.ec.europa.eu/projects/search/?page=1&sort=&domain=eplus2021&view=list&map=false&searchType=projects

an important part of which is helping the University's students and teachers to gain experience through international mobility.
- The Programme has an impact on education, research and patient care processes. As a result, participation in the Programme is fully integrated into the University's internationalization, development and modernization strategy, and is one of the most effective tools in achieving the goal of Europeanisation.
- Participation in the Programme aims to further strengthen the position and activity of the University in the European Education Area (the "**EEA**"). The University wishes to continue to be a key player in the EEA. Members of the University can continue to develop, expand existing activities of previous Programme cycles, and share the acquired good practice, knowledge and results.
- One of the primary tasks of a modern university is to provide its students and staff with a myriad of opportunities to get to know the health care system and institutions of other countries, and to bear responsibility for the cross-border dissemination of educational and research results.

57. Impact on students:

- Students who partake in the Programme return home with a broader perspective, with higher-quality intercultural competences, and get to know the educational, institutional and patient care culture of another country.
- Incoming students contribute to expanding the University's international community and strengthening its intercultural character.
- The students of today, are the teachers and researchers of the future, and so ensuring the accessibility of international experiences is extremely important.

58. Impact on educators:

- Instructors have developed professional knowledge and language skills, and have experienced new teaching methods, which they then use in their own teaching activities. Through their new vision, acquired skills and knowledge, they contribute to the realization of the University's goals of internationalization, and by incorporating innovative technologies and research results, they ensure the continuous modernization of the University's education offer and subsequently the international health care system as a whole.
- University lecturers participate in all three activities of the University; as lecturers, researchers, and indeed health professionals. Consequently, and as a result of their mobility, the Programme contributes both directly and indirectly to the modernization and development of the Hungarian and thus the EU patient care system. As a healthcare professional, the experience and professional knowledge gained during mobilities are directly applied when treating patients. As instructors, they contribute to raising the standard and quality of education, thereby increasing the professional knowledge of the educated students. This is extremely important at the University, where more than 4,000 international students study. With the acquired experience in educational methodology, they also contribute to the modernization of the institution's training.

- For research and scientific purposes, the knowledge of international professional sources is extremely important, for which knowledge of foreign languages and technical languages is essential. This increases the "value" (impact factor) of scientific publications, which increases the visibility of the University.

59. Erasmus+ opportunities for international students:

- A number of international students also participate in the Programme. They typically use the scholarship programme in their senior years, when they wish to complete their mandatory internships abroad. The existence of the Programme is an attractive opportunity, for the following reasons:
  i. It shows the embeddedness of the institution,
  ii. It offers a real and inexpensive opportunity to get to know another university.
- The absence of this reflects, in addition to the missed learning opportunity, that the University is not part of the academic atmosphere that is typical of European education.

(2) Horizon Europe Programme and the European University for Well-being (EUniWell)

60. EUniWell is an alliance of European universities, the aim of which is for the partner universities to participate in joint projects that can increase social wellbeing through a multidisciplinary approach, in cooperation with students, companies and the non-profit sector. The projects include research, training, and collaborations through which the universities have an impact on society, and ensure the well-being of the students and staff at these institutions[23]. Partners in the project include universities from Germany, Italy, France, Spain, Ukraine, UK, Netherlands, Sweden, and Hungary[24].

61. The EUniWell cooperation is the vehicle of participation in the Horizon Europe Program, the EU's key funding programme for research and innovation, as the Horizon research projects are available mainly for consortiums of researchers. The consortiums that the University was a member of were successful bidders in three recent projects of paramount importance for difficult-to-treat diseases (such as e.g. Rheumatoid arthritis which is an autoimmune disease), but the University was subsequently excluded from all of these projects as a result of the Decision.[25]

[23] Pilot phase of the project (2020 – 2023): EUR 5 million; Second phase of the project (2023 – 2027): EUR 18 million (expected funding)
[24] Leiden University (The Netherlands), Linnaeaus University (Sweden), University of Birmingham (UK), University of Cologne (Germany), University of Florence (Italy), University of Nantes (France), Semmelweis Egyetem (Hungary), University of Murcia (Spain), Taras Shevchenko National University of Kyiv (Ukraine)
[25] See the rejection letters and the notification on protection measures attached as Annex A.2, A.3, A.4 and A.5.

62. The valued position of the University and the quality of the tasks it has performed during the pilot phase of the projects are supported by the fact that, despite the current adverse circumstances, the members of the consortium have decided to include the University as a partner in the application submitted for the next cycle. During the drafting and project planning of the tender submitted for the 2023-2027 cycle, however, the University's partners have stated several times that the current status of the University is a risk factor in the success of the tender.

63. If the current situation persists:

- The University will lose its full membership and the additional resources of the decree in the draft project.
- The established strong partnership will be negatively affected, and the planned joint education and research projects will not be implemented.
- It will have a negative effect on its partners in the consortium, since the tasks undertaken by the University can only be solved by involving a new partner in order to obtain the applied funds.
- In the long term, the reputation and recognition of the University, together with its ranking, will decrease.

D. Action for Partial Annulment (Article 263 TFEU)

64. The Applicant seeks the annulment of Article 2(2) of the Decision insofar as it applies to the Applicant itself or, in the alternative, should the separation of the Applicant from applicability of the whole of Article 2(2) not be feasible, the annulment of Article 2(2) in its entirety. The Applicant also requests that the General Court order the Defendant to pay the costs of the procedure.

(1) Severability

65. Admissibility of partial annulment actions depends on severability as it has been re-confirmed by the Court in Commission v Verhuizingen Coppens: "*According to settled case-law, partial annulment of an act of EU law is possible only if the elements which it is sought to have annulled can be severed from the remainder of the measure. That requirement is not satisfied where the partial annulment of a measure would cause the substance of that measure to be altered, a point which must be determined on the basis of an objective criterion and not of a subjective criterion linked to the political intention of the authority which adopted the measure at issue (judgment of 6 December 2012, Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, paragraph 38 and the case-law cited)*"[26].

[26] See the Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 293.

(2) Admissibility

66. For the purpose of this Application the Applicant maintains that, by adopting Article 2(2) of the Decision, the Applicant has suffered legal wrong and is sufficiently affected for this case to be presented to the Court. In addition, the Applicant maintains that it has already suffered a loss, therefore the case has developed into a controversy worthy of adjudication.

67. This Application is brought under 263(4) TFEU, which provides that *"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."*. These conditions are met, as follows:

(a) the Applicant is a legal person

68. The University is a legal person pursuant to section 5(1) of Act CCIV of 2011 on Higher Education, its certificate of registration is attached hereto as Annex A.6 and its Deed of Foundation as Annex A.7.

69. In *Venezuela v Council*[27] the Court held that "*if the EU legislature takes the view that an entity has an existence sufficient for it to be subject to restrictive measures, it must be accepted, on grounds of consistency and justice, that that entity also has an existence sufficient to contest those measures (see, to that effect, judgment of 18 January 2007, PKK and KNK v Council, C-229/05 P, EU:C:2007:32, paragraph 112).*"

(b) the Decision is a regulatory act

70. The expression "regulatory act" is not defined in the Treaties[28] and, therefore, the expression "regulatory act" is a *sui generis* term of EU law[29], subject to interpretation by the Court.

71. According to the settled case-law of the Court, the meaning of "regulatory act" for the purpose of Art. 263(4) TFEU *"must be understood as covering all acts of general application apart from legislative acts"*.[30]

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[27] See the Judgment of 22 June 2021, *République bolivarienne du Venezuela v Council of the European Union*, C-872/19, EU:C:2021:507, paragraph 47.
[28] To this effect, see the Opinion of Advocate General Kokott delivered on 17 January 2013 in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, paragraph 30.
[29] ibid, paragraph 32.
[30] See the Order of 6 September 2011, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, T-18/10, EU:T:2011:419, paragraph 56. On appeal, the Court of Justice agreed with this definition, see the Judgment of 3 October 2013, C-583/11 P, EU:C:2013:625, paragraphs 60 and

72. This has been further explained by the Court in *T&L Sugars*, as follows: *"[…] regulatory acts for the purpose of the fourth paragraph of Article 263 TFEU […] are acts of general application which have not been adopted according to the ordinary legislative procedure or according to a special legislative procedure within the meaning of Article 289(1) to (3) TFEU"*.[31]

73. It follows that, in the present proceedings, the Court shall examine whether the Decision:
    (i) is an act of general application, and
    (ii) has not been adopted according to the ordinary legislative procedure or according to a special legislative procedure within the meaning of Article 289(1) to (3) TFEU.

74. These two requirements are further discussed below.

(i) the Decision is an act of general application

75. According to the settled case-law of the Court, an act is of general application if its provisions *"were addressed in abstract terms to an indeterminate number of persons and apply to objectively determined situations"*.[32]

76. Indeed, the provisions set out in Article 2(2) Decision are addressed in abstract terms to an indeterminate number of persons and apply to objectively determined situations: *"Where the Commission implements the Union budget in direct or indirect management […] no legal commitments shall be entered into with any public interest trust […] or any entity maintained by such a public interest trust."*. For comparison, in *Bloufin Touna*, cited in paragraph 75 above, the following provision was found by the Court to fulfil the criteria of being "addressed in abstract terms to an indeterminate number of persons and apply to objectively determined situations":

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61. Furthermore, see the Judgment of 25 October 2011, *Microban International and Microban (Europe) v Commission*, T-262/10, EU:T:2011:623, paragraph 21.

[31] See, to that effect, the Judgment of 6 June 2013, *T&L Sugars and Sidul Açúcares v Commission*, T-279/11, EU:T:2013:299, paragraph 36, and Mastroianni, Roberto and Pezza, Andrea (2015) "Striking the Right Balance: Limits on the Right to Bring an Action Under Article 263(4) of the Treaty on the Functioning of the European Union," *American University International Law Review*: Vol. 30: Iss. 4, Article 3., pp. 752-753, and Kucko, Magdalena (2017) "The Status of Natural and Legal Persons According to the Annulment Procedure Post-Lisbon", *LSE Law Review*, Vol 2, pp. 113 and 118.

[32] See the Judgment of 27 February 2013, *Bloufin Touna Ellas Naftiki Etaireia and Others v Commission*, T-367/10, EU:T:2013:97, paragraph 19 and the case-law cited, and Mastroianni, R. and Pezza, A. (ibid) p. 769.

"Fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45° W, and the Mediterranean by purse seiners flying the flag of or registered in France or Greece shall be prohibited as from 10 June 2010, 00h00."[33].

77. As far as the requirement for the contested act to be of general application (that is, for its provisions to be expressed in abstract terms to an indefinite number of persons and apply to objectively determined situations), the substantial similarity of the provisions set out in Article 2(2) Decision, on the one hand, and the provisions quoted above, on the other, is obvious (even more so that both provisions express a prohibition of a certain activity).[34]

78. It follows that, as far as the Article 2(2) Decision, the requirement for it to be of general application is fulfilled.

(ii) the Decision has not been adopted according to the ordinary legislative procedure or according to a special legislative procedure within the meaning of Article 289(1) to (3) TFEU

79. As the legal basis for the Decision, the Council explicitly cites the Conditionality Regulation and in particular Article 6(10) thereof.

80. Article 6 (titled, *"Procedure"*) of the Conditionality Regulation lays down a *sui generis* adoption procedure[35]. The Decision has been adopted according to this very *sui generis* procedure, and not according to the ordinary legislative procedure or according to a special legislative procedure within the meaning of Article 289(1) to (3) TFEU.

81. Furthermore, in *Microban*, when assessing the requirement of "not adopted according to the ordinary legislative procedure or according to a special legislative procedure within the meaning of Article 289(1) to (3) TFEU", the Court attached paramount importance to the fact that the contested decision was adopted (there, by the European Commission) by the exercise of *implementing* powers and not in the exercise of *legislative* powers:

"In the present case, the legal basis cited by the contested decision is Article 11(3) of Regulation No 1935/2004. That article provides that a measure taken by the Commission on the basis of that article is to be adopted in accordance with the procedure referred to in Article 5a(1) to (4) and (5)(b) of Council Decision

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[33] See the Judgment of 27 February 2013, *Bloufin Touna Ellas Naftiki Etaireia and Others v Commission*, T-367/10, EU:T:2013:97, paragraph 6.

[34] For a further example, see the Judgment of 25 October 2011, *Microban International and Microban (Europe) v Commission*, T-262/10, EU:T:2011:623, paragraphs 8 and 23.

[35] Other *sui generis* procedures are laid down, for example, in Articles 31 TFEU, 43(3) TFEU, 45(3)(d) TFEU, 66 TFEU, 103 TFEU, 109 TFEU and215(1) and (2) TFEU. To this effect, see the Opinion of Advocate General Kokott delivered on 17 January 2013 in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, paragraphs 52 and 54, footnotes 33 and 34.

1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), as amended. Accordingly, the contested decision was adopted by the Commission in the exercise of implementing powers and not in the exercise of legislative powers."[36].

82. The same applies, *mutatis mutandis*, to the adoption of the Decision. The Decision, too, was adopted (by the Council) in the exercise of implementing powers (on the basis of the Conditionality Regulation), and not in the exercise of legislative powers, and certainly not according to the ordinary legislative procedure or according to a special legislative procedure within the meaning of Article 289(1) to (3) TFEU.

83. It follows that the requirement of "not adopted according to the ordinary legislative procedure or according to a special legislative procedure within the meaning of Article 289(1) to (3) TFEU", is also fulfilled.

(c) Article 2(2) Decision is of direct concern to the Applicant

84. According to the settled case-law of the Court, the condition that a legal person *"must be directly concerned by the decision against which the action is brought, laid down in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of the individual and, second, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules"*.[37]

85. These criteria are discussed below.

86. Article 2(2) Decision prohibits entering into any legal commitment with the Applicant 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.

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[36] See the Judgment of 25 October 2011, *Microban International and Microban (Europe) v Commission*, T-262/10, EU:T:2011:623, paragraph 22.

[37] See the Judgments of 5 May 1998, *Société Louis Dreyfus & Cie v Commission of the European Communities*, C-386/16 P, EU:C:1998:193, paragraph 43 and the case-law cited, and of 29 June 2004, *Front National v European Parliament*, C-486/01 P, EU:C:2004:394, paragraph 34 and the case-law cited, and of 10 September 2009, *Ente per le Ville Vesuviane v Commission*, Joined Cases C-445/07 P and C-455/07 P, EU:C:2009:529, paragraph 45 and the case-law cited, and of 27 February 2014, *Stichting Woonlinie and Others* v *Commission*, C-133/12 P, EU:C:2014:105, paragraph 55 and the case-law cited, and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42 and the case-law cited, and of 30 June 2022, *Danske Slagtermestre v European Commission*, C-99/21 P, EU:C:2022:510, paragraph 45 and the case-law cited.

87. The Article 2(2) measure leaves no discretion to its addressees and, as the Court ruled, "*It has consistently been held that, in order to be of direct concern to an applicant who is not an addressee of a measure, that measure must, first, directly affect that applicant's legal situation and, second, leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being automatic and resulting from EU rules without the application of other intermediate rules (judgments of 13 May 1971, International Fruit Company and Others v Commission, 41/70 to 44/70, EU:C:1971:53, paragraphs 23 to 28; of 5 May 1998, Dreyfus v Commission, C-386/96 P, EU:C:1998:193, paragraph 43; and of 17 September 2009, Commission v Koninklijke FrieslandCampina, C-519/07 P, EU:C:2009:556, paragraph 48)*"[38].

88. In actual fact, this prohibition has already produced – significant and detrimental – effects on the legal situation of the Applicant, in this context see, in particular, Section III.C. of this Application.

89. These effects follow, *"solely […], without the application of any intermediate measure"*[39], from the Article 2(2) Decision. For comparison, in *BUPA*, the Court held that:

> *"As to the issue of direct concern raised by the defendant, it has consistently been held that the contested measure must directly produce effects on the legal situation of the person concerned and its implementation must be purely automatic and follow solely from the Community rules, without the application of other intermediate measures. In the case of a decision authorising aid, the same applies where the possibility that the national authorities will decide not to grant the aid authorised by the contested Commission decision is purely theoretical and there is no doubt that those authorities intend to act in that way […]. In the present case, […] the Irish authorities firmly intended to implement the RES* [note: "RES" is an abbreviation for the state aid scheme authorized by the European Commission in the contested decision]*, the only questions that remain open being the precise date on which the RES would become applicable and the RES payments commence together with the determination of the amounts of those payments. Therefore, at the time of adoption of the contested decision, the possibility that the Irish authorities would decide not to implement the RES was purely theoretical […]. […] It follows that the applicants are directly […] concerned, within the meaning of the fourth paragraph of Article 230 EC, by the contested decision […]."*[40].

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[38] See the Judgment of 7 December 2022, *WhatsApp Ireland Ltd v European Data Protection Board*, T-709/21, EU:T:2022:783, paragraph 51.

[39] See the Judgment of 12 February 2008, *British United Provident Association Ltd (BUPA) and Others v Commission of the European Communities*, T-289/03, EU:T:2008:29, paragraph 81 and the case-law cited.

[40] See the Judgment of 12 February 2008, *British United Provident Association Ltd (BUPA) and Others v Commission of the European Communities*, T-289/03, EU:T:2008:29, paragraphs 81 to 84.

90. Similarly, in the present case, 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 indeed refrain from entering into said commitments.[41] In this context, it shall be emphasized that the prohibition set forth in Article 2(2) Decision is absolute and unconditional (*"[…] no legal commitments shall be entered into […]"*), that is, it leaves no room for any discretionary adjustment.

91. It shall also be emphasized that even though the Decision is addressed to Hungary and not to the Applicant, it does not call into question that Art. 2(2) Decision directly affects the Applicant's legal situation.[42]

92. It follows that the requirements that Art 2(2) Decision "*must directly affect the legal situation*" of the Applicant and that it "*must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules*", are both fulfilled, and hence Art. 2(2) Decision is of direct concern to the Applicant.

(d) Article 2(2) Decision does not entail implementing measures

93. According to the settled case-law of the Court, *"the need for an act which does not entail implementing measures laid down in the fourth paragraph of Article 263 TFEU constitutes a different condition from the requirement that the act be of direct concern to the applicant. In particular, the question whether or not the contested regulation leaves a margin of discretion to the national authorities responsible for the implementing measures is irrelevant in ascertaining whether the contested regulation entails implementing measures"*.[43]

94. In *Químicas*, the Court provided detailed guidance on how the expression "*does not entail implementing measures*" is to be interpreted and applied, as follows:

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[41] See also, to that effect, the Judgments of 5 May 1998, *Société Louis Dreyfus & Cie v Commission of the European Communities*, C-386/16 P, EU:C:1998:193, paragraph 44 and the case-law cited, and of 17 January 1985, *SA Piraiki-Patraiki and Others v Commission of the European Communities*, C-11/82, EU:C:1985:18, paragraphs 8 to 10.

[42] See, to this effect, the Judgment of 5 May 1998, *Société Louis Dreyfus & Cie v Commission of the European Communities*, C-386/16 P, EU:C:1998:193, paragraph 54.

[43] See the Judgments of 12 September 2013, *Palirria Souliotis v Commission*, T-380/11, EU:T:2013:420, paragraph 44 and the case-law cited, and of Judgment of 6 June 2013, *T&L Sugars and Sidul Açúcares v Commission*, T-279/11, EU:T:2013:299, paragraph 53 (on appeal, the Court of Justice agreed with this position, see the Judgment of 28 April 2015, C-456/13 P, EU:C:2015:284, paragraph 42).

"In that regard, it must be recalled that the expression 'which … does not entail implementing measures', within the meaning of the final limb of the fourth paragraph of Article 263 TFEU, must be interpreted in the light of the objective of that provision, which is, as is apparent from its drafting history, to ensure that individuals do not have to break the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he did not have a legal remedy before the European Union judicature for the purpose of challenging the legality of the regulatory act. 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 (judgment of 28 April 2015, T&L Sugars and Sidul Açúcares v Commission, C-456/13 P, EU:C:2015:284, paragraph 29 and the case-law cited).

[…]

As the Court has already held, 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 final limb of the fourth paragraph of Article 263 TFEU. It is therefore irrelevant whether the act in question entails implementing measures with regard to other persons (judgment of 28 April 2015, T & L Sugars and Sidul Açúcares v Commission, C-456/13 P, EU:C:2015:284, paragraph 32 and the case-law cited).

Furthermore, in the context of that assessment, it is necessary to refer exclusively to the subject matter of the action and, where an applicant seeks only the partial annulment of an act, it is solely any implementing measures which that part of the act may entail that must, where appropriate, be taken into consideration (judgment of 10 December 2015, Kyocera Mita Europe v Commission,C-553/14 P, not published, EU:C:2015:805 paragraph 45, and the case-law cited). […]".[44]

95. Again, the Article 2(2) Decision sets forth a prohibition which is both absolute and unconditional (*"[…] no legal commitments shall be entered into […]"*) and, furthermore, it is one which became applicable towards the Applicant immediately upon publication of the Decision. As such, the Article 2(2) Decision affects the legal situation of the Applicant directly and automatically, without this affect requiring any implementing measure.

96. Indeed, and in actual fact, no measure whatsoever will be taken towards the Applicant for the purpose of "implementing" Article 2(2) Decision. In this context, it shall be emphasized, in accordance with the Court's findings in *Químicas* quoted above, that the Applicant must not be forced "to break the law in order to have access to a court".

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[44] See the Judgment of 13 March 2018, *Industrias Químicas del Vallés v Commission*, C-244/16 P, EU:C:2018:177, paragraphs 42, 45 and 46.

97. That is, the Applicant's *locus standi* in the present proceedings must not be conditional on the Applicant applying for one or more "legal commitments" within the meaning of the Article 2(2) Decision and thus, upon the existence of any decision rejecting such an application, while these "legal commitments" are already prohibited by Article 2(2) Decision absolutely and unconditionally (let alone, in those cases where the Applicant has already been excluded from a project by other project participants as a result of Art. 2(2) Decision[45]), the Applicant cannot possibly apply for a "legal commitment" and, consequently, no decision on the rejection of such application can possibly be issued. Making the Applicant's *locus standi* conditional upon the existence of such decision(s) would be against the objective of the requirement of "does not entail implementing measures", as explained by the Court in *Químicas* quoted above, and, consequently, the Applicant would be denied effective judicial protection before the European Union judicature.

98. It follows that the Article 2(2) Decision, as the Decision itself is an implementing measure, does not entail implementing measures within the meaning of Article 263(4) TFEU.

99. Based on the above, it also follows that the Applicant has *locus standi* to bring this Application and, considering that certain losses have already been incurred, this action cannot be held to be premature.

(3) Claims

100. For the purpose of this Application the Applicant maintains that, by adopting Article 2(2) of the Decision, the Defendant failed to act in accordance with its legal obligations in at least the following ways:

(i) The Decision errs in assessment of facts.

(a) The Defendant failed to ensure that the inclusion of the Applicant in the group of entities made subject to the restrictive measures by Article 2(2) Decision rested on a sufficiently solid factual basis (see ¶108-124 below).

(b) The Defendant made manifest errors of assessment (see ¶125-129 below).

(c) The Defendant failed to state adequate reasons (see ¶130-139 below).

(ii) The Applicant has been denied the right to be heard, and the opportunity to defend its rights (see ¶140-153 below).

[45] See the rejection letters and the notification on protective measures attached as Annex A.2, A.3, A.4 and A.5.

(iii) The Defendant lacked a proper legal basis for the Decision.

(a) The Conditionality Regulation contains no authorization (see ¶154-170 below).

(b) The Defendant misused its power (see ¶171-179 below).

(iv) The Defendant infringed the principle of proportionality (see ¶180-196 below).

(v) The Defendant failed to consider the effects that the Decision would have on the relevant market sector, thereby distorting the market, and hindering competition. (see ¶197-207 below).

IV. FORM OF ORDER SOUGHT

101. The applicant claims that the Court should:

(1) annul Article 2(2) of the Decision, insofar as it concerns the Applicant, or alternatively,
(2) annul the Article 2(2) of the Decision in its entirety; and, in either case,
(3) order that the Defendant pay the Applicant's costs of these proceedings.

102. The Applicant reserves the right to seek damages and other remedies out of or in connection with Article 2(2) of the Decision.

V. PLEAS IN LAW AND MAIN ARGUMENTS IN SUPPORT

103. In support of the action, the Applicant relies on five pleas in law.

A. The first plea: The Decision lacks a sufficiently solid factual basis

104. As stated in the preamble of the Decision ("*Having regard to the proposal from the European Commission*"), the Defendant, in adopting the Decision, has purported to rely on the assessment of the Commission[46] [47], without having the underlying documents in Defendant's possession[48].

105. The Commission, in its notification[49] to Hungary under Article 6(1) of the Conditionality Regulation on 27 April 2022, had raised concerns regarding:

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[46] Proposal 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; COM/2022/485 final.
[47] Communication from the Commission to the Council on the remedial measures notified by Hungary under Regulation (EU, Euratom) 2020/2092 for the protection of the Union budget; COM/2022/687 final.
[48] See communication between Applicant and Defendant in Annex A.8.
[49] See recital (2) Decision.

- systemic irregularities, deficiencies and weaknesses in public procurement procedures;
- the high share of single bids in tender procedures related to EU financing and the low level of competition in procurement procedures;
- the use of framework agreements;
- the detection, prevention and correction of conflicts of interest;
- the use of public interest trusts;
- investigations and prosecutions, and the anti-corruption framework.

The Commission had also informed Hungary of its concerns regarding the independence of the judiciary.

106. As it was stressed by the President of the Commission, "*the proceedings initiated against Hungary and the proposal for a Decision therefore set a precedent. Accordingly, it was imperative that the procedure laid down by the Regulation be followed to the letter, in order to guarantee the sound legal basis of the decision proposed that day*."[50]

107. "*The Regulation did not provide for negotiations, which, following one or more rounds of talks, could lead to a solution; instead progress was achieved on the basis of established facts*."[51]

(a) The first sub-plea: The Defendant failed to ensure that the inclusion of the Applicant in the group of entities made subject to the restrictive measures by Article 2(2) Decision rested on a sufficiently solid factual basis

108. As it follows from the above, the Commission's fact-finding was not extended to the composition, decision making, finances and operation of any of the 'public interest trusts', such as the Foundation in charge of the Applicant.

109. Thus, several facts were not established and remained unassessed, namely that the curators or the curatorium never became involved with the management of the Applicant which is run by the Senate.

110. On a separate note, there has been no indication, unsubstantiated hint or rumor that the Foundation or the Applicant, whether through an act or omission, had done anything that may have qualified as a breach of the principles of the rule of law affecting or risking the sound financial management of the Union budget or the protection of the financial interests of the Union in any and certainly not a sufficiently direct way or otherwise.

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[50] Minutes of the 2430th meeting of the Commission held on Sunday 18 September 2022 PV(2022) 2430 final, point 7
[51] ibid.

111. In its Proposal dated 18 September 2022[52] (hereinafter referred to as the "**Proposal**"), the Commission put it this way:

> "*Finally, as regards the measure relevant to the public interest trusts, the Conditionality Regulation does not require to define specific cases in which a breach of the principles of the rule of law has affected the Union budget or the Union's financial interests. In particular as regards public interest trusts, the legislation in place clearly entails a serious risk for the sound financial management of the Union budget and the Union's financial interests. Thus, the prohibition of entering into new legal commitments, is the only measure able to ensure the protective and preventive character of the procedure under the Conditionality Regulation.*"[53]

112. The reference by the Commission that "*the Conditionality Regulation does not require to define specific cases in which a breach of the principles of the rule of law has affected the Union budget or the Union's financial interests"* is a clear admission that the Commission, even had it wished to have identified, detected, or suspected a single case in which the Applicant was to have breached principles of the rule of law, it could not, and in fact had not done so.

113. Consequently, as it concerns the Applicant, the measures affecting it set forth in Article 2(2) Decision do not rest on any factual basis, let alone a sufficiently solid one.

114. In paragraph 138 of the Proposal, the Commission demonstrated that it knew perfectly well how to assess a potential breach of rule of law when it was faced with one. "*Given the particularly significant potential impact of the identified breaches of the principles of the rule of law on the sound financial management of the Union budget and on the financial interests of the Union, and taking into account the nature, duration, seriousness and scope of those breaches, this could imply a very significant potential impact on the relevant funds and thus justify a very significant level of suspension of commitments as proportionate*."

115. With no analysis of the potential impact, the nature, the duration, the seriousness and scope of identified breaches, one cannot speak of a factual basis, even less so of solid ones.

116. As argued in detail in section III.C above, the Applicant is individually affected and concerned by the prohibition included in Article 2(2) of the Decision since the Applicant has already been excluded from research projects and from other programmes. In spite of this direct concern, there are no facts or references in the Decision which would establish or refer to possible violations of the rule of law committed or even attempted by the Applicant. The lack of a factual basis, let alone

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[52] Proposal 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, COM(2022) 485 final.
[53] ¶152 Explanatory Memorandum to the Proposal.

a sufficiently solid one renders the principle of effective judicial review guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union impossible.[54]

117. However, the Applicant wishes to emphasize that even if the Decision were to have contained any facts or references on the basis on which violations of the rule of law committed by the Applicant could be established, the requirement to provide a sufficiently solid factual basis would still not have been satisfied, since according to the settled case-law of the Court, a verification of the allegations factored in the summary of reasons underpinning the decision is also required.[55] With respect to the fact that the Decision does not contain any facts referring to any violations committed by the Applicant, let alone a proper and detailed verification of such facts, the measures affecting the Applicant do not rest on a sufficiently solid factual basis.

118. According to the recitals of the Decision, communications and information exchanges between the Commission and Hungary had been in progress since November 2021, one year before the Decision. Even had there been plenty of time, the Applicant was not informed in any way about the grounds on which the Applicant's inclusion in the group of entities adversely affected by the measures adopted by Article 2(2) of the Decision was based. In order to enable the entity concerned by an adverse measure to properly defend its rights, institutions of the European Union are bound to communicate the grounds on which the given entity is included in the group affected negatively by a measure, preferably immediately when that inclusion is decided upon or, at the very least, as swiftly as possible after that decision in order to enable the entity to exercise, within the periods prescribed, its right to bring an action[56].

119. With respect to the date of notification of the statement of reasons on which the decision adversely affecting the entity concerned, those reasons must, in principle, be communicated at the same time as the decision adversely affecting the given entity or as indicated in the preceding paragraph, even at an earlier date, that is as soon as the inclusion of the given entity in the group affected negatively by a measure is decided upon. Failure to state these reasons cannot be remedied by the fact that the person concerned learns of the reasons for the decision during the

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[54] See the judgment of 28 November 2013, *Council v Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 73 and the case-law cited; and of 3 December 2020, *Saleh Thabet and Others v Council*, Joined Cases C-72/19 P and C-145/19 P, EU:C:2020:992, paragraph 33 and the case-law cited.

[55] See the judgment of 28 November 2013, *Council v Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 73 and the case-law cited; and of 3 December 2020, *Saleh Thabet and Others v Council*, Joined Cases C-72/19 P and C-145/19 P, EU:C:2020:992, paragraph 33 and the case-law cited.

[56] See the judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 336 and the case-law cited.

proceedings before the Court[57]. Therefore, in the present case, even if the Defendant discloses the grounds for including the Applicant in the group of entities adversely affected by the prohibition, such disclosure may help the Applicant to have an understanding of the background of its inclusion, but it can by no means remedy the failure.

120. The purpose of the obligation to state reasons is twofold in the sense that it serves the interests of both the party individually affected by a decision and the Court adjudicating the lawfulness of the decision. On the one hand, the obligation to state reasons enables the Court to review the legality of the decision, and on the other hand, it provides the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested.[58] The aforementioned dualism unequivocally highlights the importance of providing a sufficiently solid factual basis by emphasizing that the proper communication of the grounds on which a decision is based is a must from the very beginning of the inclusion of the person concerned, until the very end of the adaption of a judgment on the legality of the said decision for the proper defence of the concerned entity's rights as well as for the principle of effective judicial review to prevail.

121. In another case, the Court held, that: "*The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person in Annex I to Regulation No 881/2002 (the Kadi judgment, paragraph 336), the Courts of the European Union are to ensure that that decision, which affects that person individually (see, to that effect, judgment of 23 April 2013 in Joined Cases C-478/11 P to C-482/11 P Gbagbo and Others v Council, paragraph 56), is taken on a sufficiently solid factual basis (see, to that effect, Al-Aqsa v Council and Netherlands v Al-Aqsa, paragraph 68). That entails a verification of the factual allegations in the summary of reasons underpinning that decision (see to that effect, E and F, paragraph 57), with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated*."[59]

122. Pursuant to the Conditionality Regulation, applicability of measures shall be conditioned by any such eventual breach of the principles of the rule of law having an effect on the Union budget or the Union's financial interests. Consequently, there shall be, or rather, should have been a factual link between the breach and its effect

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[57] See the Judgment of 26 November 1981, *Michel v Parliament*, C-195/80, EU:C:1981:284, paragraph 22.
[58] See the Judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission*, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 462, 463 and the case-law cited.
[59] See the Judgment of 18 July 2013, *Commission and Others v Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 119 and the case-law cited.

on the Union's finances. However, neither the Conditionality Regulation nor the Decision contains any reference to any fact-finding concerning any such link that would support Article 2(2) of the Decision and certainly not its applicability to the Applicant.

123. It is known by the Commission, that there are only two indirect links between EU finances and the Applicant, these being the Erasmus+ and the Horizon Europe programmes.

124. Even a cursory consideration of these programmes would have revealed that the Foundation has no influence in controlling the way in which funds are granted and spent. As a rule[60], subsidies and grants are directly dealt with and controlled by the team leaders of the tender-winning teams.

(b) The second sub-plea: The Defendant made manifest errors of assessment

125. At the sitting of the College of Commissioners held on 18 September 2022, the President rightly stressed "*that the proceedings initiated against Hungary and the proposal for a Decision therefore set a precedent. Accordingly, it was imperative that the procedure laid down by the Regulation be followed to the letter, in order to guarantee the sound legal basis of the decision proposed that day*." The President went on emphasizing "*that the Conditionality Regulation set very tight deadlines that had to be strictly observed. The Regulation did not provide for negotiations, which, following one or more rounds of talks, could lead to a solution; instead progress was achieved on the basis of established facts.*"

126. As the preamble and the recitals of the Decision indicate, in the adoption of the Decision the Defendant acted on the Proposal of the Commission. As evidenced by the section above, the proceedings leading to the Decision, and indeed the Decision itself, harboured the intention of setting a precedent. This precedent-making ambition of the Decision envisages how subsequent cases involving identical or similar facts, or the lack of them, will be decided in the future.

127. As it is thoroughly referenced in the recitals to the Decision itself, in adopting the Decision's Article 2(1) measures, the Defendant relied on the Commission's Proposal.

128. However, in reliance on the Commission's Proposal, which itself has failed to establish facts supporting the Article 2(2) measures, the Defendant failed, properly or at all, to take into account or evaluate the fact that no relevant facts had been established concerning the Article 2(2) measures.

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[60] Paragraph 3.4(6) *Gazdálkodási Szabályzat* (internal Business Practice Regulation) of the University.

129. Under Article 6(9) Conditionality Regulation, the Commission's Proposal should have set out the specific grounds and evidence on which the Commission based its findings, which is also relevant for the terms of the Article 2(2) measures. No such specific grounds had been established either in the Commission's Proposal or the Decision.

(c) The third sub-plea: The Defendant failed to state adequate reasons

130. The Commission identified issues related to conflict of interest and transparency of public interest trusts (i.e., the foundations), implying lack of public control over the functioning and governance of these entities[61].

131. At the same time, however, in paragraph 93 of the same Proposal the Commission, held the following: "*The Commission considers that the remedial measure proposed by Hungary, if correctly specified in detailed rules and implemented accordingly, would be capable of addressing in principle the issues raised, as it would enable the generalised and unconditional application of public procurement rules to public interest trusts and the entities maintained or managed by them (i.e. all of them would be considered contracting authorities for the purposes of public procurement rules), and as the remedial measure would establish clear conflict of interest rules for such entities and their board members.*"

132. The Commission accused Hungary of having submitted its remedial measures "*at a late stage*"[62] but did not, in principle, dispute the adequacy of those measures dependent on proper implementation.

133. The obligation to state reasons is a fundamental procedural requirement that cannot be omitted or circumvented by the institutions of the European Union. Therefore, the assessment of whether the Defendant complied with this obligation when it adopted the Decision shall primarily be carried out from a procedural point of view. As pointed out by the relevant case-law of the Court: *"[...] concerning the question whether the Commission failed to comply with its obligation to state reasons, it must be made clear that that obligation is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure*".[63] Hence, the statement of reasons must have been an integral and essential part of the procedure carried out by the Defendant which led to the adoption of the measures included in Article 2(2) of the Decision.

134. The Applicant points out also, that it is apparent from the case-law that the question of whether the institution concerned fulfilled the requirements to be satisfied by the statement of reasons shall be assessed on a case-by-case basis. In addition, the

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[61] ¶33 Explanatory Memorandum to the Proposal.
[62] ¶121 Explanatory Memorandum to the Proposal.
[63] See the Judgment of 7 March 2002, *Italy v Commission*, C-310/99, EU:C:2002:143, paragraph 48.

assessment must be more comprehensive then the simple examination of the wording of the reasons, as in addition to the wording, the context and all the legal rules governing the matter in question must be taken into consideration when examining the fulfilment of the obligation to state reasons.[64] Due to the fact that the assessment on the adequacy of the measures implemented in connection with the public interest trusts was cut short in a rather abrupt manner, there is no trace or reference, which would suggest that such a complex and comprehensive assessment had been carried out prior to the adoption of the Decision. On the contrary, the above-referred accusation of the Commission rather indicates that the required analysis was not completed at all.

135. The fact that a proper and detailed assessment must be carried out without exceptions on a case-by-case basis is also supported by the following findings of the Court: "*The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations".*[65]

136. When adopting Article 2(2) of the Decision, the Defendant should have paid particular attention to the fact that the prohibitions have a detrimental effect on the Applicant and on its students, researchers, teachers and employees as well, meaning that it would have been in the interest of the Applicant and these persons affected directly by the measures adopted to receive an explanation as to why they were arbitrarily deprived of such rights and opportunities for which they had legitimate expectations.

137. The Court has established in a number of cases, that: "*According to settled case law, the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in*

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[64] See the Judgment of 7 March 2002, *Italy v Commission*, C-310/99, EU:C:2002:143, paragraph 48.

[65] See the Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 131 and the case-law cited.

question (see, inter alia, Case C 390/06 Nuova Agricast [2008] ECR I-0000, paragraph 79, and Joined Cases C 341/06 P and C-342/06 P Chronopost and La Poste v UFEX and Others [2008] ECR I 0000, paragraph 88 and the case law cited)."[66]

138. Pursuant to Article 6(9) Conditionality Regulation, the Commission's "*proposal shall set out the specific grounds and evidence on which the Commission based its findings*". The lack of such evidentiary grounds suggests that an arbitrary decision had been made to harm the businesses of the Applicant as a consequence of an inability or unwillingness of the Commission and Hungary to communicate in a timely manner. Additionally, while it may transpire that Hungary's remedial measures will be satisfactory, by the time such measures are operational, inevitable and unavoidable damage will have been done to the Applicant's businesses.

139. In conclusion, as discussed above, the Defendant has failed, properly or at all, to take into account and/or act on the relevant information that it should have taken into consideration.

B. The second plea: The Applicant, an affected person, has been denied the opportunity to defend its rights; its right to be heard has been infringed

140. As part of the right to good administration, the right to be heard constitutes a general principle and a fundamental right within the European Union's legal order, enshrined, as an essential part of good administration, in Article 41(2)(a) of the Charter of Fundamental Rights of the Union[67]. It is the right of every person to be heard, before any individual measure which would affect him or her adversely is taken[68].

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[66] See the judgment of 22 December 2008, *Regie Networks*, C-333/07, EU:C:2008:764, paragraph 63 and the case-law cited. See also, to that effect, the Judgments of 14 February 1990, *Delacre and Others v Commission*, C-350/88, EU:C:1990:71, paragraphs 15, 16 and the case-law cited, and of 1 July 2008, *Chronopost and La Poste v UFEX and Others*, Joined Cases C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 88 and the case-law cited, and of 15 July 2004, *Spain v Commission*, C-501/00, EU:C:2004:438, paragraph 73 and the case-law cited, and of 22 March 2001, *France v Commission*, C-17/99, EU:C:2001:178, paragraphs 35, 36 and the case-law cited and of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2008:392, paragraph 166 and the case-law cited.

[67] See Art. 6(1) TEU

[68] See the Judgment of 11 December 2014, Khaled Boudjlida v Préfet des Pyrénées-Atlantiques, C-249/13, EU:C:2014:2431, paragraph 31: *"The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (the judgments in Kamino International Logistics, EU:C:2014:2041, paragraph 29, and Mukarubega, EU:C:2014:2336, paragraph 43)"*.

141. As has been identified above[69], carrying out the measures set forth by the Article 2(2) Decision definitively affects the Applicant and its businesses. The Applicant is additionally affected by the fact that its loss, as a direct consequence of the Decision, was designed for the direct benefit of its competitors. As paragraph 142 of the Proposal candidly put it: "*Moreover, as the prohibition of entering into new legal commitments is limited to these entities, the allocation of funds from all Union programmes under direct and indirect management may still be used for any other entity, as beneficiary or implementing entity."*

142. Certainly, in order to avoid misinterpretations or otherwise, a recent clarification on behalf of the Commission[70] made it clear as follows: "*The aim of the* [Conditionality] *Regulation is not to impose sanctions but to protect the EU budget.*"

143. This clarification is in line with the Court's finding[71] in connection with the Conditionality Regulation itself. The Court held: "*Furthermore, it is apparent from the wording of Article 5(2) of the contested regulation, read in the light of Article 5(4) and recital 19 of that regulation, that that provision is intended not to penalise a Member State for a breach of a principle of the rule of law, as Hungary, supported by the Republic of Poland, submits, but 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. Accordingly, that provision is not such as to support the claim that the contested regulation is intended to penalise breaches of the principles of the rule of law in a Member State rather than to protect the Union budget.*"

144. In connection with the Conditionality Regulation, the Court repeatedly laid emphasis on that aspect[72] that neither the Conditionality Regulation, nor the measures adopted under it, were aimed at penalising Hungary or the breaches of the principles of the rule of law. It follows from the aforementioned findings of the Court that measures adopted under the Conditionality Regulation may only be lawful and adequate in that case, if those were not aimed at and not serving the purpose of the penalization of Hungary and/or any other persons or entities. *A contrario*, measures adopted under the provisions of the Conditionality Regulation serving the purpose of or even being capable of penalizing Hungary or the persons directly concerned by the adopted measures must be deemed unlawful.

145. On another note, it is clear from the mechanisms of Horizon and the Erasmus+ projects explained in detail above (¶¶51 to 63), that the final recipients and beneficiaries of the programmes and funds affected by the prohibition under Article

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[69] See, in particular, Section III.C.

[70] P-003944/2022 Answer given by Mr Hahn on behalf of the European Commission (3.2.2023)

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

[72] See the Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, e.g., paragraphs 115, 170, 171, 308, 353.

2(2) Decision are the students, teachers and researchers of the Applicant. Thus, the legitimate interests of these groups should have been taken into account and safeguarded, and the measures adopted by the Defendant cannot lawfully be aimed at the penalization of the University's community.

146. Once it is understood and accepted that the purpose of the Conditionality Regulation and the Decision was not to penalize Hungary, and certainly not the Applicant, "*but to safeguard the legitimate interests of final recipients or beneficiaries*" it leaves no doubt that penalizing in actual fact the Applicant, and in addition to all of that, for the benefit of its direct competitors, must have been only an incidental and unintended result of Article 2(2) of the Decision.

147. As stressed in a number of cases by the Court,[73] observance of the right of the defence is a fundamental principle of the community law as well as the right to be heard. Consequently, the aforementioned principles must prevail in every proceeding, compliance with them cannot be omitted or circumvented.

148. In the present case, the possibility to adopt adverse measures was established by the passing of the Conditionality Regulation. Then a line of communication had begun between the institutions of the European Union and Hungary and according to the recitals of the Decision, the communication was rather continuous up until the adoption of the Decision. However, the Applicant was never invited to make its views known and to express its opinion on the proposed measures adversely affecting its operation and business and had been totally excluded from the whole process. Therefore, the Applicant's right to be heard, a fundamental principle of the community law, has been severely infringed, especially given that the measures adopted by Article 2(2) have already adversely affected its business and the persons' affiliated with it.

149. According to settled case law: "*In that regard, it should be noted that, according to settled case-law, observance of the rights of the defence is a fundamental principle of EU law, in which the right to be heard in all proceedings is inherent (judgment of 3 July 2014, Kamino International Logistics and Datema Hellmann Worldwide Logistics, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 28 and the case-law cited).*

In accordance with that principle, which applies where the authorities are minded to adopt a measure which will adversely affect an individual, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision (judgment of 3 July 2014, Kamino

[73] See e.g. the Judgment of 20 December 2017, *Prequ' Italia*, C-276/16, EU:C:2017:1010, paragraph 45 and the case-law cited; the Judgment of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraphs 36, 37 and the case-law cited; the Judgment of 29 June 1994, *Fiskano v Commission*, C-135/92, EU:C:1994:267, paragraph 39 and the case-law cited.

International Logistics and Datema Hellmann Worldwide Logistics, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 30 and the case-law cited)."[74]

150. The Court has emphasized, that: "*It is clear, however, both from the nature and objective of the procedure for hearings, and from Articles 5, 6 and 7 of Regulation No 99/63, that this Regulation, notwithstanding the cases specifically dealt with in Articles 2 and 4, applies the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission. This is especially so in the case of conditions which, as in this case, impose considerable obligations having far-reaching effects.*"[75]

151. The Court established the infringement of the right to be heard in the following case: "*As regards the plea in law regarding an infringement of the rights of the defence in respect of PTT, which complain of never having been heard by the Commission, it should be stated first that these undertakings are the direct beneficiaries of the Sute measure at issue and that they are expressly named in the Postal Law, that the contested decision relates directly to them and that the economic consequences of that decision directly affect them.*

In these circumstances, it must be stated that these undertakings are entitled to be heard.

It must next be observed that the Commission had only informal discussions with PTT in October 1988, that it merely informed them of the problems raised by the Postal Law with regard to the competition rules of the Treaty and that it never informed them in precise terms of its specific objections to the Sute measure at issue.

In these circumstances, it must be declared that the Commission has infringed the right of PTT to be heard."[76]

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[74] See the Judgment of 20 December 2017, *Prequ' Italia*, C-276/16, EU:C:2017:1010, paragraphs 45, 46 and the case-law cited. See also, to that affect, the Judgment of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraphs 36, 37 and the case-law cited.

[75] See the Judgment of 23 October 1974, *Transocean Marine Paint Association v Commission*, C-17/74, EU:C:1974:106, paragraph 15. See also, to that affect, the Judgments of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraphs 9, 11., of 5 March 2015, *Commission and Others v Versalis and Others*, Joined Cases C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 94 and the case-law cited, of 29 June 1994, *Fiskano v Commission*, C-135/92, EU:C:1994:267, paragraphs 39 to 41 and the case-law cited and of 27 June 1991, *Al-Jubail Fertilizer Company and Others v Council*, C-49/88, EU:C:1991:276, paragraph 15 and the case-law cited.

[76] See the Judgment of 12 February 1992, *Netherlands and PTT Nederland v Commission*, Joined Cases C-48/90 and C-66/90, EU:C:1992:63, paragraphs 50 to 53.

152. In another case, the Court established, that: "*However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.*"[77]

153. Should the Applicant's right to be heard as an affected person at the relevant time not have been denied, it would have unavoidably resulted in considerations leading to proper, proportionate, relevant and honest limitations of the measures adopted. In conclusion, the Defendant's approach has not met the standard of good administration.

C. The third plea: The lack of legal basis

(a) The first sub-plea: The Conditionality Regulation contains no authorization appropriate for the measures set out in Article 2(2) Decision

154. As a principle, the Union competences are governed by the principle of conferral and subsidiarity (Article 5 TEU).

155. The chronology of events is of particular importance:

- on 22 December 2020:
  the Defendant adopted the Conditionality Regulation in order to protect the Union budget;
- on 30 April 2021:
  the Hungarian official gazette published Act IX of 2021 on Public Interest Asset Management Foundations Performing a Public Task (in Hungarian: *közfeladatot ellátó közérdekű vagyonkezelő alapítványokról*), in EU English legal parlance, on the "*public interest trusts*"[78];
- on 27 April 2022:
  the Commission sent its Notification to Hungary raising "*issues related to the public procurement system in Hungary, including […] issues related to public interest trusts*"[79];

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[77] See the Judgment of 21 November 1991, *Technische Universität München v Hauptzollamt München-Mitte*, C-269/90, EU:C:1991:438, paragraph 14.
[78] See recital (1)(e) Decision and elsewhere.
[79] See Recital (2) Decision – the text itself of the Notification remained unavailable for the Applicant to date.

- on 18 September 2022:
  the Commission introduced the Proposal and identified two issues of concern, these were: **(i)** the "*public interest trusts not being subject to rules under the EU public procurement directives*", and **(ii)** "*issues related to conflict of interests and transparency for public interest trusts, including the explicit legal exception of members of the boards of these trusts from conflict of interest requirements and conflict of interest rules not being applicable to members of Parliament, state secretaries and other public officials of the government who may serve at the same time as board members of such trusts*"[80]. In response to Hungary's observations, the Commission noted a third issue of concern, namely the "*lack of public control over the functioning and governance of these entities*"[81];
- on 30 November 2022:
  the Commission, in its follow-up Communication to the Council[82], noted **(i)** that the public procurement laws have been statutorily extended to the 'public interest trusts' (paragraph (68)), and **(ii)** that conflict of interest rules have also been extended to include members of Parliament, state secretaries and other public officials of the government (paragraph (69)). In terms of the third subject raised, "*The Commission notes, however, that top-level officials, including senior political executives from the National Assembly and Hungary's autonomous bodies, have not been excluded from sitting on boards of public interest asset management foundations, as requested in the course of the exchanges with Hungary*" (paragraph (70)).
- on 15 December 2022:
  the Defendant adopted the Decision, Article 2(2) penalizing – among other higher education institutions – the Applicant.

156. It follows from the above chronology that, at the very time of the adoption of the Conditionality Regulation, neither the Defendant nor the Commission nor anybody in Hungary or elsewhere could have had any issue with the public interest asset management foundations performing a public task (i.e., the 'public interest trusts'), simply because no such foundations existed at that time.

157. Sixteen months later, in the Commission's Notification, the issue of the 'public interest trusts' was raised in the context of public procurement only. The issue of conflict of interest was developed even later.

158. It shall be noted that **(i)** the public procurement issue had been resolved before the adoption of the Decision, and **(ii)** the conflict-of-interest issue as such has never existed vis-à-vis the Applicant as none of the curators of the Foundation in charge of its management was a member of Parliament or of the government.

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[80] See ¶28 Explanatory Note to the Proposal.
[81] See ¶33 Explanatory Note to the Proposal.
[82] COM(2022) 687 final

159. Consequently, the Applicant was not, and there was no indication that it could have been, under consideration by the Conditionality Regulation. Thus, the Decision, which was designed to implement the Conditionality Regulation, went beyond the authorisation given in the Conditionality Regulation.

160. The Conditionality Regulation established the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States (Art. 1). Once the Commission finds that breaches[83] of the principles of the rule of law[84] in a Member State 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, it shall submit its proposal to the Council for an implementing decision on the appropriate measures[85].

161. The measures so proposed shall be "appropriate" and "proportional".

162. The requirement of appropriateness is derived from Art. 4(1) and Art. 6(6), the requirement of proportionality is *expressis verbis* contained in Art. 5(3) Conditionality Regulation. Prior to deciding on a proposal for implementing appropriate measures, the Commission shall carry out its assessment of information (see Art. 6(6) and (8)).

163. "*The measures shall, insofar as possible, target the Union actions affected by the breaches.*" (Last sentence Art. 5(3) Conditionality Regulation).

164. While interpreting the letter and spirit of the Conditionality Regulation, the Court held that: "*In that regard, first, as regards the alleged infringement of the principle of proportionality, it should be recalled that, according to settled case-law of the Court, that principle, which is one of the general principles of EU law, requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 6 September 2017, Slovakia and Hungary v Council, C-643/15 and C-647/15, EU:C:2017:631, paragraph 206 and the case-law cited).*"[86]

165. The legitimate objective of the Conditionality Regulation, and likewise the Decision, is "*the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States*"[87]. Consequently, appropriateness and proportionality shall be established in this framework.

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[83] In the meaning of Art. 4(2) Conditionality Regulation
[84] As defined in point (a) Art. 2 Conditionality Regulation
[85] Art. 6(6) Conditionality Regulation
[86] See the Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 340.
[87] Art. 1 Conditionality Regulation

166. It follows that the authorization embedded in the Conditionality Regulation is not a *carte blanche*, it shall be limited **(a)** by purpose ("*the protection of the Union budget*") and **(b)** to the means that are appropriate for attaining such a purpose.

167. First, any act that goes beyond what is necessary in order to achieve such a purpose shall not be taken as authorized. The assets frozen by the Article 2(1) measures amount to EUR 6.3 billion. Compared to that, as a result of the Article 2(2) measures, the commitments put on hold amount to EUR 1.85 million. This disproportionality in fiscal effect of the measures disqualifies the purpose-bound objection of Article 2(2) measures.

168. Second, "*when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages*". This "*least onerous*" criterium can only be interpreted from the position of the affected party. As it has been indicated above[88], the effects of the Article 2(2) measures are detrimental to the businesses and good reputation of the Applicant but even more so to its students, researchers and other professionals as members of the University's community.

169. Furthermore, it is worth mentioning that whatever the disagreement between the European Union and Hungary, it is definitively beyond the purview of the Applicant, and subsequently, the Applicant can do nothing about it.

170. Considering the reasons above, the Conditionality Regulation contained no authorization appropriate for the measures adopted by Article 2(2), which consequently should not have been enacted in its current form, or otherwise.

(b) The second sub-plea: The Defendant misused its power

171. It is particularly significant that the Defendant, in adopting measures to direct Hungary into improving the rule of law in order to protect the Union budget, has simultaneously selected the Applicant, or a group of universities of which incidentally the Applicant is a member. The Applicant is a civil law entity doing business in the field of medical education, scientific research and health care, and has done so for centuries. Even if the Article 2(2) measures are not intended to be 'sanctions' *per se,* they in fact, penalize the Applicant to a level that has already been detrimental to its business and well-being for years to come.

172. When the Defendant elected to encourage Hungary to straighten out its issues regarding the rule of law by putting 55% of certain funds on hold, it completely cut off not simply the direct and indirect EU finances of the Applicant but the professional, personal and scientific relationships that those finances come with.

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[88] See, in particular, Section III.C. of this Application.

173. In connection with the misuse of power, the Court held, that: "*In accordance with settled case-law, a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case (judgment of 5 May 2015, Spain v Parliament and Council, C-146/13, EU:C:2015:298, paragraph 56 and the case-law cited).*"[89]

174. In the present case, the power for adopting a decision was conferred to the Defendant for "*the adoption of appropriate measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary*".[90] As the Applicant pointed out above, there has been no indication or reference that the Applicant, whether through an act or omission, had done anything that may have qualified as a breach of the principles of the rule of law.

175. The Court also pointed out, that: "*According to settled case-law, a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the FEU Treaty for dealing with the circumstances of the case (judgments in Fedesa and Others, C-331/88, EU:C:1990:391, paragraph 24, and Spain and Italy v Council, C-274/11 and C-295/11, EU:C:2013:240, paragraph 33 and the case-law cited).*"[91]

176. Furthermore: *"A measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see, to that effect, Case C-442/04 Spain v Council [1998] ECR I-3517, paragraph 49 and case-law cited).*"[92]

177. The Court also established, that: "*Furthermore, the Court has consistently held (see in particular the judgments in Joined Cases 140, 146, 221 and 226/82 Walzstahl-Vereinigung and Thyssen v Commission [1984] ECR 951, paragraph 27, and Case 69/83 Lux v Court of Auditors [1984] ECR 2447, paragraph 30) that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure*

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[89] See the Judgment of 24 November 2022, *Parliament v Council (Mesures techniques relatives aux possibilités de pêche)*, C-259/21, EU:C:2022:917, paragraph 61 and the case-law cited.
[90] Art. 1(1) Decision
[91] See the Judgment of 5 May 2015, *Spain v Parliament and Council*, C-146/13, EU:C:2015:298, paragraph 56 and the case-law cited.
[92] See the Judgment of 16 April 2013, *Spain and Italy v Council*, Joined Cases C-274/11 and C-295/11, EU:C:2013:240, paragraph 33 and the case-law cited.

specifically prescribed by the Treaty for dealing with the circumstances of the case."[93]

178. In another case, the Court emphasized, that: "*Third, concerning misuse of powers, it should be borne in mind that the Court has consistently held (see, inter alia, Case C-84/94 United Kingdom v Council [1996] ECR I-5755, paragraph 69, and Case C-48/96 P Windpark Groothusen v Commission [1998] ECR I-2873, paragraph 52) that there is a misuse of powers where a Community institution adopts a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.*"[94]

179. Unless the Court holds that the Defendant acted beyond its powers in adopting measures set out in Article 2(2) of the Decision, the Defendant will effectively have been given complete control over the designation criteria and the targeted persons to be affected by the Decision, which cannot be anything but arbitrary.

D. The fourth plea: The Defendant infringed the principle of proportionality

180. Article 5(4) TEU provides: "*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*."

181. The principle of proportionality is one of the fundamental principles of Community law, hence it must be applied during each and every decision-making process of the institutions in order to ensure that the acts adopted by them do not create any disproportionate disadvantages or otherwise.

182. "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*"[95]

183. As indicated in ¶174 above, the legitimate objective within the framework of which proportionality shall be established is "*the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States".*

184. Recital 18 of the Conditionality Regulation itself, emphasizes that: "*The principle of proportionality should apply when determining the measures to be adopted, in*

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[93] See the Judgment of 13 November 1990, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*, C-331/88, EU:C:1990:391, paragraph 24 and the case-law cited.

[94] See the Judgment of 7 March 2002, *Italy v Commission*, C-310/99, EU:C:2002:143, paragraph 47 and the case-law cited.

[95] Art. 52(1) Charter 2012/C 326/02

particular taking into account the seriousness of the situation, the time which has elapsed since the relevant conduct started, the duration and recurrence of the conduct, the intention, the degree of cooperation of the Member State concerned in putting an end to the breaches of the principles of the rule of law, and the effects on the sound financial management of the Union budget or the financial interests of the Union.".

185. According to recital 61 of the Decision, the Defendant argues that the chosen measure is in line with the principle of proportionality, since the suspension of budgetary commitments:

- "*ensuing from programmes concerned once they will be approved provides for an effective and timely protection of the Union budget by preventing that the breaches of the principles of the rule of law identified in this Decision affect the budget allocated to the programmes concerned*";
- "*still allows Hungary to start implementing those programmes according to the applicable rules, and therefore preserves the objectives of cohesion policy and the position of final beneficiaries*" and
- "*is of a temporary character and does not have definitive effects*".

186. The Applicant notes that none of the arguments above are sufficient to satisfy the principle of proportionality of the measures adopted by Article 2(2). Recitals 22 and 62 of the Decision refer to "*identified breaches relevant to public interest trust*" and "*identified breaches in relation to public interest trust*". None of those breaches, however, have been identified and certainly not as having been committed by the Applicant. As to the first argument in recital 61 of the Decision, the Applicant notes that it had not committed or omitted anything that would qualify as a violation of the rule of law. The most evidential reason for this is that the Applicant is a university, meaning that it has no powers to commit such violations as are itemized in Article 3 of the Conditionality Regulation. Regarding the second argument, it should be emphasized that this argument specifically establishes that it is the State of Hungary, not the Applicant, which has the right and ability to implement the programmes, meaning that the Applicant has neither the powers nor authorization to implement measures to ensure the continuance of its participation in the programmes concerned. Finally, the effects of the prohibition specified by Article 2(2) cannot be considered as temporary from the Applicant's perspective. As presented in detail in section III.C. above, the effects of the ban on the activities, programmes, students and researchers of the University are far reaching, detrimental and the ultimate consequences of which are as yet unforeseeable.

187. The measures adopted by Article 2(2) of the Decision are not in line with the principle of proportionality, as the arguments put forward by the Defendant, to establish their sufficiency in achieving the protection of the Union budget while being the least onerous can be easily and clearly refuted by the Applicant.

188. In connection with the principle of proportionality, the Court held, that: „*According to settled case-law, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments in British American Tobacco (Investments) and Imperial Tobacco,C-491/01, EU:C:2002:741, paragraph 122; ERG and Others,C-379/08 and C-380/08, EU:C:2010:127, paragraph 86; and Gauweiler and Others,C-62/14, EU:C:2015:400, paragraphs 67 and 91).*"[96]

189. In another judgment, the Court established, that: "*As a preliminary point, it ought to be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, inter alia, Case 137/85 Maizena [1987] ECR 4587, paragraph 15; Case C-339/92 ADM Ölmühlen [1993] ECR I-6473, paragraph 15, and Case C-210/00 Käserei Champignon Hofmeister [2002] ECR I-6453, paragraph 59).*"[97]

190. The requirement to limit the measures to what is strictly necessary was established in connection with the Conditionality Regulation itself: "*In addition, under Article 5(1) and (3) of that regulation, those appropriate measures consist, essentially, in the suspension of payments, of the implementation of legal commitments, of the disbursement of instalments, of the economic advantage under a guaranteed instrument, of the approval of programmes, or of commitments; terminations of legal commitments; prohibitions on entering into new legal commitments or entering into new agreements; early repayments of guaranteed loans; reductions of the economic advantage under a guaranteed instrument, of commitments or of pre-financings; and interruption of payment deadlines, and those measures must be proportionate, that is to say, limited to what is strictly necessary in the light of the actual or potential impact of breaches of the principles of the rule of law on the financial management of the Union budget or the financial interests of the Union.*"[98]

191. In another case, the Court held, that: "*However, the parties are not for that reason deprived of legal protection. As the Court has held in its judgment of 25 September 1984 in Case 117/83 Könecke v BALM [1984] ECR 3291, a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal*

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[96] See the Judgment of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, paragraph 78 and the case-law cited.

[97] See the Judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 122 and the case-law cited.

[98] See the Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 112 and the Judgment of 16 February 2022, Poland v Parliament and Council, C-157/21, EU:C:2022:98, paragraph 126.

basis. Moreover, the Court has always emphasized that fundamental rights are an integral part of the general principles of Community law which it is called upon to enforce. Finally, it is settled law (see most recently the judgment of 18 March 1987 in Case 56/86 Société pour l'exportation des sucres v OBEA [1987] ECR 1423) that the provisions of Community law must comply with the principle of proportionality, that is to say, the means which they employ must be appropriate to achieve the objective pursued and must not go beyond what is necessary to achieve it."[99]

192. The Applicant notes that in order to attain the legitimate objective pursued, measures that are detrimental to the businesses of the University as well as to the persons affiliated therewith cannot be considered as appropriate and necessary[100] to achieve the said objective, since they have an effect on an entity that has no influence whatsoever on the actions considered as a breach of the principle of the rule of law.

193. Furthermore, in order to ensure strict adherence of the principle of proportionality, the institution adopting the act has an obligation to weigh up appropriately the various interests at play, analyse their function and role, and make decisions accordingly.

194. The above statement is substantiated by the Court: "*In the third place, the ESCB weighed up the various interests in play so as to actually prevent disadvantages from arising, when the programme in question is implemented, which are manifestly disproportionate to the programme's objectives.*"[101]

195. The obligation to carry out a thorough analysis of the situations subject to the possible measures is highlighted in the judgment adopted in connection with the Conditionality Regulation, where the Court held, that: "*Those various requirements thus entail an objective and diligent analysis of each situation which is the subject of a procedure under the contested regulation, as well as the appropriate measures necessitated, as the case may be, by that situation, in strict compliance with the principle of proportionality, in order to protect the Union budget and the financial interests of the Union effectively against the effects of breaches of the principles of the rule of law, while respecting the principle of equality of the Member States before the Treaties. In those circumstances, Hungary's argument that the application of Article 5(2) of the contested regulation entails an infringement of that principle is unfounded.*"[102]

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[99] See the Judgment of 18 November 1987, *Maizena v BALM*, C-137/85, EU:C:1987:493, paragraph 15 and the case-law cited.
[100] See also the Judgment of 27 July 2022, *RT France v Council of the European Union*, T-125/22, EU:T:2022:483, paragraph 168.
[101] See the Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 91.
[102] See the Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 317.

196. In the present case, there is no identifiable evidence that would suggest that the interests of the Applicant were taken into account at any level or in any form or that the situation of the Applicant was analysed, let alone objectively, diligently, and proportionally prior to the adoption of the measures included in Article 2(2).

E. The fifth plea: Distortion of market

197. Semmelweis University provides education, research and health care services as public goods to ultimately enhance the welfare of patients seeking care in Hungary, Europe, and further afield. While the Applicant is a non-profit educational institution, all universities are conscious of their position as competitors in a market. Students invest significant amounts of time and money in their education and understandably expect value in return. Any modern model which fails to consider the added value of education given to the student, is flawed.

198. The European Commission in its European strategy for universities in early 2022 had a similar view: "*Universities have to remain competitive on a worldwide scene. Europe's relative weight at global scale when it comes to research-intensive universities is shrinking. There is unused potential in bringing together Member States' efforts on the global scene. Europe could still do better in stimulating mobility and attracting and retaining talented students, academics and researchers to maximise Europe's global influence when it comes to values, education, research, industry and societal impact.*"[103]

(a) The relevant market

199. It follows from EU strategy that from a visionary European standpoint, the relevant market is worldwide. Nevertheless, for legal and practical purposes, the relevant market in this instance shall be defined more narrowly[104].

200. In terms of the Applicant's services, the product market may be identified as the higher education and R&DI in the field of medical sciences. In considering the geographic market, consideration was given to the countries of origin of the Applicant's students and those of the consortium members the Applicant is currently working with on R&DI projects. Thus, the geographical market may be identified as Central Europe.

201. Considering factors such as tuition fees, national income levels and the EU-wide availability of substitutes, the conditions for access are practically unrestricted.

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[103] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European strategy for universities (COM(2022) 16 final).

[104] Commission Notice 97/C 372 /03 at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997Y1209%2801%29 and Commission Staff Working Document SWD(2021) 199 final at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021SC0199

However, when considering the quality of the product, the elasticity of demand is sensitive to even minor changes in those factors, especially in quality. Given the practically unlimited supply-side substitutability by competing institutions, deterioration in quality cannot but result in a decline in demand.

(b) Prohibition of distortion of market

202. Article 107 TFEU provides that "*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*" Granted, that Article 107 TFEU is not *prima facie* addressed to the Union's institutions *per se*.

203. However, "*the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted*" and the Union shall, if necessary, take action to this end[105] and not otherwise.

204. Thus, the prohibition of distortion of a market with no justification is embedded in the fundamental freedoms of the Union.

205. As has been discussed above, the Article 2(2) Decision has had an immediate effect on R&DI projects and also jeopardizes the Applicant's participation in the Erasmus+ and Horizon programmes in the near future. It will also inevitably have a consequentially detrimental effect for the Applicant's businesses in the Central-European medical higher education and R&DI markets. In the absence of reliable information regarding the analysis of facts and assessment of effects on the part of the Defendant in making the Decision, it remains unclear whether these market effects were pre-designed by the Defendant or are simply the by-products of measures implemented for another purpose.

206. Pursuant to Recital (62) Decision, the Article 2(2) "*measure does not affect the overall allocations of funds from Union programmes under direct and indirect management which may still be used for other entities and is therefore sufficient to achieve the protection of the Union budget while being proportionate to what is strictly necessary to achieve that objective*". While it is good news that the funds withheld from the Applicant, its students, and its researchers will not lose their higher educational and research purposes, the funnelling of those funds to close competitors of the Applicant will worsen the created competition disparity already suffered by the Applicant.

207. Applying dissimilar conditions to equivalent or similar business players cannot but result in discrimination and may well result in distortion of market. As the Union is

[105] Protocol (N°27) TEU.

founded on the rule of law[106] , such a measure without careful analysis and sound justification cannot be held legitimate.

VI. CONCLUSIONS

208. For the reasons set out above, the Applicant requests the General Court to make the orders at ¶101 above.

Budapest, 13 March 2023

Respectfully submitted,
Dr. Péter P. Nagy
Dr. Balázs Karsai

[106] Art. 2 TEU.

Schedule of annexes

No.	short description of the annex	page numbers of the first and last pages of the annex	number of the paragraph in which the item is mentioned for the first time
A.1	Council Implementing Decision (EU) 2022/2506 of 15 December 2022, that is the measure whose partial annulment is sought	pp. 1-16.	1.
A.2	Rejection of the Applicant's participation in the AI-POD project and related correspondence	pp. 17-29.	48.
A.3	Rejection of the Applicant's participation in the SPIDeRR project and related correspondence	pp. 30-37.	48.
A.4	Rejection of the Applicant's participation in the STRATA-FIT project and related correspondence	pp. 38-43.	48.
A.5	Formal notification on budgetary protection measures	pp. 44-45.	48.
A.6	Certificate of Registration of the Applicant and its English translation	pp. 46-48.	68.
A.7	Deed of Foundation of the Applicant and its English translation	pp. 49-81.	68.
A.8	Defendant's statement on not having the documents it relied on when adopting the Decision in its possession and the related correspondence	pp. 82-86.	104.

A.9	Copies of the attorneys' licences of Dr. Péter P. Nagy and Dr. Balázs Karsai	pp. 87-88.	-
A.10	Power of Attorney	p. 89.	-