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Council of the European Union

Brussels, 21 May 2024
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TO THE PRESIDENT AND THE MEMBERS
OF THE GENERAL COURT OF THE EUROPEAN UNION

STATEMENT OF DEFENCE

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

in Case T-138/23

Semmelweis Egyetem v Council of the European Union

SEMMEIWEIS EGYETEM (University of Semmelweis),
established in Budapest (Hungary), represented by Dr Péter P. Nagy and Dr Balázs Karsai,
lawyers,

applicant

against

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

defendant

in proceedings brought for the annulment, pursuant to Article 263 TFEU, of Article 2(2)
of Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for
the protection of the Union budget against breaches of the principles of the rule of law in
Hungary¹.

¹ 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, OJ L 325, 20.12.2022, p.
94-109.

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I. INTRODUCTION

1. The Applicant is a medical and health sciences research university in Budapest (Hungary). The application states that '[a]s 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 ... to the National Foundation for Healthcare and Medical Education, a self-governing public interest asset management foundation performing a public task' ('PIT')². The activity of that trust is governed by, inter alia, the provisions of Hungary's Act IX of 2021 on public interest trusts with a public service function.
2. By means of an application lodged on 13 March 2023 and notified to the Council on 16 March 2023, the Applicant brought an action for the annulment, pursuant to Article 263 TFEU, of Article 2(2) of Council Implementing Decision (EU) 2022/2506 ('the contested Decision'), putting forward five pleas in law in support of its action.
3. Based on Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget ('Conditionality Regulation' or 'RLCR'), and in particular Article 6(10) thereof, the challenged provision provides as follows: '[w]here the Commission implements the Union budget in direct or indirect management ... , no legal commitments shall be entered into with any public interest trust established on the basis of the Hungarian Act IX of 2021 or any entity maintained by such a public interest trust'.
4. On 30 May 2023, the Council submitted a plea of inadmissibility by way of a separate document pursuant to Article 130(1) of the Rules of Procedure, asking the General Court to dismiss the Applicant's action in its entirety as manifestly inadmissible. By means of an order of 4 April 2024³, the General Court rejected that plea of inadmissibility and asked the Council to submit its defence on the substance.
5. For the reasons set out below, the Council respectfully requests that the General Court dismiss the present action in its entirety, as all pleas in law raised by the Applicant are unfounded.

II. LEGAL FRAMEWORK AND BACKGROUND

6. As stated in paragraphs 4 to 14 of the Council's plea of inadmissibility, the contested Decision is the first and so far only application of a complex legal regime intended to equip the European Union with an effective toolkit to protect its financial interests in situations of rule of law backsliding in the Member States. In this sense, the Conditionality Regulation and the implementing decisions based on it aim not only to protect the financial interests of the Union in individual cases but also – and more importantly for the case at hand – to protect those interests in the face of risks that are systemic in nature.

² Paragraph 10 of the application.

³ Order of 4 April 2024, *Semmelweis Egyetem v Council*, T-138/23, EU:T:2024:211.

7. Such an understanding is reflected in Recital (15) of the RLCR, which states that '[b]reaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities'.
8. A solution based on such principles is not unique to the Conditionality Regulation, as the possibility of protecting the Union budget from 'systemic irregularities' is also provided for in the Common Provisions Regulation, notably in its Article 103⁴. Furthermore, the legality of such an approach was confirmed by the Court of Justice in its landmark judgments of 16 February 2022, in which it held as follows:

*'in so far as the Republic of Poland, supported by Hungary, submits that breaches which have been determined of the principles of the rule of law are liable to prove to be systematic in nature, such that they also affect areas other than those relevant to the sound financial management of the Union budget or to the protection of its financial interests, it has been pointed out in paragraphs 267 to 270 above that, where such a breach is also liable to affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union, the Union cannot be criticised for implementing the means necessary to protect that sound management and those financial interests*⁵.
9. In the above statement, the Court recognises the Union's power to protect its public finances in the face of systemic breaches of the principles of the rule of law⁶, justifying that power in the light of the protection of its constitutional identity, including the values of Article 2 TEU – this is the meaning of the Court's reference to paragraphs 267 to 270 of its own judgment.
10. In the months preceding the adoption of the contested Decision, Hungary committed to undertaking a set of changes, in particular to its legal system, to allay the risks for the EU budget deriving from the model of university governance based on PITs. However, the Commission considered that those changes were not sufficient to eliminate the risks and proposed the adoption of the measure set out in Article 2(2) of the contested Decision, which was then adopted by the Council. Hungary, which is the sole addressee of the contested Decision, chose not to challenge the legality of that Decision before the EU judicature within the time limit prescribed by Article 263(6) TFEU. As a result, the Council Implementing Decision is legally final vis-à-vis Hungary as a Member State as regards both its factual and legal findings.

⁴ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, p. 159-706.

⁵ Judgment of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 362.

⁶ See also Communication from the Commission, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, C(2022) 1382 final, 2.3.2022, paragraph 13.

11. In addition to the rationale set out in Recitals (42), (43), (62) and (63) of the contested Decision, the reason for adopting the contested measure is further spelled out in the Commission communication of 30 November 2022, which, together with other documents, constituted the basis for the Council's deliberations (Recital (33) of the contested Decision). In the part dedicated to 'Ensuring the transparency of the use of Union support by public interest asset management foundations [a.k.a. PITs]', the communication states as follows:

'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. Instead, since the Commission's proposal of 18 September 2022 [for a Council Implementing Decision], and despite this concern having also been consistently raised by the Commission in its annual Rule of Law reports, Hungary has reintroduced as of 1 November 2022 the possibility (by means of an exception from the general prohibition) for senior political executives to have other remunerated employments. This exception creates a situation in which senior political executives may participate in decision-making relating to the disbursement of public funds to entities, in which they themselves are employed and have key decision-making powers⁷.

12. The Commission therefore concluded that 'important risks remain[ed] as regards a number of other issues, namely: ... the further facilitation, after the Commission's September assessment of the proposed remedial measure, of the presence of top-level officials on boards of public interest management foundations whose purpose it is to disburse large amounts of public funds'⁸.
13. It is against this backdrop that the Council submits the following observations.

III. SUBSTANCE

14. The Applicant raises five pleas in law. With the first plea, which consists of three further sub-pleas, the Applicant claims that the contested Decision lacks a sufficiently solid factual basis. With the second plea, the Applicant maintains it has been denied the opportunity to defend its rights, especially its right to be heard. With the third plea, which consists of two further sub-pleas, the Applicant claims that the contested Decision lacks a legal basis. With the fourth plea, the Applicant maintains that the contested Decision infringes the principle of proportionality. Finally, with the fifth plea, the Applicant alleges that the contested Decision distorts the market in which the Applicant is competing.

⁷ 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, 30.11.2022, paragraph 70.

⁸ *Ibidem*, paragraph 154(vi).

First plea in law, alleging that the contested Decision lacks a sufficiently solid factual basis

15. This first plea in law consists of three separate sub-pleas. With the first sub-plea, the Applicant claims that the Council ‘failed to ensure that the inclusion of the Applicant in the group of entities made subject to the restrictive measures by Article 2(2) [of the contested Decision] rested on a sufficiently solid factual basis’. With the second sub-plea, the Applicant maintains that the Council ‘made manifest errors of assessment’. And with the third sub-plea, the Applicant claims that the Council ‘failed to state adequate reasons’.

First sub-plea in law: lack of a sufficiently solid factual basis

16. Although this part of the application does not present a clear, coherent argument, the Council understands the Applicant’s main claim to be that the contested Decision was adopted without considering the specific situation of the Applicant, including its composition, decision-making, finances and operation (‘the curators or the curatorium [read: the PIT] never became involved with the management of the Applicant which is run by the Senate’)⁹, and without indicating ‘any facts referring to any violations committed by the Applicant, let alone a proper and detailed verification of such facts’¹⁰.
17. In response to this first sub-plea, the Council highlights that the Applicant’s claims are predicated on a misconception about the rationale of the Conditionality Regulation and the contested Decision. As noted in the introduction to this defence, the Conditionality Regulation aims to protect the Union budget in the face of individual as well as generalised or systemic breaches of the rule of law. As regards systemic breaches, neither the Commission nor the Council needs to assess the situation of each of the entities that might be affected by an implementing decision such as the one under scrutiny in these proceedings. A different interpretation would not only deprive the Conditionality Regulation of its *effet utile* but would also contradict its letter.
18. For instance, Article 4(2) of the RLCR, which lays down the cases in which breaches of the principles of the rule of law may lead to the adoption of ‘appropriate measures’, includes situations or conduct that are systemic and structural in nature. In addition, Article 6(3) of the RLCR provides that when assessing if the conditions for the adoption of measures are met (Article 4 of the RLCR), ‘the Commission shall take into account relevant information from available sources, including decisions, conclusions and recommendations of Union institutions, other relevant international organisations and other recognised institutions’. What is more, Article 6(8) of the RLCR stipulates that ‘[w]hen assessing the proportionality of the measures to be imposed, the Commission shall take into account the information and guidance referred to in paragraph 3’. Recital (16) of the RLCR sets out a non-exhaustive list of the sources at the Commission’s disposal, which includes judgments of the Court of Justice, reports of the Court of Auditors, the Commission’s annual Rule of Law Report and EU Justice Scoreboard, reports of OLAF, the EPPO and the FRA, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as GRECO and the Venice Commission.

⁹ Paragraph 109 of the application.

¹⁰ Paragraph 117 of the application.

19. Therefore, the Commission does not have to base its proposal under Article 6(9) of the RLCR on the specific situation of the Applicant. In the case of generalised or systemic breaches, the Commission has to base its proposal on a macro-level, document-based assessment, which in turn is to be based on information that is both relevant and reliable, and subject to review by the EU judiciary¹¹. In other words, the burden of proof imposed on the Council (and on the Commission) should reflect the systemic nature of the breaches of the principles of the rule of law, ruling out the need to provide evidence of a breach of the principles of the rule of law affecting the Union budget for each and every individual entity concerned by a measure. Furthermore, the Court has specified that appropriate measures are not limited to cases of proven effect on the sound management of the budget or financial interests of the Union but also apply to cases that *'although not yet proven, can nevertheless be reasonably foreseen, since there is a high probability they will occur'*¹².
20. Contrary to what the Applicant claims, the explanatory memorandum of the Commission proposal as well as the recitals of the contested Decision clearly show that both the Commission and the Council complied with the foregoing requirements, considering for the purpose of the contested Decision many of the sources listed in Recital (16) of the RLCR. This is reflected, for instance, in paragraphs (11), (33), (34), and (43) of the explanatory memorandum and Recitals (11) and (13) of the contested Decision. Indeed, the main issue with the PITs in Hungary is the legislation governing them. The risk of conflicts of interest affecting the sound financial management of the Union's budget is not related to the situations or conduct of specific PITs but to the overarching legal framework under which PITs operate.
21. Further confirmation that the Commission complied with the requirements set out in the Conditionality Regulation when it adopted its proposal for a Council Implementing Decision came recently from the Court of Auditors, which adopted in February 2024 a special report pursuant to the second paragraph of Article 287(4) TFEU. Given the reference to the reports of the Court of Auditors in Recital (16) of the RLCR, it is worth mentioning the following two excerpts:
- 'For the single case in which the Commission has proposed measures under the Conditionality Regulation since it entered into force in January 2021 (Hungary), we concluded that it had done so on the basis of a fair assessment, in compliance with the Regulation, and in complementarity with other protective tools under the Recovery and Resilience Facility and cohesion policy'.
- 'Our analysis showed that this proposal was in line with the Conditionality Regulation, based on a fair assessment and sufficiently documented'¹³.
22. In the light of the foregoing considerations, this first sub-plea in law should be rejected as unfounded.

¹¹ Judgment of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 341.

¹² Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 262.

¹³ European Court of Auditors, 'Special report 03/2024: The rule of law in the EU – An improved framework to protect the EU's financial interests, but risks remain', paragraphs 99 and 103, available [here](#).

Second sub-plea in law: manifest errors of assessment

23. With its second sub-plea in law, the Applicant claims that '[u]nder 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'¹⁴.
24. The title of this sub-plea appears to indicate that the Applicant seeks to claim error on the part of the Council in its evaluation of the evidence underlying the contested Decision. However, the Applicant gives no details to support this argument and concludes this rather succinct part of the application with the sentence quoted in the previous paragraph. That sentence will therefore be the starting point of the Council's response.
25. Contrary to what the Applicant claims, the explanatory memorandum of the Commission proposal and the contested Decision clearly indicates the grounds and evidence on which both the Commission and the Council based their findings. For instance, the situation of PITs and entities maintained by them was explicitly addressed in paragraphs (33), (93), (128), (141), (142) and (147) of the explanatory memorandum. As regards the contested Decision, the relevant passages are as follows:
- Recital (42) states that 'the [Hungarian] regulatory framework still does not prevent top-level officials, including senior political executives from the National Assembly and Hungary's autonomous bodies, from sitting on boards of public interest asset management foundations, as repeatedly requested by the Commission. Moreover, Hungary has reintroduced as of 1 November 2022 the possibility (by means of an exception from the general prohibition) for senior political executives to have other remunerated employment, including on boards of public interest asset management foundations. The Council considers that for these reasons as further set out in the Commission's communication, the weaknesses of the regulatory framework combined with the new legislative developments aggravate the possible conflict of interest that the remedial measure was meant to address and therefore renders it inadequate to address the concerns originally raised by the Commission'.
 - Recital (62) states that '[c]oncerning the identified breaches in relation to public interest trusts, the regulatory framework in Hungary has weaknesses, as set out above, which have not remedied the risk of conflict of interest that the remedial measure was meant to address. In light of the inadequacy of the remedial measure, a serious risk for the Union budget remains and can best be addressed by a prohibition on entering into new legal commitments with any public interest trust and any entity maintained by them under any programme under direct or indirect management'.

¹⁴ Paragraph 129 of the application.

26. The foregoing excerpts are evidence of the fact that both the Commission and the Council acted on the basis of specific evidence, notably the 2022 Rule of law Report (see paragraph (33) of the explanatory memorandum) and an assessment of the Hungarian regulatory framework applicable to the PITs and the entities maintained by them. Furthermore, both the Commission and the Council specified the grounds underlying the proposal and the contested Decision, notably a situation in which senior political executives may participate in the decision-making process regarding the disbursement of public funds to entities in which they themselves are employed and have significant decision-making authority.
27. Against this backdrop, the contested Decision and the other documents that ‘constitute[d] the basis for the Council’s deliberations’ establish a very clear set of evidence and grounds, in full compliance with the requirements set out in Article 6 of the RLCR. This second sub-plea in law should therefore be rejected as unfounded.

Third sub-plea in law: failure to comply with the duty to state reasons

28. With its third sub-plea in law, the Applicant claims, in essence, that the Council did not sufficiently substantiate its decision, contrary to the requirements set out in EU primary law (Article 296 TFEU), the case-law and the Conditionality Regulation (Article 6(9) of the RLCR). The Applicant states, for instance, that ‘it would have been in the interest of the Applicant and these persons affected directly by the measures adopted to have received an explanation as to why they were arbitrarily deprived of such rights and opportunities for which they had legitimate expectations’¹⁵.
29. The Council points out that the duty to state reasons ‘*must be appraised by reference to 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. 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 [296 TFEU] 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 question*’¹⁶.
30. It is also worth reiterating that, according to case-law, an implementing act, such as the contested Decision, ‘*satisfies the duty to state reasons where it contains an express reference to the provisions of the regulation on which it is based, so that the criteria leading to its adoption can be understood*’¹⁷.
31. Considering the foregoing case-law, the Council asserts that it has clearly and adequately explained the reasons for adopting the contested Decision. This assertion is supported not only by the recitals of that Decision but also by the explanatory memorandum of the Commission proposal and by the Commission communication of 30 November 2022, together with the updated assessment of 9 December 2022, which constituted the basis for the Council’s deliberations, as expressly stated in Recital (33) of the contested Decision. The Council has already provided ample evidence in this regard, especially in paragraphs (25) and (26) of this defence.

¹⁵ Paragraph 136 of the application.

¹⁶ Judgment of 24 November 2005, *Italy v Commission*, C-138/03, EU:C:2005:714, paragraph 55.

¹⁷ Judgment of 24 June 2015, *GHC v Commission*, T-847/14, EU:T:2015:428, paragraph 32.

32. Against this backdrop, this third sub-plea in law should be rejected as unfounded.

Second plea in law, alleging a denial of the Applicant's right to be heard

33. With its second plea in law, the Applicant argues that the Council violated its right to be heard. In particular, the Applicant argues that it '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'¹⁸. It concludes this plea by stating that '[s]hould [its] 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'¹⁹. To corroborate its argument, the Applicant makes reference to Article 41(2), point (a), of the Charter and to several excerpts from case-law.
34. To begin with, the Council highlights that the contested Decision was adopted under the procedure laid down in Article 6 of the RLCR and that that provision does not confer on anyone other than the Commission, the Council and the Member State concerned the right to take part in the procedure. In line with the understanding that measures based on the Conditionality Regulation should not be considered as 'restrictive measures', the Court of Justice found that those measures are '*not intended to penalise breaches of the rule of law as such, but rather (...) to ensure the protection of the Union budget*'.²⁰
35. Accordingly, the contested Decision is not an individual decision. As the General Court stated in its order of 4 April 2024, the contested Decision '*is of general application in that it applies generally to the economic operators concerned, that is to say, in particular, to any natural or legal person falling within the scope of the contested provision*'; it "*therefore constitutes a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU*"²¹.
36. Because the contested Decision produces its effects on a rather large (and potentially varying) number of individuals, including those who are subject to the measure set out in Article 2(1), the Council cannot legitimately be expected to hear all those who may be affected by that Decision. If this were to be considered an essential requirement, the Council would hardly be in a position to adopt acts of general application.
37. With this in mind, case-law acknowledges that '*although Article 41(1) of the Charter of Fundamental Rights provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union, Article 41(2)(a) thereof provides that that right includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. Thus, the wording of that provision only concerns individual measures*'²². As a result, the contested Decision falls outside the scope of the protection afforded by the right to be heard.

¹⁸ Paragraph 148 of the application.

¹⁹ Paragraph 153 of the application.

²⁰ Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 353.

²¹ Order of 4 April 2024, *Semmelweis Egyetem v Council*, T-138/23, EU:T:2024:211, paragraph 36-37.

²² Judgment of 10 December 2015, *Front Polisario v Council*, T-512/12, EU:T:2015:953, paragraph 132.

38. What is more, case-law states that *'the right to be heard in an administrative procedure taken against a specific person, which must be observed, even in the absence of any rules governing the procedure in question ... , cannot be transposed to a legislative procedure leading, as in the present case, to the adoption of a measure of general application'*²³. Although the contested Decision is not a legislative act, it certainly is an act of general application, and that is all that matters for the purpose of the foregoing case-law, which aims to ensure that institutions do not encounter insurmountable procedural requirements when adopting legal acts that apply generally, i.e. to any natural or legal person that falls within their scope. The fact that the Applicant is directly concerned by the contested Decision does not alter that finding²⁴.
39. For the foregoing reasons, the second plea in law should be dismissed as unfounded.

Third plea in law, alleging that the contested Decision lacks proper authorisation and that the Council misused its power

40. With the third plea in law, the Applicant puts forward two arguments. First, the Applicant claims that the 'Conditionality Regulation contains no authorisation appropriate for the measures set out in Article 2(2) of the Decision', and specifies that 'the authorisation 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'²⁵. Secondly, the Applicant maintains that the Council misused its power.
41. The Council notes that the Applicant does not substantiate in any way the arguments included in the third plea in law. The reasoning lacks clarity, coherence, and structure. In accordance with settled case-law, Article 76 of the Rules of Procedure requires that the application be sufficiently clear and precise to enable the defendant to prepare its defence or to enable the Court to decide the case, if appropriate without other information. A mere abstract statement of the grounds does not satisfy the requirements of the Statute or the Rules of Procedure²⁶. Moreover, a lack of coherence and intelligibility can be grounds for declaring specific pleadings inadmissible²⁷. That appears to be the case here.
42. In any event, and to the extent that some of the Applicant's claims are not already addressed in the fourth plea regarding an alleged violation of the principle of proportionality, the Council highlights that the concept of 'misuse of power' covers adoption by an EU institution of a measure that *'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'*²⁸.

²³ Judgment of 11 September 2002, *Alpharma v Council*, T-70/99, EU:T:2002:210, paragraph 388.

²⁴ Judgment of 10 December 2015, *Front Polisario v Council*, T-512/12, EU:T:2015:953, paragraph 134.

²⁵ Paragraph 166 of the application.

²⁶ Judgment of 12 January 1995, *Viho v Commission*, T-102/92, EU:T:1995:3, paragraph 68.

²⁷ Order of 15 February 2022, *eSlovensko v Commission*, T-295/21, EU:T:2022:77, paragraphs 16 and 17; judgment of 30 January 2020, *PV v Commission*, T-786/16, EU:T:2020:17, paragraph 78; judgment of 30 April 2015, *Al Chihabi v Council*, T-593/11, EU:T:2015:249, paragraph 94; judgment of 18 July 2006, *Rossi v OHIM*, C-214/05 P, EU:C:2006:494, paragraph 37.

²⁸ Judgment of 16 April 2013, *Spain and Italy v Council*, C-274/11, EU:C:2013:240, paragraph 33.

43. The Applicant merely invokes a series of quotations from case-law and does not bother in any way to provide a shred of evidence to support its claim that the contested Decision was adopted for an end other than the one reiterated repeatedly in the recitals, namely the protection of the Union's financial interests.
44. The Applicant states, for instance, that '[u]nless 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'²⁹. In its reasoning, however, the Applicant fails to consider (1) that the contested Decision results from the application of a procedure that the Court of Justice deemed compatible with EU primary law, (2) that the Commission and the Council followed that procedure to the letter (no evidence to the contrary is given), and (3) that that procedure is not intended to penalise single entities but rather to achieve a legitimate objective recognised in the Treaties, namely the protection of the Union budget (Articles 310 and 317 TFEU), starting from the assumption that respect for the rule of law is an essential precondition for the attainment of that objective³⁰.
45. Under these circumstances, and in the absence of a real substantiation of the claims by the Applicant, the third plea in law should be rejected as inadmissible or, in the alternative, as unfounded.

Fourth plea in law, alleging an infringement of the principle of proportionality

46. With the fourth plea in law, the Applicant claims that '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'³¹. The Applicant concludes the fourth plea by stating that '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)'³².
47. 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. With regard to judicial review of the conditions referred to in the previous paragraph, the EU legislature must be allowed broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue*'³³.

²⁹ Paragraph 179 of the application.

³⁰ Judgment of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:99, paragraph 130.

³¹ Paragraph 187 of the application.

³² Paragraph 196 of the application.

³³ Judgment of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, paragraphs 78-79.

48. In its judgments of 16 February 2022, the Court held that the measures under the Conditionality Regulation are budgetary corrective measures and not penalties imposed on the offending Member State. Therefore, *'the proportionality of the measures to be adopted is ensured, decisively, by the criterion of the 'impact' of breaches of the principles of the rule of law on the sound financial management of the Union budget or on the protection of the financial interests of the Union. As regards the criteria based on the nature, duration, gravity and scope of those breaches, they may be 'duly taken into account' only in order to determine the extent of that impact, which may vary depending on the characteristics of the breaches found, as illuminated by the application of those criteria'*³⁴.
49. As regards the criterion of the impact referred to in the previous paragraph, Recital 19 of the contested Decision specifies that '[t]he potential impact of the identified breaches on the sound financial management of the Union budget or the protection of the financial interests of the Union is considered to be particularly significant, given that those breaches are intrinsically linked to the process under which Union funds are used by Hungary in that they consist in improper functioning of the public authorities deciding on the award of contracts financed through the Union budget. In addition, if the identified breaches are coupled with the limits and obstacles in the detection, investigation and correction of fraud, identified as additional grounds related to investigation, prosecution and the anti-corruption framework, the impact can be considered even more significant'. Therefore, the Council assessed the appropriateness, necessity and proportionality of the different measures provided for by the Conditionality Regulation after finding that the 'potential impact' of the identified breaches on the sound financial management of the Union budget was 'particularly significant'. That assessment is not contested by the Applicant.
50. As regards the requirement that the contested Decision be appropriate for attaining the desired end, Recital (61) specifies that 'the suspension of budgetary commitments ... 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'. In a communication of 12 January 2024, the Commission confirmed the appropriateness of the measure adopted by stating that '[a]s regards the question of effectiveness of the measure related to the public interest trusts (Article 2(2) of the Council Implementing Decision), since the adoption of the Council Implementing Decision there has been no new legal commitment signed with the public interest trusts and the entities maintained by them, thereby ensuring full protection of the Union's financial interests from the conflict of interests risks identified'³⁵. The contested Decision is therefore appropriate for ensuring the protection of the financial interests of the Union.

³⁴ Judgment of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:99, paragraph 361.

³⁵ Communication from the Commission to the European Parliament and the Council on the application of 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, COM(2024) 17 final, 12.1.2024, p. 13.

51. As regards the requirement that the contested measure does not go beyond what is necessary to achieve the desired end, the Council points out, firstly, that the measure is of a temporary character, it does not have definitive effects, and it can be lifted under the procedure provided for in Article 7 of the RLCR. Secondly, as the President of the General Court stated in the order of 1 June 2023 rejecting the request for interim measures in *Debreceni Egyetem v Council*, a joint reading of Recital (62) and Article 2(2) of the contested Decision confirms that the measure only covers the conclusion of new commitments with PITs and entities maintained by them, leaving the performance of pre-existing commitments unaffected³⁶. Thirdly, Recital (62) also states that '[s]uch a 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'.
52. Another element to consider is that the contested Decision, as explained in its Recital (63), 'does not affect the obligations of Hungary to implement the programmes and funds concerned by [the] Decision, and in particular its obligations towards final recipients or beneficiaries, including the obligation to make payments under the applicable sector-specific or financial rules'. This sentence reflects the general obligation of Article 5(2) of the Conditionality Regulation. In terms of what the General Court found in its order of 4 April 2024³⁷, by virtue of the wording of Article 5(2) of the RLCR, the foregoing obligation covers not only the EU funds in shared management but also those in direct and indirect management where a government entity is a recipient. To begin with, Article 5(2) of the RLCR refers to both point (a) and point (b) of Article 5(1). Secondly, point (a) refers to direct and indirect management. Thirdly, Article 5(2) of the RLCR also specifies that the government entities referred to in Article 5(1), point (a), have the obligation 'to implement the programme ... affected by the measure'. The contested Decision provides for a measure that does not go beyond what is necessary to achieve the desired end, namely the protection of the financial interests of the Union.
53. As regards the requirement that recourse be had to the least onerous measure, in the explanatory memorandum of its proposal the Commission stated that 'there is currently a general exception for board members of public interest trusts to abide by conflict of interest requirements ... , such exceptions may affect any budget these entities may implement or manage. Thus it is practically impossible to consider that the prohibition should apply for some public interest trusts and the entities maintained by them, or that the Commission can enter in partial legal commitments with such entities'³⁸. Against this backdrop, the measures listed in Article 5(1), point (a), of the RLCR that entail a suspension of payments, a suspension of the disbursement of instalments in full or in part or a suspension or reduction of the economic advantage under an instrument guaranteed by the Union budget would have had disruptive effects on the programmes already in progress, causing difficulties for third parties as well (for instance, other universities in other Member States). Given these circumstances, the Council maintains that, among the five measures listed in Article 5(1), point (a), the least onerous one was indeed the obligation not to enter into new legal commitments, as provided for in Article 5(1), point (a)(ii), of the RLCR.

³⁶ Order of 1 June 2023, *Debreceni Egyetem v Council*, T-115/23 R, EU:T:2023:297, paragraph 28.

³⁷ Order of 4 April 2024, *Semmelweis Egyetem v Council*, T-138/23, EU:T:2024:211, paragraphs 73-77.

³⁸ Explanatory memorandum accompanying the 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, 18.9.2022, paragraph 142.

54. Finally, the Council points out that, in accordance with the case-law cited in paragraph 47 of this defence, the Council enjoys a degree of discretion when choosing between the different 'appropriate measures' listed in Article 5 of the RLCR. And the Applicant only makes some very general statements but has not demonstrated that the Council exceeded the degree of discretion available to it. The fourth plea in law should therefore be rejected as unfounded.

Fifth plea in law, alleging that the contested Decision distorts the market in which the applicant is competing

55. With its fifth plea, the Applicant argues that the contested 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'³⁹. Therefore, the Applicant claims a violation of Article 107 TFEU, which enshrines a general prohibition of state aid.
56. The Council notes that the Applicant does not substantiate its claim regarding Article 107 TFEU and its plea lacks clarity, coherence, and structure. In accordance with the case-law referred to in paragraph 41 of this defence, this plea in law should be declared inadmissible.
57. In any event, the Council highlights that, as the Applicant itself acknowledges, Article 107 TFEU is not addressed to the Union institutions⁴⁰. Case-law holds that for there to be 'state aid' within the meaning of Article 107 TFEU, the aid '*must, first, be granted directly or indirectly through State resources ... and, second, be imputable to the State*⁴¹. Given this definition, the Council cannot understand how the contested Decision, which aims to protect the financial interests of the Union against breaches of the principles of the rule of law in the Member States, might ever bring about effects that qualify as 'state aid' and, thereby, infringe Article 107 TFEU.
58. For the foregoing reasons, this plea should be rejected as inadmissible or, in the alternative, as unfounded.

³⁹ Paragraph 205 of the application.

⁴⁰ Paragraph 202 of the application.

⁴¹ Judgment of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 24.

IV. CONCLUSION

For the abovementioned reasons, the Council requests that the General Court:

- reject the application in its entirety as unfounded,
- and
- order Semmelweis Egyetem to pay the costs.

Giacomo Rugge

Lucie Vetillard

Emanuele Rebasti

Agents of the Council