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Statement in intervention submitted by Hungary

Case T-138/23 \*

**Document lodged by:**

Hungary

**Usual name of the case:**

Semmelweis Egyetem v Council

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\* Language of the case: English.



[OMISSIS] [Or. 2]

[Statement of intervention submitted in a case] seeking the annulment of Article 2(2) of Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.

## **I. Introduction**

- 1 By communication from the General Court of 6 June 2024, the President of the Sixth Chamber granted Hungary leave to intervene in Case *Semmelweis Egyetem v Council* (T-138/23) and set 15 July 2024 as the deadline for submission of its statement in intervention.
- 2 Hungary sets out below its statement in intervention in support of the forms of order sought by the applicant.

## **II. Background to the contested decision; public interest trusts with a public service function and the entities maintained by such trusts**

- 3 In its statement, the Hungarian Government seeks primarily to address the framework for the establishment of public interest trusts with a public service function ('public interest trusts') and the regime applicable to them, as well as concerns raised in their regard in the contested decision and in the course of the procedure that resulted in the adoption of that decision. It will be demonstrated that public interest trusts, and therefore the entities \* maintained by such trusts – such as the applicant – perform their tasks independently of the State and the government and that, contrary to the conclusions set out in the contested decision, no concerns relating to the rule of law, or the lawful use of Union funds can be raised in their regard.
- 4 By adopting the provision of the Magyarország Alaptörvénye (the Fundamental Law of Hungary; 'the Fundamental Law') providing that '*[t]he establishment, operation and termination of, and the performance of the public service function of a public interest trust with a public service function shall be governed by an institutional act*',<sup>1</sup> the National Assembly highlighted the prominent role of public interest trusts in the creation of social value, and subjected them to strict

\* NB: it is perhaps useful to clarify that the concept of '*jogi személy*' should be translated by 'legal person'. The French language version of the Commission's proposal which led to the contested decision [COM(2022) 485 final] also uses 'legal person' in some places, in particular in paragraph 92, but mainly uses the term 'entity'. In the French language version of the contested decision, the term 'entity' was used. I will therefore use that term.

<sup>1</sup> Article 38(6) of the Fundamental Law.

constitutional protection, which includes the institution’s autonomy under private law.

- 5 The purpose of a public interest trust, in the form of a private law entity which guarantees its independence with regard to any de facto government, is to achieve public interest objectives of major importance for society. By separating aspects of public law and private law, the Hungarian legislature sought to strengthen the stable operation and legal certainty of long-term social processes, in particular higher education, research and scientific activities. Within a legislative framework delivering legal certainty and institutional stability, the legislature guarantees that public interest trusts have a high level of institutional independence.
- 6 It is with the most effective achievement of social objectives in mind that the legislature created a legal institution which is both capable of adapting to the rapid evolution of social, economic and cultural life and ensures the desired level of fulfilment of public service functions. The Hungarian State supports the operation of public interest trusts by respecting and protecting the autonomy of such institutions under private law and the free exercise **[Or. 3]** of fundamental rights enshrined in the Fundamental Law, having regard, in particular, to the freedom of scientific research, the freedom of artistic creation and the freedom to learn and to teach.
- 7 The creation of the legal institution of public interest trusts is part of the process to bring the Hungarian higher education system in line with international trends. One of the ways to provide high-level higher education is to involve external actors in the operation and management of institutions, and to promote (such education) by introducing mechanisms and indicators that encourage performance. One of the most important objectives of that process was granting teachers and researchers the status of salaried workers, so that universities can therefore pay them competitive and performance-based income, thus increasing the level of teaching and research. The Hungarian legislature recognised that institutions operating within the previous framework were less able to be competitive due to changing socio-economic conditions affecting universities. That is why a change in model was necessary, with the aim of enabling universities to fulfil their objective in accordance with the expectations of a modern market and knowledge sector.
- 8 The new model creates the possibility for universities to operate as institutions that react more quickly to market demands, and that objective is served by the fact that the institutions continue to operate and carry out public service functions within a normative framework which is different to that of the State budget. Universities maintained by public interest trusts do not constitute institutions maintained by the State; the State has transferred ownership of the infrastructure directly necessary for their [operation], as well as the founder’s (*alapítói jogok*) and owner’s rights (*fenntartói jogok*).
- 9 Given that the universities in question were, before the model change, maintained by the State, it was necessary, in order to carry out that change, for the State, as

founder, firstly to create the public interest trusts and, second, to transfer the founder's rights. A necessary step in the regulatory process was also the appointment by the State, as founder, of the board members of the public interest trusts ('*kuratórium*') – the Minister for Higher Education representing the State for that purpose – and that decision was followed by registration of the articles of association by judicial process. The principle governing the composition of the boards of such trusts is that they must include members whose experience acquired in their scientific, economic and academic careers guarantees that they will fulfil the criteria of professional management. To that end, the government had previously formally requested that the rectors of universities, and the presidents of the Magyar Tudományos Akadémia (Hungarian Academy of Sciences) and the Magyar Művészeti Akadémia (Hungarian Academy of Arts) nominate potential members of the boards of trustees, proposals that were duly taken into account. The board members are appointed by the holder of the founder's rights, the transfer of those rights therefore implying, in practice, that the appointment of a new trustee to fill a vacancy is decided by the members of the board together with the supervisory board and requires the votes of a majority of the members of the collegiate body with the vacancy. The articles of association may, however, also require an additional qualified majority to decide the issue. <sup>2</sup> [Or. 4]

- 10 Since the objective of the model change is to facilitate the possibility of catching up with changing knowledge-based market and economic conditions, a fundamental condition is to ensure that professional knowledge permeates the fulfilment of the trust's tasks. A provision that expressly seeks to guarantee professionalism is that of Act IX of 2021 which provides that: '*the right to nominate a person as a member or chair of the board of trustees or the supervisory board of the trust may be conferred by the articles of association to persons or organs outside the trust ...*', <sup>3</sup> so that, in practice, it is mainly the members of the university senate ('*szenátus*') who are taken into account for appointments. '*The articles of association may impose conditions concerning diplomas and qualifications and other professional requirements for the chair and members of the board of trustees and the supervisory board*'. <sup>4</sup> In practice, it appears that the members of the board of trustees possess graduate diplomas and have either academic, professional or sectoral experience in the scientific field

<sup>2</sup> Section 7(4) of the *az közfeladatot ellátó közérdekű vagyonkezelő alapítványokról szóló 2021. évi IX. törvény* (Act IX de 2021 on public interest trusts with a public service function; 'Act IX of 2021') (NB: I have used the title used in the translation of the application and other procedural documents in Case *Debreceni Egyetem v Council*, T-115/23; by way of reminder, the title used in the translation of the application in the present case is 'Act IX of 2021 on public interest asset management foundations carrying out public service functions' (see, to that regard, my note inserted in paragraph 11)).

<sup>3</sup> Idem, Section 7(5).

<sup>4</sup> Idem, Section 6(3).

cultivated by the university maintained by the trust, or directly carry out an activity on the market.

- 11 Public interest trusts are specific civil law entities operating in the form of a foundation<sup>\*</sup> and carrying out public service functions determined by law. The institutional rules of such entities, including in relation to conflicts of interests, are set out in detail in Act IX of 2021. That law provides, as a requirement in the asset management of trusts, that *‘[t]he trust shall use the assets donated by the State or the proceeds thereof directly or indirectly for the fulfilment of public service functions. In doing so, the trust may pursue economic activities observing the market economy investor principle, provided that this does not jeopardise the fulfilment of public service functions. Expenditure and revenue from such activities shall be recorded separately in terms of accounting.’*<sup>5</sup>
- 12 The trust is to manage, as an economic activity, the assets allocated to it in so far as that is the objective of the trust and it may manage such assets freely, without prejudice to the requirement of responsible asset management.<sup>6</sup> The founder, or where the articles of association confer the power to make appointments on the trust, the board of trustees and the supervisory board together have the obligation to appoint an asset management controller to ensure, in particular, the lawfulness of the asset management activity relevant for ensuring the fulfilment of the trust’s public service functions and for the creation of resources necessary for that purpose. Only accounting firms, accountants, law firms, lawyers or other persons without a criminal record holding a specialised higher education degree specified in the articles of association may be designated and appointed as an asset management controller.<sup>7</sup> *‘The asset management controller of a trust with a*

\* NB: regrettably, the concept of *‘közérdekű vagyonkezelő alapítvány’* is not translated very consistently. In the French language version of the contested decision, Article 2(2) of the operative part uses the expression ‘public interest trust’. It should be noted, however, that the recitals of that decision often use ‘public interest asset management foundation’ (see, for example, recital 43). The French language version of the Commission’s proposal which led to the contested decision (COM(2022) 485 final) uses both ‘public interest trust’ and ‘public interest asset management foundation’ (see recitals 92 and 92, under the heading ‘Public Interest Management Foundations (or Public Interest Trusts)’). It is not clear why the term ‘trust’ was used. A translation using ‘foundation’ would, at first glance, have seemed more appropriate in so far as (1) a ‘trust’ is an institution specific to Anglo-Saxon law which does not exist under Hungarian law, and (2) a ‘trust’, when established for management purposes, is characterised by the obligation on the trustee to transfer to the trustee/settlor or to a third party the transferred assets after having managed them, since the period of management of the assets is, moreover, necessarily limited (in French law, for example, that period cannot exceed 99 years). Nevertheless, I have decided to translate *‘közérdekű vagyonkezelő alapítvány’* by ‘public interest trust’ in order to comply with the French language version of the operative part of the contested decision.

<sup>5</sup> Idem, Section 11(3).

<sup>6</sup> Idem, Section 3(6).

<sup>7</sup> Idem, Section 8(1) to (3).

*public service function shall ensure that the asset management activity of the trust is in line with the relevant legislation, the articles of association and the trust's statutes on asset management. In addition, the asset management controller [Or. 5] shall ensure compliance by the board of trustees and the supervisory board with their statutory obligations.'*<sup>8</sup>

- 13 Under the procedure laid down in Regulation (EU, Euratom) 2022/2092 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, Hungary made the following commitment pursuant to one of the 17 remedial measures proposed in its letter to the Commission of 22 August 2022, namely the measure relating to public interest trusts (No 4).

'4. Ensuring the transparency of the use of Union support by public interest trusts

Hungary maintains its view that public interest trusts fall within the scope of Section 5(1)(e) of the *a közbeszerzésekről szóló 2015. évi CXLI. törvény* (Act CXLI of 2015 on public procurement). However, in the interests of clarity, the government undertakes to submit a draft amending act to the Országgyűlés (Hungarian National Assembly) as follows:

*A new point f) is added to Section 5(1) of Act CXLI of 2015 on public procurement worded as follows:*

*f) public interest trusts performing public interest activity and entities established or maintained by them.*

*The government undertakes to adopt the amending act by 30 September 2022. The government undertakes unconditionally and indefinitely to maintain in force the amending act and accordingly to implement the rules contained therein.*

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In order to develop and clarify general conflict of interest rules related to public interest trusts, the government undertakes to submit a draft amending act to the National Assembly in order to ensure full compliance with Article 61 of the Financial Regulation, as well as to align the instructions and practice to the Commission Guidance Notice on the avoidance and management of conflicts of interest under the Financial Regulation as follows:

Paragraph (3) of Section 15 of Act IX of 2021 on public interest trusts is replaced by the following:

*(3) Any person whose ability to perform his or her duties in an impartial, objective and unbiased manner is limited or may be considered to be limited due*

<sup>8</sup> Idem, Section 9(1).



*to an economic interest or any other direct or indirect personal interest or circumstance – including family or emotional reasons and political or national affiliation – shall refrain from any activity which may be contrary to the interests of the trust or of the organisations donating assets to the trust or which provide it with direct or indirect support. Any person with a conflict of interest or for whom there is a risk of or there appears to be a conflict of interest shall declare it, without delay and before a decision is taken, in writing or – in the event of unforeseen circumstances - orally with the declaration being formally recorded. In the case of the chair or members of the collegiate body, the declaration must be addressed to that body. [Or. 6] In all other cases, the declaration must be addressed to the holder of employer rights. The addressee shall confirm in writing whether the existence of a conflict of interest has been established. The public interest trust shall publish the decision electronically within one week of the decision and for a period of no less than one year. Where the existence of a conflict of interests has been established, the public interest trust shall ensure that the person concerned ceases all activities related to the matter in question. This paragraph shall also apply to the chairs and members of the supreme body and supervisory board of a public interest trust with a public service function and entities created or maintained by such a trust, as well as to their staff.*

The government confirms that the general personal scope of that provision covers all persons who exercise a function or who are employed in public interest trusts with a public service function and in entities created or maintained by such trusts, independently of any other activity or function carried out, including within public authorities.

The government undertakes to adopt the amending act by 30 September 2022. The government undertakes unconditionally and indefinitely to maintain in force the amending act and accordingly to implement the rules contained therein.

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The Hungarian Government undertakes to ensure that, when involved in the implementation of any Union financial support (as final recipients, beneficiaries or intermediaries), public interest trusts and entities created or maintained by such trusts, including the chairs and members of their supreme body and supervisory board, as well as their staff are, with regard to access to public information, audits and controls, including conflict of interest rules, subject to the same obligations as those which are imposed under Hungarian law on public bodies and entities maintained by such bodies.’

- 14 The content of the remedial measure referred to in the previous paragraph, like that of all the other measures (17 in total) proposed on 22 August 2022, was formulated in the course of the exchanges between the representatives of the Hungarian Government and the Commission, and all the remedial measures, including the measure relating to public interest trusts, received the agreement and support of the Commission, expressed informally at a high level.

15 The Commission formally confirmed its position in its Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rules of law in Hungary, delivered on 18 September 2022.<sup>9</sup> [Or. 7]

16 In recital 92 of the Commission Proposal of 18 September 2022, the Commission stated that:

*‘[w]ith this remedial measure, the Hungarian Government has committed by 30 September 2022 to a) the adoption of an amending act to ensure the generalised application of public procurement rules to public interest asset management foundations performing public interest activity and entities established or maintained by the them, b) adopt an amending act in order to ensure full compliance with Article 61 of the Financial Regulation as well as alignment of instructions and practice to the Commission Guidance notice on the avoidance and management of conflicts of interest under the Financial Regulation, in order to improve and clarify general conflict of interest rules related to public interest asset management foundations. The key implementation step for this remedial measure, as set out in the Annex, are the adoption of both amending acts mentioned above by 30 September 2022’.*

17 So far as concerns that commitment, the Commission, in recital 93 of the Commission Proposal of 18 September 2022, explained that it:

*‘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’.*

18 Furthermore, in the context of its assessment of the 17 remedial measures, the Commission, in recital 121 of that proposal, expressed its position as follows:

*‘the proposed remedial measures, taken together, if correctly specified in the enacting laws and implementing rules, and implemented accordingly, could in principle, depending on the details of the measures, be capable of addressing the issues described in the notification regarding systemic irregularities, deficiencies and weaknesses in public procurement, risks of conflicts of interest, and concerns regarding “public interest trusts”, as well as the additional grounds regarding investigation, prosecution and the anti-corruption framework’.*

<sup>9</sup> COM (2022) 485 final; ‘Commission Proposal of 18 September 2022’.

- 19 In other words, the Commission, in the Commission Proposal of 18 September 2022, essentially expressed the view that, if Hungary fully implements the commitments made under the remedial measures, the procedure directed against it under Regulation 2022/2092 would be somewhat redundant. [Or. 8]
- 20 It should be noted that, in the context of the aforementioned commitments, Hungary has not made any undertakings according to which senior political executives should be automatically excluded from collegiate bodies managing public interest trusts. Instead, it undertook to introduce into Act IX of 2021 a provision on public interest trusts which essentially provides that any person – including the chairs and members of the supreme body (board of trustees) and of the supervisory board of public interest trusts, as well as their staff – whose ability to perform his or her duties in an impartial, objective and unbiased manner is limited or may be considered to be limited due to an economic interest or any other direct or indirect personal interest or circumstance, is required to refrain from any activity which may be contrary to the interests of the public interest trust or of the organisations which donate assets to the trust, or which provide it with direct or indirect support. Any person with a conflict of interest or for whom there is a risk of or there appears to be a conflict of interest is required to declare it without delay and before a decision is taken and, on that basis, the addressee (the competent collegiate body or the holder of employer rights) is required to determine whether the existence of a conflict of interest is established. Where the existence of a conflict of interests is established, the public interest trust is required to ensure that the person concerned ceases all activities related to the matter in question. As explained above, Hungary undertook to introduce into Act IX of 2021 a specific provision under which, it is on an individual basis that, where a conflict of interests exists, senior political executives serving as members of the board of trustees or supervisory body of a public interest trust are automatically excluded from the decision-making process in the matter affected by that conflict of interests.
- 21 It is also worth noting that the Commission – given that Hungary had not yet had the opportunity, before the adoption of the Commission Proposal of 18 September 2022, to implement the remedial measures proposed on 22 August 2022 – proposed, in its Proposal for a Council Implementing Decision, that the latter adopt two types of measures. With regard to Article 2(2) of the Commission Proposal of 18 September 2022, the Commission expressly proposed that the Council, in the event of a failure to implement the aforementioned commitment relating to public interest trusts, adopts the measure at issue. By contrast, the adoption of the measure provided for in Article 2(1) of that proposal, which is not the subject of the present proceedings, was proposed by the Commission to the Council in the event that Hungary fails to implement its commitments under the other 16 remedial measures.
- 22 Having regard to the concerns expressed by the Commission in the context of the procedure provided for by Regulation 2022/2092, and in the light of the remedial measures proposed by the Hungarian Government on 22 August 2022 and the

assessment thereof by the Commission as set out above, the National Assembly, in accordance with what was provided for in the draft amending act submitted by the Hungarian Government, amended Act IX of 2021 by introducing the content of the aforementioned remedial measure, an amendment which, in accordance with Article 61 of [Or. 9] the Financial Regulation,<sup>10</sup> established strict conflict of interest rules with regard to members of the board of trustees and the supervisory board of public interest trusts and with regard to persons who may be designated as asset management controllers.<sup>11</sup>

23 Pursuant to the amendment of Act IX of 2021:

*‘The trust and the entities created or maintained by that trust, including the chairs and members of the supreme body or supervisory board, as well as their staff, shall comply with the conflict of law rules set out in this point. Any person whose ability to perform his or her duties in an impartial, objective and unbiased manner is inexistent or limited due to an economic interest or any other direct or indirect personal interest or circumstance (including family or emotional reasons and political or national affiliation), shall refrain from any activity which may be contrary to the interests of the trust, a member thereof or those donating assets to the trust directly or indirectly. Any person with a conflict of interest or for whom there is a risk of or there appears to be of a conflict of interest shall declare it, without delay and before a decision is taken, in writing or – in the event of unforeseen circumstances – orally with the declaration being formally recorded. In the case of decisions made by the collegiate body, the declaration must be addressed to that body by the chair or member thereof and, in all other cases, the declaration must be addressed to the holder of employer rights. The addressee shall confirm in writing whether the existence of a conflict of interest has been established. The public interest trust shall publish the decision electronically within one week of the decision and for a period of no less than one year. Where the existence of a conflict of interests has been established, the public interest trust shall ensure that the person concerned does not participate in the decision-making of the trust or the entities created or maintained by it.’<sup>12</sup>*

<sup>10</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (OJ 2018 L 193, p. 1).

<sup>11</sup> *Az európai uniós költségvetési források felhasználásának ellenőrzésével összefüggő egyes, a közfeladatot ellátó közérdekű vagyongazdálkodó alapítványokat, a Nemzeti Adó- és Vámhivatal, valamint az Európai Csalásellenes Hivatal ellenőrzéseit érintő törvények módosításáról szóló 2022. évi XXIX. törvény* [Act XXIX of 2022 amending certain Acts concerning public interest asset management foundations performing public duty, the National Tax and Customs Administration and the checks of the European Anti-Fraud Office in relation with the control of the use of European Union budget funds] (‘Act XXIX of 2022’), adopted on 4 October 2022 and entered into force on 13 October 2022.

<sup>12</sup> Act IX of 2021, Section 15(3).

The scope of that provision covers all persons who exercise a function or who are employed in public interest trusts with a public service function and in entities created or maintained by such trusts.

- 24 Furthermore, by adopting the law referred to in the previous paragraph, the legislature – once again in full compliance with the draft provision relating to the other element of the aforementioned remedial measure – amended the Act on public procurement in so far as it clearly indicated in Section 5(1)(f) of that law that public interest trusts and the entities created or maintained by such trusts must be considered contracting authorities required to organise public procurement procedures.<sup>13</sup> In addition, according to the Hungarian Government, public interest trusts fall within the scope of the Act on public procurement as from the creation of the legal institution, which corresponds to the concept of entity possessing legal capacity within the meaning of Section 5(1)(e) of that act. **[Or. 10]**
- 25 It must therefore be noted that, with regard to public interest trusts and the entities maintained by them, the commitments made by Hungary – in the context of the procedure provided for by Regulation 2022/2092 – concerning the rules on public procurement and on conflict of interests have been fully implemented and applied, with transparency in the management of the funds of such trusts being ensured by means of specific legal guarantees. The contested decision itself recognises, in recital 43, that, in accordance with the remedial measure, amendments were introduced ‘*that enlarged the scope of the rules on public procurement and on conflict of interests to cover also public interest asset management foundations performing public duty*’.
- 26 As for the Commission’s assessment<sup>14</sup> – set out without further elaboration by the Council in the contested decision<sup>15</sup> – according to which the conflict of interest rules adopted by Hungary do not yet satisfy the concerns raised since ‘*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*’, it may be said that it appears to be a completely new complaint compared to those contained in the Commission Proposal of 18 September 2022. The contested decision states that the Commission had ‘repeatedly’ raised that complaint but, in reality, it was raised only after the Commission Proposal of 18 September 2022 and in relation to the Commission’s assessment set out therein. In its letter to the Commission of 19 November 2022 – and in the preceding informal exchanges – the Hungarian

<sup>13</sup> That provision also forms part of Act XXIX of 2022, adopted on 4 October 2022 and entered into force on 13 October 2022.

<sup>14</sup> Paragraph 70 of the 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 of 30 November 2022 (COM(2022) 687 final).

<sup>15</sup> Second part of recital 43 of the contested decision.

Government explained that such a commitment was not included in the remedial measure of 22 August 2022, and that the legislative amendment criticised by the Commission was intended solely to make it clear in the *a kormányzati igazgatásról szóló 2018. évi CXXV. Törvény* (Act CXXV of 2018 on government administration) that the conflict of interest rules of Act IX of 2021 also apply to ‘top-level officials’.

- 27 It is useful to point out that both the contested decision and the Commission Proposal giving rise to it fail to demonstrate how the rules governing public interest trusts and the entities maintained by them may in practice affect the lawful management and use of Union funds, or even show that a single problem or case of abuse actually occurred in the management of Union funds by such trusts and/or entities.
- 28 Despite the commitments made by the Hungarian Government in the context of the procedure provided for by Regulation 2022/2092, and despite the amendments subsequently made by the legislature which are fully in line with the commitments, both the Commission and the Council, on the basis of the Commission’s assessment in its communication of 30 November 2022, concluded, without further elaboration, that **[Or. 11]** there are systemic problems in the use of Union funds by public interest trusts, but without demonstrating as such.

### **III. Position taken by the Hungarian Government with regard to certain pleas invoked by the applicant**

- 29 The Hungarian Government endorses the pleas and claims of the applicant. With regard to the pleas in law invoked by the applicant in support of the form of order sought in the application, the Hungarian Government will set out its views, in brief, on the first plea (insufficiency of the factual basis of the contested decision) and, in more detail, on the fourth plea (infringement of the principle of proportionality).
- 30 In a judgment of the Court of Justice of the European Union relating to Regulation 2022/2092, it was held that the Commission and the Council must make their assessments taking into account, in particular, the particular features of the legal system of the Member State in question and the discretion which that Member State enjoys in implementing the principles of the rule of law.<sup>16</sup> The Court’s judgment clarified in several respects the requirements which the Commission and the Council must satisfy in the application of the regulation.
- 31 As a preliminary point, the Hungarian Government disagrees with the Council’s argument, set out in paragraph 17 of its defence, according to which neither the Council nor the Council are required, during the course of the procedure, to assess

<sup>16</sup> See judgment of 16 February 2022, *Hungary v Parliament and Council* (C-156/21, EU:C:2022:97), paragraph 235.

the situation of each of the entities likely to be affected by an act such as the contested decision.

- 32 The Hungarian Government disputes the position taken by the Council. First of all, with regard to whether the individual situation of each of the entities must be assessed when adopting the decision and determining the measures, the wording of the regulation does not rule it out. The Hungarian Government acknowledges that there may be EU programmes for which the Council cannot not be expected to carry out an individual assessment of the situation of those concerned on account of their particularly high number.
- 33 However, where – as with the measures at issue in the present case – it is possible to identify precisely the relatively small number of persons who will be affected by the measure, not only would [the Council’s argument] undermine the effectiveness of Regulation 2022/2092, but it would be correctly served by an individual assessment carried out by the Commission and, when adopting the contested decision, by the Council since – as stated above – it is the only way to determine whether the ‘direct link’ required by the regulation actually exists and whether the proposed measure is proportionate, to the extent that it constitutes an appropriate response to the concerns raised. In that regard, it must be observed that neither in the Commission’s proposal for a Council implementing decision of 18 September 2022, in particular in the statement of reasons,<sup>17</sup> nor in the contested decision is there any mention, however general, of the fact that **[Or. 12]** the entities maintained by public interest trusts also include higher education institutions, so that neither the Commission nor the Council, when taking their decisions, examined in any way the extent to which such entities were affected. Accordingly, at the time the measure was adopted, it was not possible to examine the requirements of the regulation from the point of view of the Hungarian higher education institutions in question – including the applicant – and such an examination did not actually take place.
- 34 Furthermore, the Council’s argument does not comply with the requirement, set out in recital 19 of Regulation 2022/2092, according to which the potential impact on final recipients and beneficiaries must be taken into account when considering the adoption of measures. There is nothing to indicate that that requirement was fulfilled by the Commission or the Council.
- 35 Not only did the Commission and, when adopting the contested decision, the Council not examine the individual situation of the applicant or other legal entities operating under the public interest trust model and which are in a similar situation, but they did not examine in further detail the general impact of the measures on that category of persons.

<sup>17</sup> See paragraphs 27, 28 and 31 to 33 of the statement of reasons for the Commission Proposal of 18 September 2022.

*Insufficiency of the factual basis of the contested decision (first plea in law relied on by the applicant)*

- 36 Article 4(1) of Regulation 2022/2092 requires a genuine link to be established, in all cases, between breaches of the principles of the rule of law, on the one hand, and effects or serious risk of effects on the sound financial management or the protection of the financial interests of the Union, on the other. In its judgment relating to that regulation, the Court imposed on the Commission and the Council the requirement to demonstrate clearly the existence of a link between the established breach of the rule of law and the risk of effects on the sound use of Union funds, thereby precluding measures based on a suspected link. The contested decision has not demonstrated that link, in breach of Article 4(1) of that regulation.
- 37 It follows not only from the principle of proportionality, which is expressly set out in Article 5(3) of Regulation 2022/2092, but also from Article 4(1) of that regulation that the measure adopted is intended to target only entities in respect of which it can be clearly demonstrated that there is a genuine link between the breach of the rule of law and the effect or risk of an effect on the financial interests of the Union. However, in the case of the applicant, such a link – even if it were acknowledged that the legislation could effectively raise a concern that there is a conflict of interest – is manifestly lacking or, at the very least, the contested decision does not present any evidence thereof.
- 38 The Hungarian Government is of the opinion that the measure would be consistent with Regulation 2022/2092 only if it targeted those categories of persons in respect of whom the ‘direct link’ mentioned above exists and that is why the Commission, and the Council in adopting the decision, are required to carry out a detailed analysis of the categories of persons likely to be affected, to avoid [Or. 13] the situation whereby the scope of the measures also covers those in respect of whom the measures are not justified.
- 39 Consequently, the contested decision is unlawful for that reason alone and because the Council clearly did not carry out such an examination and extended the measure to cover all public interest trusts and entities maintained by such trusts, regardless of whether the alleged conflict of interests, and therefore the effect or risk of an effect on the financial interests of the Union, could actually occur in their regard.

*Infringement of the principle of proportionality (fourth plea in law relied on by the applicant)*

- 40 The Hungarian Government shares the applicant’s view that the prohibition contained in the contested decision – which precludes the Commission from entering into legal commitments, in the context of the implementation of the EU budget under direct or indirect management, with public interest trusts or entities maintained by such trusts – is not consistent with the principle of proportionality.



- 41 Not only is the principle of proportionality one of the general principles of EU law, but emphasis is also placed on that principle in Regulation 2022/2092, in particular in the context of measures to protect the Union budget and the procedure relating thereto, provided for in Articles 5 and 6 of that regulation, respectively. Consequently, the Court of Justice repeatedly highlighted the importance of the principle of proportionality in its judgment relating to that regulation and insisted on the obligation on the part of the Commission and the Council to take that principle into account in the procedure provided for by that regulation.<sup>18</sup>
- 42 In the contested decision, it is explained that ‘[i]n 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’.<sup>19</sup> So far as concerns proportionality, the contested decision states that the 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.<sup>20</sup>
- 43 It is not apparent from the contested decision that the Commission, then the Council – defendant – when adopting the decision, actually carried out an assessment of the consequences of the measure for public interest trusts and the entities maintained by such trusts, which is the starting point of the examination of proportionality. In the course of the procedure within the Council which resulted in the adoption of the contested decision, the Council – without taking into account the concerns **[Or. 14]** raised by Hungary with regard to the serious breach of the principle of proportionality – failed to examine the proportionality with regard to the substance, whether at the level of the working group, Coreper or, subsequently, at the time of adoption at ministerial level.
- 44 In the absence of an examination from the point of view of whether it is possible to resolve the issues that allegedly exist using other measures, it cannot validly be argued that the measure adopted may be deemed to be proportionate to the issues identified, or even that it constitutes an appropriate tool to address those issues. It is apparent from the wording of the contested decision (*‘can best be addressed’*) that the Council envisaged alternative measures, but the contested decision does not contain any reference to such alternatives. In reality, as stated above, the

<sup>18</sup> See judgment of 16 February 2022, *Hungary v Parliament and Council* (C-156/21, EU:C:2022:97), paragraphs 112 and 317.

<sup>19</sup> Recital 62 of the contested decision (emphasis added by the [Hungarian] government).

<sup>20</sup> *Idem*.

contested decision still fails to specify how and to what extent the alleged shortcomings may affect the lawful and efficient use of Union funds, which immediately calls into question whether the proportionality of the measure adopted can be established.

- 45 As the applicant rightly observes in paragraph 186 of its application, it is clear that the contested decision indicates that the measures it contains are of a temporary character and do not have definitive effects,<sup>21</sup> but this does not stand up to scrutiny with regard to the applicant, the other public interest trusts and entities maintained by them. The applicant rightly notes that the final consequences of the measures relating to it are not foreseeable, and this is a serious issue in particular because the Council has not carried out an individual examination of the situation of the applicant and the other entities potentially affected by the contested decision, nor the seriousness of the damage suffered by them as a result of those measures. In the case of EU programmes such as Erasmus+ and Horizon Europe relied on by the applicant, the measure adopted in the contested decision – the immediate prohibition on entering into commitments – excludes the applicant (or rather its researchers, teachers and students) from access to financial means which will not be available to it later since they will have been awarded to and used by other contractors.
- 46 While it may be true, in the grand scheme of things, that such resources are not lost since they can be used by others, the fact remains that is a definitive ‘loss’ for public interest trusts and the entities maintained by such trusts which are affected by the measures because they cannot participate in the calls for tenders launched during the relevant period or, even if they could, they would not be able to obtain EU funding for their teaching and research. The measure must therefore ultimately be considered as a definitive ‘loss’ for the students, teachers and researchers of higher education institutions. All this calls into question whether the Commission or the Council actually examined the consequences of the measure for public interest trusts and entities maintained by such trusts, despite having the obligation to do so under Regulation 2022/2092. The paramount importance of that obligation was highlighted in the judgment of the Court of Justice cited above.
- 47 In paragraph 52 of its defence, the Council maintains, in essence, that the contested decision requires Hungary to fulfil its obligations towards final recipients or beneficiaries, also with regard to the prohibition disputed by the applicant. **[Or. 15]** If the Hungarian Government has understood correctly, the Council seeks to demonstrate that the applicant and those persons in a similar situation to its own cannot, in fact, be harmed by the prohibition in question since Hungary must latently bear the loss of Union funding resulting from that prohibition. However, that argument completely disregards the nature of the Erasmus+ and Horizon Europe programmes, within the framework of which the

<sup>21</sup> Recital 61 of the contested decision.

Commission cannot make new commitments with the applicant since the entry into force of the contested decision, on account of the prohibition laid down therein. Those programmes are far from being relevant for universities, including the applicant, due to EU funding alone. The international system of contacts and cooperation, in the framework of which the teachers, researchers and students use the EU funding obtained, constitutes a significant part of those programmes. The prohibition on entering into commitments has the effect of excluding the universities concerned from calls for tenders launched within the framework of those programmes, which causes them much more serious harm than the loss of financial resources.

- 48 The exclusion of funding under the Erasmus+ programme alone precludes students of the Hungarian higher education institutions concerned from participating in that programme. The possibility of participating in the Horizon Europe programme cannot, moreover, be fully guaranteed by the provision of Hungarian budgetary resources since the intention of institutions from other Member States to conclude contracts with Hungarian higher education institutions excluded from Union funding pursuant to the contested decision, constitutes a significant, if not insurmountable, obstacle in practice. \* There is no indication that the Commission or the Council, when adopting the contested decision, took that circumstance into account in their assessment of proportionality.
- 49 The applicant states, in paragraph 158 of its application, that no conflict of interest arises with regard to the holding trust since none of its trust members are members of the National Assembly or Government, nor are they ‘senior political executives’ within the meaning of the contested decision. It clearly follows that the Commission, then the Council in adopting the contested decision, failed to carry out an analysis which would have made it possible to determine which public interest trusts are affected by the alleged conflict of interest. In the absence of such an analysis, it can be concluded that the principle of proportionality was seriously infringed by the fact that the Council did not exclude from the scope of the measure provided for in Article 2(2) of the contested decision public interest trusts or the entities maintained by such trusts that are able to establish that the concern raised of a conflict of interests underlying the measure has no basis in fact so far as they are concerned.
- 50 The Hungarian Government firmly states that a general measure which applies indiscriminately to all public interest trusts and entities maintained by them – and, in the case of universities, all the teachers, researchers and students – regardless of whether the alleged conflict of interests actually exists so far as they are

\* NB: perhaps that sentence should be understood as follows: ‘the possibility of participating in the Horizon Europe programme cannot, moreover, be fully guaranteed by the provision of Hungarian budgetary resources since the fact that Hungarian higher education institutions are excluded from Union funding pursuant to the contested decision constitutes a significant, if not insurmountable, obstacle to the intention of institutions from other Member States to conclude contracts with them, and also to the very conclusion of such contracts’ (emphasis added).

concerned, is necessarily disproportionate since it also targets persons for whom the existence of reasons capable of justifying it can be ruled out at the outset. **[Or. 16]**

- 51 None of that can be explained by the fact that the operation of certain universities under the public interest trust model is sufficient to conclude that a conflict of interests may arise on account of the legal regime applicable to them. Such a link by way of corollary is not in line with the principle of proportionality – in that such an approach disproportionately affects entities for which the concerns of potential conflicts of interest constitute at most a remote or possible risk, if it actually exists at all – or with the specific provisions of the regulation relating to conditionality.
- 52 Lastly, the Hungarian Government notes, with regard to the infringement of the principle of proportionality, that the contested decision imposes the prohibition on entering into commitments with private interest trusts and entities maintained by such trusts despite the fact that both the Commission and the contested decision acknowledge that, in Hungary, *‘[i]n line with the remedial measure [relating to public interest trusts], Act XXIX of 2022 introduced amendments that enlarged the scope of the rules on public procurement and on conflict of interests to cover also public interest asset management foundations performing public duty’* and, furthermore, several remedial measures were implemented accordingly, in whole or in part, to address initial concerns, as explained above.
- 53 However, the measure proposed by the Commission, then adopted by the Council, remained a total prohibition on entering into commitments, which clearly establishes that the measure did not take into account the level of possible risk for the financial interests of the Union in so far as the reduced risk was not followed by an amendment, reduction or reassessment of the proposed measure, in breach of the principle of proportionality. The fact that the contested decision failed to consider the specific nature of the board of trustees of the various public interest trusts, including with regard to their composition, also implies an infringement of that principle.
- 54 In summary, the Council, in adopting the contested decision, did not act with the prudence necessary in so far as it brought the applicant within the scope of Article 2(2) of that decision. In the course of the procedure within the Council, it also failed to examine, with regard to the applicant, the potential effects of the decision, including in the long term, and the categories of persons actually affected, in particular university researchers, teachers and students. Accordingly, Article 2(2) of the contested decision is contrary to Regulation 2022/2092, and in particular to Article 4(1) and Article 5(3) thereof. **[Or. 17]**

#### **IV. Conclusion**

- 55 In the light of the foregoing considerations, the Hungarian Government approves the applicant’s action and requests that the General Court upholds it.

**Budapest, 15 July 2024.**

[Signatures]