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

OBSERVATIONS ON THE STATEMENTS IN INTERVENTION BY THE EUROPEAN COMMISSION AND BY HUNGARY

both dated 15 July 2024

Lodged on 11 September 2024, pursuant to Article 145(3) of the Rules of Procedure of the General Court, by

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in Case **T-138/23**

SEMMELWEIS EGYETEM

Applicant

v.

COUNCIL OF THE EUROPEAN UNION

Defendant

in proceedings brought for partial annulment in respect of Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union Budget against breaches of the principles of the rule of law in Hungary, insofar as it concerns the Applicant.

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1. Applicant Semmelweis Egyetem, in response to the statements in intervention by the European Commission (the "**Commission**") and Hungary, both dated July 15, 2024, submits these observations.

I. Introduction

2. First, the Applicant submits that it has no particular observations on the statement in intervention submitted by Hungary other than that Hungary's responses to the political messaging contained in the Council's Defence shall be considered irrelevant in this matter together with that messaging either. The Applicant understands that, for good or ill, the Commission and the Defendant have political concerns against the Government of Hungary which resulted in the Decision. However, by the contested part of the Decision, contained in a package of measures designed to keep Hungary in line, i.e. as a by-product, the Applicant and its students, researchers and hospitals are being unfairly discriminated against and used as a scapegoat for the Defendant's political problems with Hungary. As stated in the Application (¶28), the Applicant refrains from dealing with the Conditionality Regulation and its political surroundings, it is the rule of law that matters.

3. The Commission avoids commenting on the second and third sub-pleas of the first plea, the second sub-plea of the third plea, and the fifth plea, it has nothing to add to the arguments the Defendant has made in its Defence, and it concurs with those arguments without any reservations[1]. The pleas in the Applications are, however, intertwined, consequently, as a matter of practicality, this submission follows the structure of the pleas.

4. It is established that the contested Decision[2] is a regulatory act[3], which does not entail implementing measures[4], and that the Applicant is directly affected by such contested Decision[5] and, consequently, does have a standing to sue[6] as submitted in the Application.

5. In its statement in intervention, the Commission, likewise the Council in its Defence, appear to candidly acquiesce to the facts that support the Applicant's claims (for a list see Annex A.20).

6. Instead of the first form of order sought by the Applicant, the Commission appears to sympathize rather with the second form of order requested, i.e. to annul Article 2(2) of the contested Decision in its entirety. This consideration, however, has nothing to do with the admissibility of the present action as presented.

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[1] Commission's Statement in Intervention ¶10-11
[2] 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 (OJ 2022 L 325, p. 94; the "**contested provision**")
[3] ¶37 Order of the General Court Apr-4-2024
[4] ¶54 ibid
[5] ¶60, 68 ibid
[6] ¶82 ibid

II. The first plea: Lack of a sufficiently solid factual basis

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

7. Naturally, Applicant does not wish to question the sincerity of the Defendant's stated purpose for its Decision – namely, the protection of the Union budget. However, as Applicant demonstrated in the Application (¶39-63), there is no conceivable way in which the administration of „Horizon" and „Erasmus" could damage said budget. The Defendant and the Commission make no attempt to substantively dispute this.

8. It is established in the Application and remains undisputed that none of the documentation or communication in preparation of the contested Decision has ever been communicated to the Applicant prior to the Decision. It is an admitted fact that there was no assessment of the fact that the curatorium of the Foundation ever became involved in the management of the Applicant or its assets, nor the fact that no actual rule of law violations was revealed, let alone verified in relation to the Applicant. It rests undisputed that neither the Applicant nor the Foundation has any influence on the use and allocation of funds from the Horizon Europe and Erasmus+ Programmes. Notwithstanding, Applicant has been directly and individually affected by the prohibition included in the contested provision, since it has been excluded from the Horizon projects and the Erasmus+ Programme. No factual basis to the contrary, let alone sufficient and solid, was provided ever, certainly not in the Statement of Intervention of the Commission[7].

9. In its Defence, the Council expressly admitted that the Applicant's situation was not assessed before the adoption of the contested Decision, arguing that such assessment is not required by the Conditionality Regulation (¶17). This admission of knowingly not taking into account the Applicant's circumstances is attempted to be excused by the Commission: '[t]*he concrete situation of this or that particular public interest trust or university maintained by it, including the applicant, is irrelevant for the assessment of the legality of the Council implementing decision, which was adopted at a general level to protect the Union budget against a problem of a systemic nature in Hungary.*'[8] Therefore, even though seemingly acting for the achievement of a noble goal, none of the two Union institutions considered it necessary or relevant to assess the specificities of the entities actually punished by the measure or whether they committed any rule of law violations or not.

10. The Commission presents some additional considerations to the ones put forward by the Council, however, these arguments are either hypothetical or unfounded. The Commission refers to and cites various Hungarian legal provisions at length, which theoretically may allow the maintainer public interest trust to have more significant powers (¶16-22). But it is clear from the passages quoted, in view of the use of the

[7] See Application footnote N°55
[8] Commission's Statement in Intervention ¶27

conditional tense, that this is merely a hypothesis and not a necessity. It should be noted that the documents annexed to[9] or referenced in[10] the Application clearly demonstrated that it could not be established that the Foundation had significant powers which arbitrarily interfered with University's autonomy; on the contrary, the most significant decision-making powers remained with the Senate. The allocation and use of the relevant funds received through the Horizon Europe and Erasmus+ Programmes are subject to strict procedures, which are accompanied by accounting obligations as well, and that there is a clear 'pathway' for these funds to reach their final recipients and beneficiaries. By way of example, the Erasmus+ scholarship awarded to a given student could hardly be channelled by the Foundation or its curatorium to itself or to a third person, since there is not a single step in the procedure on which it could exert any influence whatsoever.

11. The core of the Commission's argument is that, notwithstanding case law and this Court's order on admissibility, **(i)** Applicant is not included in '*a group of entities*', since the contested Decision '*contains no list or annex detailing the entities to which the prohibition applies*'[11] and **(ii)** the contested Decision '*does not impose repressive measures or penalties of any kind on the applicant*'.[12] The Applicant notes that even though the contested Decision does not contain a list of the entities concerned by it, Article 2(2) explicitly refers to Act 2021:IX, the annex to which exhaustively lists the entities covered[13]. Purportedly in support of this view, the Commission even refers to the judgment rendered by the Court noting that the purpose of the Conditionality Regulation is to protect the Union budget and not to penalize the breaches of the principles of the rule of law.[14] The Applicant fully agrees: the purpose of the Conditionality Regulation is definitely not and certainly should not be to penalize the innocents such as the Applicant and its students and faculty. The Commission did not endeavour to complete its own argument: if being stripped of opportunities and financing is not a penalty, then what is it, a reward?

12. As to the second objection, the Applicant on the one hand refers to the fact that the measure included in the contested Decision has far-reaching and detrimental effects on its business, reputation, and market position. This statement is supported *inter alia* by the rejection decisions[15] indicating that the measure practically excludes the Applicant from the European academic scene and makes it impossible for it to engage in active academic cooperation with other European universities in cases where such cooperation would take place in the form of a project funded by the Horizon Europe Programme. Also, students and researchers of the University are deprived of the opportunity to participate in the Erasmus+ Programme, even though such participation would be crucially important for the Applicant. On the other hand,

[9] See Annex A.8. attached to the Application (Deed of Foundation of the Applicant)
[10] See Application footnote N°8 (By-laws of the Applicant)
[11] Commission's Statement in Intervention ¶29
[12] Commission's Statement in Intervention ¶29
[13] For further arguments see ¶63-64 Order of the General Court 4 April 2024
[14] See the Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, ¶119
[15] Annexes no. A.2., A.3., A.4., A.12., A.13., A.14., A.15., A.16. and A.19.

the Applicant notes that the judgment cited by the Commission[16] in fact supports its argumentation, as it clearly states that the Union budget shall be protected from results effecting from rule of law violations, however, no such violation or potential for violation was identified or even suspected having committed by the Applicant.

B. The second sub-plea: Manifest errors of assessment

13. In the Application, the Applicant argued that the Defendant failed to take into account or evaluate the fact that no relevant facts have been established concerning the measures included in Article 2(2) Decision (¶128). The Applicant referred to Article 6(9) Conditionality Regulation, under which the Proposal should have set out the specific grounds or evidence on which the Commission based its findings, which are also relevant for the terms of the contested Decision. No such specific grounds or evidence had been established either in the Proposal or in the Decision.

14. The Defence attempted to argue that the grounds and evidence on which the Commission and later the Council based their findings are clearly indicated in both the Proposal and the Decision and cited recitals ¶42 and ¶62 contested Decision. The specific evidence listed are the 2022 Rule of law Report and an assessment of the Hungarian regulatory framework applicable to PITs and the entities maintained by them (¶25-26). The Defendant also referred to the possibility of political executives hypothetically participating in the decision-making process regarding the disbursement of public funds (¶26). In its Reply, the Applicant pointed out that the Defendant failed to refute its arguments as its submissions are rather general (i.e., they are not tailored to the Applicant) and they refer to different topics, including the concerns in connection with the regulatory framework applicable to PITs, the inadequacy of the remedial measures implemented by Hungary (i.e. not by the Applicant, who had and still has no powers to form an opinion on, let alone influence these measures) (¶34). Since the Commission added no further arguments or considerations to the above statements of the Council,[17] the Applicant's arguments presented under this sub-plea are neither refuted nor even properly addressed on the merits.

C. The third sub-plea: Failure to comply with the duty to state reasons

15. In its third sub-plea, the Applicant pointed out that the obligation to state reasons is a fundamental procedural requirement that cannot be omitted by the institutions of the EU and compliance with this obligation shall be assessed from a procedural point of view and on a case-by-case basis (¶133-135). Since the Explanatory Memorandum to the Proposal only stated that Hungary submitted its remedial measures relevant to the PITs '*at a late stage*'[18] but did not dispute their adequacy. The Applicant noted that there is no trace that complex and comprehensive

[16] Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97
[17] Commission's Statement in Intervention ¶11
[18] Explanatory Memorandum to the Proposal ¶121

assessment required for the fulfilment of the obligation to state reasons had been carried out.

16. The Council violated the provisions of Article 6(9) Conditionality Regulation, as it failed to take into account and/or act on the relevant information that it should have taken into consideration prior to the adoption of the contested Decision. In its rather brief response, the Defendant cites two Court judgments[19] and concludes that it has clearly and adequately explained the reasons for adopting the contested Decision, which is supported by the recitals of the Decision as well as other documents produced by the Commission during its preceding procedure (¶29-31). The Applicant highlighted that the Defendant did not put forward any arguments refuting the above submissions on the merits. It can be concluded from the Court judgment cited by the Council[20] that as an entity being directly concerned by the contested provision, from the Applicant's point of view, the detailed statement of reasons why it was negatively affected by the provision is of particular importance. None of the other provisions listed by the Defendant allegedly explaining the reasons underlying the adoption of the contested Decision contain any reasons regarding the inclusion of Applicant in the group of entities concerned by the contested provision.

17. Since the Commission added no considerations to the above statements of the Council,[21] the Applicant's arguments presented under this sub-plea are not refuted but rather further justified.

III. The second plea: the Applicant has been denied the opportunity to defend its rights; its right to be heard has been infringed

18. Despite the fact that the Application was lodged less than 3 months after the publication of the contested Decision, the Applicant was already able to demonstrate, by means of documents annexed to the Application[22], the detrimental effects which the prohibition has on the Applicant and on its community as a whole. By then, the Applicant had already been excluded from a number of major Horizon projects in which it would have participated as the leader or a member of the consortium. The Application also set out in detail, supported by figures and facts, the potential detrimental effects in terms of the University's budget, reputation, and attractiveness to students (both Hungarian and foreign). Additional documents have been attached to the observations on the plea of inadmissibility evidencing further exclusions from different Horizon projects[23] and the Applicant demonstrated, by means of a rejection letter annexed to its reply,[24] that its exclusion had become simply automatic. In addition to scientific projects, the exclusion of university community from the Erasmus+ Programme has in the meantime become even more

[19] Judgment of 24 November 2005, *Italy v Commission*, C-138/03, EU:C:2005:714 and Judgment of 24 June 2015, *GHC v Commission*, T-847/14, EU:T:2015:428
[20] Judgment of 24 November 2005, *Italy v Commission*, C-138/03, EU:C:2005:714
[21] Commission's Statement in Intervention ¶11
[22] Annexes no. A.2., A.3., A.4.
[23] Annexes no. A.12., A.13., A.14., A.15., A.16.
[24] Annex no. A.19.

prejudicial, the previously conditionally supported applications have been rejected, leaving many students and researchers without an irreplaceable opportunity to enrich their expertise at other European universities. The disadvantages set out in detail by the Applicant in its previous submissions and supported by evidence, are irreparable, since the Applicant will not be able to join or re-participate retroactively in the projects from which it was once excluded.

19. In its second plea in law, the Applicant argued that its right to be heard, which constitutes a general principle and fundamental right within the Union's legal order and is also an essential part of good administration has been infringed. According to the settled case law, it is the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.[25] The Applicant has suffered significant disadvantages with far-reaching consequences as a direct result of the adoption of the contested provision. The Applicant's market position also deteriorates significantly, since the funds whose acquisition is prohibited can be forwarded to other entities – the direct competitors of the Applicant.

20. The Court pointed out repeatedly[26] that neither the Conditionality Regulation, nor the measures adopted under it were aimed at penalizing Hungary or any other persons or entities. It shall be noted that this finding was candidly pointed out by the Commission as well.[27] However, in light of the actual effects of the contested provision on the operation and business of the Applicant, it is hard to pretend that Article 2(2) contested Decision does not penalize or sanction the University and its community. Therefore, considering the findings of the Court, the measures intended to penalize Hungary directly concerned the Applicant itself, the contested provision has a negative effect on the whole university community as well.

21. According to the recitals of the contested Decision, a line of communication took place between Hungary and the institutions of the European Union, which had begun in November 2021 and was rather continuous up until the adoption of the contested Decision. Neither the Applicant, nor any of its stake-holders were ever invited to participate in these exchanges, thus they were not in a position to become aware of the measure proposed to be adopted, let alone make their views known. Therefore, the Applicant's right to be heard has been severely infringed, especially given the fact how adversely the contested provision affected the Applicant's business.

22. The Defence responded to the Applicant's detailed line of argumentation supported by plenty of Court decisions rather briefly by relying on two main points, namely that **(i)** Article 6 Conditionality Regulation does not confer the Applicant with the right to take part in the procedure (¶34) and that **(ii)** the contested Decision is of general application, whereas Article 41(2)(a) Charter can only be interpreted in case of individual measures (¶35-37). Hence, the Defendant implicitly acknowledged the

[25] See the Judgment of 11 December 2014, Khaled Boudjlida v Préfet des Pyrénées-Atlantiques, C-249/13, EU:C:2014:2431, paragraph 31

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

[27] Commission's Statement in Intervention ¶29

infringement of the Applicant's right to be heard but sought to explain away why this violation was allegedly lawful and appropriate, which is, at the very least, controversial in the case of an institution acting allegedly in the good name of the rule of law.

23. As explained in the Reply (¶40-43), none of the Defendant's arguments is well-founded. As to the first argument, the Applicant pointed out that the right to take part in the procedure and the right to be heard are two separate rights not to be confused. The fact that the Conditionality Regulation does not prescribe that the persons directly concerned must be heard before the adoption of a measure, cannot be interpreted in a manner that they are deprived of this right. Also, the Conditionality Regulation sets forth that '*[r]espect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.*'[28] In light of this statement, the importance of fundamental rights can hardly be called into question and the Defendant cannot successfully argue that, if there is no express invitation to ensure the exercise of the right to be heard, it can be disregarded.

24. As to the second argument, deprivation of a fundamental right cannot be rectified by the fact that more than one person is concerned by the measure. As the Applicant pointed out repeatedly, the list of 22 universities directly concerned by the contested prohibition is an exhaustive one and can be easily identified,[29] thus the fact that the involvement of these entities would somewhat lengthen the legislative process cannot serve as a lawful basis for depriving them of their right to be heard. Also, the contested measure has undoubtedly a punitive nature as it has a detrimental effect on the Applicant's operation and business and before any such measures are taken, the right to be heard must necessarily be guaranteed, as is the law.

25. The Commission dedicates only one paragraph to this plea (¶30), in which it essentially seeks to strengthen the Defendant's second argument by referring to the order ruling on the admissibility of the Application, which confirmed that the contested Decision is a regulatory act of a general nature. Therefore, the Commission argues that the right to be heard guaranteed by the Charter does not apply to the Applicant and can be interpreted only in relation to the Member State. Contrary to this line, it is a fact admitted that the contested Decision is a regulatory act of a general nature. The Applicant does not claim that it is an individual measure, but that, by being directly and adversely affected by it, the contested provision penalizes the Applicant, in the light of which, according to the practice of the Court, that particularly important fundamental right must necessarily prevail.

26. The fact that the Defendant and the Commission hand-in-hand attempt to argue that the fact that the right to be heard should not have been guaranteed to the Applicant proves the violation of the Applicant's fundamental rights and it carries the risk that

[28] Recital (6) Conditionality Regulation
[29] See the annexes to Act IX:2021

the institutions of the European Union may invoke a right to cherry-pick when and to whom to grant the right to be heard.

IV. The third plea: the lack of legal basis

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

27. The Application summarised the chronology of the main relevant events, which demonstrates that the legislation governing the PITs did not even exist at the time of the adoption of the Conditionality Regulation, and the objections raised by the Commission related initially to the applicability of public procurement provisions to the PITs only and the possible conflict-of-interest issues of the curators arose later. The Applicant pointed out that the public procurement issue was resolved before the adoption of the contested Decision, whereas the conflict-of-interest issue never existed vis-à-vis the Applicant, since none of the curators of the maintainer Foundation is a member of the Government or an active politician (¶155-158).

28. The objective of the Conditionality Regulation is to protect the EU budget, with measures that meet the requirements of proportionality and appropriateness. Measures exceeding these limits are, by definition, beyond the scope of the authorization provided. The Applicant highlighted the contested provision's failure to comply with these requirements by pointing out that the measure included in Article 2(2) concerned a significantly lower amount of money (EUR 1.85 million) than the measure included in Article 2(1) (EUR 6.3 billion),[30] thus the fiscal effect of the measures disqualifies the purpose-bound objection of Article 2(2) measures. Where there is a choice between several appropriate measures, the least onerous measure must be chosen. The effects of the measure chosen by the Defendant are detrimental and irreversible for the Applicant, thus the requirements of proportionality and appropriateness have not been met. In the light of the foregoing, the Conditionality Regulation did not authorize the Defendant to adopt the measure set out in Article 2(2) Decision. The Defence merged the Applicant's two sub-pleas, so that it is not clear which of the arguments put forward by the Defendant refers to the first and which refers to the second sub-plea. The Defendant also failed to refute the Applicant's arguments, but merely argued that the Applicant did not substantiate in any way the arguments included in the third plea in law, hence it should be rejected as inadmissible or, in the alternative, as unfounded (¶41). Otherwise, the Council wished to confirm the legality and the correctness of the contested Decision by stating that it was adopted in compliance with the procedural rules set forth by the Conditionality Regulation, which the Court of Justice deemed compatible with EU primary law and that the procedure was not intended to penalize single entities but to protect the financial interests of the European Union (¶44).

29. With reference to the alleged lack of proper and coherent argumentation, the Applicant pointed out in its Reply that its relevant statements were detailed on

[30] See Application ¶167

multiple pages and were supported by findings from the settled case law (¶45). One can only wonder whether the argument seeking to create an appearance of incomprehensibility and inconsistency, lacking any rebuttal on the merits, originates from the fact that the Defendant cannot substantially refute the third plea in law.

30. As to the alleged compliance with the procedural rules, it should be noted that they may have been followed to the letter of Article 6 Conditionality Regulation, however, the Council failed to grant the Applicant the opportunity to exercise its right to be heard, which is – in fact – admitted by the Council and the Commission. As to the achievement of a legitimate objective, i.e., the protection of the Union budget, in the case of breaches of the principles of the rule of law, the Defendant failed to demonstrate or even mention any rule of law violations committed by the Applicant. The conflict-of-interest issues repeatedly brought up by the Council (as well as the Commission) never existed vis-à-vis the Applicant, as has been stated in our earlier submissions.

31. Unlike the Defendant, the Commission separated the first and second sub-plea but decided to respond only to the first one by dedicating several paragraphs to the matter, which, at the very least, calls into question the well-foundedness of the Defendant's objections that the argument has no structure and is incoherent. Firstly, the Commission argues that the structural issues with the PITs were raised since the beginning of the procedure under the Conditionality Regulation and in support of this, the Commission lists plenty of documents produced by it, although simultaneously admits in a footnote that most of these documents are not public[31] (¶32).Secondly, when reflecting to the arguments regarding the non-existence of conflict-of-interest issues in respect of the curators of the Foundation, the Commission invokes the paragraph in which it admitted that the specifics and the situation of the Applicant were not assessed, allegedly, as it would have been irrelevant (¶33). Thirdly, the Commission seeks to substantiate that the contested provision is within the scope of the measures provided for in the Conditionality Regulation by stating that the Conditionality Regulation is particularly relevant in case of systemic breaches. The Commission argues the applicability of the Conditionality Regulation to such breaches by referencing certain articles of said regulation as well as a judgment of the Court.[32] In conclusion, the Commission submits that, in essence, initiation of the proceedings was a must in respect of systematic infringements, '*since for individual issues Union law generally provides for leaner and more effective tools.*'[33] (¶34-36).

32. Although the Commission aims to refute and undermine the arguments developed by the Applicant, its submissions are not capable to reach that end. With reference to the contents of the documents produced by the Commission, the Applicant admittedly was not in the position to access them[34] and to learn their contents, as

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[31] Footnote N°16 Commission's Statement in Intervention
[32] Judgment of the Court of 16 February 2022, Poland v Parliament and Council, C-157/21, EU:C:2022:98
[33] Commission's Statement in Intervention ¶36
[34] See footnote N°79 Application: '*See Recital (2) Decision – the text itself on the Notification remained unavailable for the Applicant to date.*'

they were not publicly available and were not annexed to the Commission's Statement in Intervention, therefore, the fulfilment of the principle of the equality of arms is at least called into question at this point.

33. The Commission's reluctance to take into account the specifics of the Applicant as well as the curators or the Foundation or at least to consider them as relevant factors further supports the well-foundedness of the third plea and other pleas in law of the Applicant, including the violation of its right to be heard and that the Decision lacks a sufficiently solid factual basis.

34. Although the Commission wishes to substantiate its arguments by referring to systemic irregularities, which bound it to launch the procedure under the Conditionality Regulation, it fails to present or even to reference any irregularities committed or attempted by the Applicant.

35. The reference made to Article 3 Conditionality Regulation supports the hypothetical nature of the Commission's arguments as this provision contains a list of activities indicative of breaches of the principles of the rule of law. None of those could have been committed by the Applicant as a university, therefore, the precondition for initiating the procedure could not have been fulfilled. The lack of any violations on the Applicant's part renders the Commission's pleadings fundamentally unsubstantiated.

B. The second sub-plea: The Defendant misused its power

36. The power for adopting the Decision was conferred on the Defendant for '*the adoption of the Decision was the protection of the Union budget against breaches of the principles of the rule of law in Hungary*.'[35] There has been no indication or reference of any rule of law violation committed by the Applicant, who was included in a group of entities adversely affected by the contested provision for a reason which remains a mystery to the Applicant until this very day. While the provision concerning the budgetary commitments towards Hungary suspended 55% of the funds, the prohibition included in Article 2(2) Decision completely cut off the EU finances of the University as well as the professional, personal, and scientific relationships coming with those finances. The contested provision has a detrimental effect on the business, operation, market position and reputation of the Applicant, and there are possibly further negative effects which cannot be foreseen yet. Since the end achieved by the measure is other than that stated, the Applicant argued – and supported by references made to the case law – that the Defendant misused its powers (¶171-179).

37. Since the Commission added no further considerations to the statements of the Council,[36] the Applicant's arguments presented under this sub-plea are not refuted.

[35] Article 1(1) contested Decision
[36] Commission's Statement in Intervention ¶11

V. The fourth plea: infringement of the principle of proportionality

38. The principle of proportionality is one of the fundamental principles of Union law. In the present case, the legitimate objective within the framework of which proportionality shall be established is '*the protection of the Union budget against breaches of the principles of the rule of law in Hungary.*'[37] The principle of proportionality is highlighted in the Conditionality Regulation as well.[38] Notwithstanding, this case is about no danger of harm on the part of the Union budget *versus* a great deal of actual harm on the part of the Applicant.

39. Defendant sought to substantiate that the contested provision was in line with the principle by stating in recital 61 Decision that the suspension of budgetary commitments: **(i)** '*ensuing from programmes concerned once they will be approved provides for an effective and timely protection of the Union budget by preventing that the breaches of the principles of the rule of law identified in this Decision affect the budget allocated to the programmes concerned';* **(ii)** *'still allows Hungary to start implementing those programmes according to the applicable rules, and therefore preserves the objectives of cohesion policy and the position of final beneficiaries' and* **(iii)** *'is of a temporary character and does not have definitive effects'*.

40. None of these arguments is sufficient to substantiate the proportionality of the contested provision, since **(i)** no rule of law violations were committed or even attempted by the Applicant, nor does the Defendant claim otherwise; **(ii)** the Applicant has no power or authorization to implement measures to ensure the continuance of its participation in the programmes concerned; **(iii)** the effects of the prohibition cannot be considered as temporary as the Applicant already suffers substantial irreversible disadvantages as a result of the contested provision. Further, for the sake of argument, what on earth could the Applicant do to remedy the Defendant's budgetary concerns raised against Hungary? Certainly nothing at all, therefor what is the Applicant's penalized for?

41. To attain the legitimate objective pursued, measures that are detrimental to the businesses of the Applicant as well as its community cannot be considered as appropriate and proportionate, as supported by several citations from the Court's case law (¶188-195). The various interests in play should have been weighed up properly before the adoption of the Decision, a step apparently omitted by the Defendant.

42. In its Defence, the Council argued that the principle of proportionality was not infringed, since the contested Decision is appropriate for achieving its purpose, which is the protection of the Union budget. Defendant also cited Court judgments and laid a special emphasis on the ones confirming the legality of the Conditionality Regulation and referred to recitals ¶19 and ¶61 Conditionality Regulation referencing identified breaches of the principle of the rule of law (¶47-50). The Council wished

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[37] Article 1(1) Decision
[38] Recital (18) Conditionality Regulation

to substantiate the appropriateness of the contested measure by referencing a Communication of the Commission[39] as well. The Defendant once again argued the allegedly temporary character of the measure (¶51). The Council also noted that the funds not allocated to the Applicant may well be used for the benefit of other entities, i.e. Applicant's competitors (¶51). The Defendant held that the chosen measure is still the least onerous one among the five measures listed in Article 5(1)(a) Conditionality Regulation and the Council also has a degree of discretion when choosing from these measures and the Applicant failed to demonstrate that the Defendant exceeded this degree of discretion (¶53-54). Applicant submitted that the Council failed to provide any evidence that the contested provision was adopted indeed in line with the principle of proportionality. As to the judgments cited, they either support the Applicant's fourth plea or confirm the legality the Conditionality Regulation and not the contested decision itself. Since the Conditionality Regulation does not provide for any measures explicitly naming the entities maintained by PITs, the fact that budgetary corrective measures can be adopted under the Conditionality Regulation, cannot substantiate the proportionality of the contested provision.

43. As to the recitals (¶19 and ¶61) of the Conditionality Regulation refencing identified breaches invoked by the Defendant, the Applicant once again submits that the Defendant can specify not a single case, no matter how small, in which the Applicant even came close to violating the principle of the rule of law, since there is none. Without any breaches identified in respect of the Applicant, the references made by the Council are irrelevant and weightless. In its references made to the temporary character of the measure, the Defendant seemingly ignores the arguments put forward and the evidence provided by the Applicant and once again confirms that it failed and continues to fail to take into account the individual specifics of the Applicant. The detrimental effects of the measure have been demonstrated at length by the Applicant in its previous submissions as well as in this brief. Also, the fact that the Defendant itself points out that the funds '*spared*' by the exclusion of the Applicant by Article 2(2) Decision are to be awarded to the competitors of the Applicant substantially support the arguments developed mostly in the fifth plea. The Defendant attempts to substantiate the fulfilment of the principle of proportionality by stating that it chose the least onerous measure among the five measures listed in Article 5(1)(a) Conditionality Regulation. The Applicant points out that the Council seemingly misinterpreted its line of argumentation, whereas the Applicant has not argued that the Defendant did not choose the least onerous of the five different measures, but that, in the absence of an infringement of the principle of the rule of law, no such sanction should have been imposed on the Applicant at all.

44. The Commission develops its arguments though several paragraphs (¶38-50) regarding the fourth plea, however, the core of its argumentation is rather simple and straightforward. By referencing and citing the respective points of documents prepared by the Commission before the adoption of the Decision as well as the Decision itself, the Commission argues that due to the possibility that conflict-of-interest issues may hypothetically arise in respect of the members of the curatoriums

[39] See Defence footnote N°35

of PITs, irrespective of the fact that whether such issues exist in respect of any of the curators, adoption of the contested provision was the only possible and proportionate solution to ensure the protection of the Union budget.

45. The Commission repeatedly argues that neither the foundations nor the entities maintained by them should have been assessed before the adoption of the contested measure.[40] Furthermore, the Commission states that it was not necessary during the legislative process to examine other less onerous measures and argues that the Applicant fails to identify certain risks, such as: '(…) *those members* [of the curatorium] *could also have a decisive influence on the university and ensure that Union funding is channelled to other entities.*'[41]

46. The simplest way to summarize the Commission's arguments is to conclude that it wishes to defend the proportionality of the contested provision by making hypothetical statements and by repeatedly submitting that the assessment of the individual situation of the Applicant would have been irrelevant, hence none of the acting EU institutions made any effort whatsoever to learn about these entities before the adoption of the contested provision. Therefore, with respect to a provision of the national legislation applicable to senior political executives which the Commission and the Council disapproves of, hundreds or even thousands of students and researchers of the Applicant must have been deprived of the possibility to participate in the Erasmus+ Programme and the Applicant must have been exiled from prestigious research projects without any assessment taking into consideration the Applicant's organization, asset management specifics, let alone its history. The Commission's argument regarding the Applicant's omission to the fact that the curators "may" channel the Union funding to other entities is not even hypothetical, it is an irresponsible reference to hypothetical embezzlement. The general references made by the Commission to documents produced by it before the adoption of the Decision are not capable to substantiate the proportionality of the contested measure. It is rather a truthful admission of the lack of individual assessment and supports the Applicant's fourth plea in law and its other pleas, including the lack of sufficiently solid factual basis as well as the infringement of its right to be heard.

VI. The fifth plea: Distortion of market

47. The goods provided by Applicant are education, research and health care services to enhance the welfare of patients. As any other university, the Applicant is conscious of its position on the market as it competes with other universities offering the same or similar types of services. In the Application, it was specified that the relevant market is the higher education and R&DI in the field of medical sciences and the geographic market may be identified as Central Europe (¶199-200). Even though the conditions for access are practically unrestricted, the elasticity of demand is highly sensitive even to minor changes in these factors, especially in quality. Any

[40] See, in particular, Commission's Statement in Intervention ¶40, ¶43, ¶44
[41] Commission's Statement in Intervention ¶45

deterioration in quality results in a decline in demand. The Applicant argues that the prohibition of distortion of a market with no justification is embedded in the fundamental freedoms of the Union. The Applicant demonstrated that the contested provision immediately had a negative effect on its R&DI projects and jeopardized its participation in future Horizon and Erasmus+ Programmes as well, therefore, it has a detrimental effect on the Applicant’s business on the above specified markets. Also, funnelling the funds withheld from the Applicant to its close competitors worsens the created competition disparity already suffered by the Applicant. Application of dissimilar conditions to equivalent or similar business players (in the present case, to universities) results in discrimination and market distortion and such a measure without careful consideration and sound justification cannot be held legitimate.

48. The Defence provided no substantial response to the fifth plea other than labelling it as inadmissible, or in the alternative, unfounded (¶56). Hence, the Council chose the easier path and instead of assessing the arguments developed by Applicant on the merits, it simply addressed the matter by stating the non-applicability of the cited article to the present case (¶57). Without any counterarguments on the merit presented, the Applicant considers that the Defendant does not dispute its fifth plea in law on the merits and implicitly admits the market distorting effects of the contested provision.

49. The Commission adds nothing to the submissions of the Defendant; thus, the market distorting effect is not disputed by the Commission either, on the contrary, the references made to the possibility to allocate the funds withheld from the Applicant to competitors, makes the admission on the Commission’s part even more clear.

VII. Conclusions

50. For the reasons set out in the Application and its subsequent briefs and above, the Applicant requests the General Court to make the orders requested at ¶101 in the Application.

Budapest, 11 September 2024

Respectfully submitted,

Dr. Péter P. Nagy
Dr. Balázs Karsai

Schedule of annexes

No.	short description of the annex	page numbers of the first and last pages of the annex	number of the paragraph in which the item is mentioned for the first time
A.20.	List of facts acquiesced by the Defendant and the Commission	pp. 1-6.	5.