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COUNCIL IMPLEMENTING DECISION (EU) 2022/...

of ...

**on measures for the protection of the Union budget
against breaches of the principles of the rule of law in Hungary**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget¹, and in particular Article 6(10) thereof,

Having regard to the proposal from the European Commission,

¹ OJ L 433I, 22.12.2020, p. 1.

Whereas:

- (1) On 24 November 2021, the Commission sent a request for information to Hungary pursuant to Article 6(4) of Regulation (EU, Euratom) 2020/2092, to which the Hungarian authorities replied on 27 January 2022.
- (2) On 27 April 2022, the Commission sent a written notification to Hungary pursuant to Article 6(1) of Regulation (EU, Euratom) 2020/2092 (the ‘notification’). In the notification, the Commission raised its concerns and presented its findings regarding a number of issues related to the public procurement system in Hungary, including:
 - (a) systemic irregularities, deficiencies and weaknesses in public procurement procedures;
 - (b) the high rate of single bidding procedures and the low intensity of competition in procurement procedures;
 - (c) issues related to the use of framework agreements;
 - (d) the detection, prevention and correction of conflicts of interest; and
 - (e) issues related to public interest trusts.

- (3) Those issues and their repetition over time demonstrate a systemic inability, failure or unwillingness, on the part of the Hungarian authorities, to prevent decisions that are in breach of the applicable law, as regards public procurement and conflicts of interest, and thus to adequately tackle risks of corruption. They constitute breaches of the principles of the rule of law, in particular the principles of legal certainty and prohibition of arbitrariness of the executive powers and raise concerns as to the separation of powers.
- (4) In the notification, the Commission set out additional grounds and presented its findings regarding a number of issues related to investigation and prosecution, and the anti-corruption framework, including limitations to the effective investigation and prosecution of alleged criminal activity, the organisation of the prosecution services, and the absence of a functioning and effective anti-corruption framework in practice. Those issues constitute breaches of the principles of the rule of law, in particular regarding legal certainty, the prohibition of arbitrariness of the executive powers and effective judicial protection.
- (5) In the notification, the Commission set out the factual elements and specific grounds on which it based its findings and also requested Hungary to provide certain information and data regarding those factual elements and grounds. In the notification, the Commission gave two months to the Hungarian authorities to submit their observations.

- (6) On 27 June 2022, Hungary replied to the notification (the ‘first reply’). By letters of 30 June and 5 July 2022, Hungary submitted further information to complement the first reply. Moreover, on 19 July 2022, Hungary sent an additional letter proposing a number of remedial measures to address the findings in the notification.
- (7) The Commission assessed the observations submitted in the first reply and concluded that they did not allay its concerns and findings set out in the notification. Furthermore, the Commission considered that neither the first reply nor the additional letters of 30 June and 5 July 2022 contained adequate remedial measures appropriately committed in the context of Regulation (EU, Euratom) 2020/2092. Due to the late submission of the letter of 19 July 2022, it could not be taken into account in the assessment of the first reply. However, the Commission took into consideration all the relevant information in that letter in the course of the next steps of the procedure set out in Article 6 of Regulation (EU, Euratom) 2020/2092, in accordance with the principle of sincere cooperation with Member States.
- (8) In line with Article 6(7) of Regulation (EU, Euratom) 2020/2092, the Commission sent a letter to Hungary on 20 July 2022 (the ‘intention letter’) to inform the Member State of its assessment pursuant to Article 6(6) of that Regulation, and of the measures that the Commission envisaged to propose for adoption by the Council pursuant to Article 6(9) of that Regulation, in the absence of a commitment from Hungary to take adequate remedial measures. In the intention letter, the Commission gave Hungary the opportunity to submit its observations, in particular on the proportionality of the envisaged measures.

- (9) Hungary replied to the intention letter on 22 August 2022 (the ‘second reply’), in which it provided its observations on the Commission’s findings, the procedure and the proportionality of the measures referred to in the intention letter. Despite having contested the Commission’s findings, Hungary proposed certain remedial measures to address the concerns raised by the Commission. On 13 September 2022, Hungary sent the Commission a letter which included clarifications and further commitments relevant to the remedial measures proposed. In Hungary’s view, the remedial measures, including the additional commitments included in the letter of 13 September 2022, fully addressed the Commission’s concerns, and the Commission should therefore not have proposed any measures to the Council.
- (10) Considering that the conditions for the application of Regulation (EU, Euratom) 2020/2092 were met, on 18 September 2022 the Commission adopted a proposal for a Council implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (the ‘Commission's proposal’).

- (11) According to findings set out in the Commission's proposal, there are, firstly, serious systemic irregularities, deficiencies and weaknesses in public procurement procedures in Hungary. Such irregularities have been found following consecutive audits conducted by the Commission services for both the 2007-2013 and the 2014-2020 programming periods. Those audits closed with significant overall amounts of financial corrections, as well as several European Anti-Fraud Office (OLAF) investigations that led to financial recommendations for the recovery of significant amounts from Hungary. In addition, the available data indicate that there were unusually high percentages of contracts awarded following procedures in which just one single bidder participated; the attribution of contracts to specific companies, which have been gradually gaining large market shares; as well as serious deficiencies in the attribution of framework agreements. Moreover, there are concerns regarding the non-application of public procurement and conflict of interest rules to 'public interest trusts' and the entities managed by them, and the lack of transparency with regard to the management of funds by those trusts. Those issues and their recurrence over time demonstrate a systemic inability, failure or unwillingness, on the part of the Hungarian authorities, to prevent decisions that are in breach of the applicable law, as regards public procurement and conflicts of interest, and thus to adequately tackle risks of corruption. They constitute breaches of the principles of the rule of law, in particular the principles of legal certainty and prohibition of arbitrariness of the executive powers and raise concerns as regards the separation of powers.

- (12) Secondly, there are additional issues as regard limitations to the effective investigation and prosecution of alleged criminal activity, the organisation of the prosecution services, and the absence of a functioning and effective anti-corruption framework. In particular, there is a lack of effective judicial remedies by an independent court against decisions of the prosecution service not to investigate or prosecute alleged corruption, fraud and other criminal offences affecting the Union's financial interests, a lack of a requirement to give reasons when such cases are attributed or reassigned, and an absence of rules to prevent arbitrary decisions in their regard. In addition, there is a lack of a comprehensive anti-corruption strategy which covers the most relevant corruption prevention areas; an under-utilisation of the full range of preventive tools to assist the investigation of corruption, in particular high-level corruption cases; as well as an overall lack of effective prevention and repression of criminal fraud and corruption offences. Those issues constitute breaches of the principles of the rule of law, in particular regarding legal certainty, the prohibition of arbitrariness of the executive powers and effective judicial protection.

- (13) According to the Commission, the observations put forward in the replies from Hungary do not adequately address the findings set out in the notification and the intention letter. In particular, the replies provided no evidence following the recent improvements brought about by Hungary in its procurement system (as regards transparency, intensity of competition, conflicts of interests checks). While some changes took place in the Hungarian public procurement system following the Commission services' audits, there are no indications that those changes have had an impact on the level of competition on the Hungarian market. The data available to the Commission shows not only an increase in the concentration of awards in public procurement, but also an increase in the odds of winning for actors of the Hungarian ruling party. The Commission procured a study which provided a statistical empirical analysis of more than 270 000 public procurement contracts in Hungary between 2005 and 2021. The observations of the study were corroborated with findings of an examination of certain tender data regarding contracts awarded to some of the companies identified as companies with political connections. Moreover, reports by media and stakeholders were collected by the Commission in the tourism, communication and sports sectors. Hungary did not provide any evidence on the applicability (nor the application in practice) of conflict of interest rules relevant for the protection of the Union budget in relation to public interest trusts.

- (14) The identified irregularities, deficiencies and weaknesses are widespread and intertwined, which means that procedures other than those provided for by Regulation (EU, Euratom) 2020/2092 cannot address the risks for the Union budget more effectively. Even if certain means available under sectoral rules may be used, such as audits performed by Commission services, and financial corrections for irregularities not corrected by the Hungarian authorities, those measures generally relate to expenditure already declared to the Commission and the continuation of deficiencies over many years shows that financial corrections are not sufficient to protect the Union's financial interest from either current or future risks.

- (15) Concerning the observance and monitoring of the enabling conditions enshrined in Regulation (EU) 2021/1060 of the European Parliament and of the Council¹, it should be noted that the only consequence of failure to fulfil an enabling condition set out in Article 15(5) of that Regulation is that the Commission will not reimburse expenditure related to operations linked to the specific objective to the Member State in question. Regulation (EU, Euratom) 2020/2092 grants a broader range of possible measures to protect the Union's budget, including the suspension of approval of one or more programmes, as well as the suspension of commitments under shared management. The possible measures under Regulation (EU, Euratom) 2020/2092 also concern pre-financing, which is not provided for under Article 15 of Regulation (EU) 2021/1060.

¹ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ L 231, 30.6.2021, p. 159).

- (16) As regards the application of public procurement rules and their interpretation, recital 17 of Regulation (EU, Euratom) 2020/2092 clarifies that the Union legislation referred to in Article 6(1) of that Regulation is financial and sector-specific. Infringement procedures are not based on a legislative act but directly on Article 258 of the Treaty on the Functioning of the European Union (TFEU). That provision of primary law cannot be considered as ‘Union legislation’ within the meaning of Article 6(1) of Regulation (EU, Euratom) 2020/2092.
- (17) Article 22(1) of Regulation (EU) 2021/241 of the European Parliament and of the Council¹ provides that Member States are to take all the appropriate measures to protect the financial interests of the Union when implementing measures under the Recovery and Resilience Facility. In order to ensure compliance with Article 22 of that Regulation, the Commission, on 30 November 2022, presented a proposal for an implementing Decision of the Council on the approval of the assessment of the Recovery and Resilience Plan for Hungary, which contains milestones that incorporate the commitments undertaken by Hungary under the remedial measures agreed with the Commission in the framework of this procedure.

¹ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17).

The primary responsibility to comply with Union and national law when implementing measures under the Recovery and Resilience Facility remains with the Member States, in accordance with Article 22(1) of Regulation (EU) 2021/241, whereas the Commission, in accordance with Article 22(5) of that Regulation, can proceed to corrective measures in cases of fraud, corruption, and conflicts of interests affecting the financial interests of the Union that have not been corrected by the Member State, or in the case of a serious breach of an obligation resulting from the loan agreement or the financing agreement. Moreover, the milestones are conditions which require to be fulfilled in order for Hungary to be able to submit requests for future payments under the Recovery and Resilience Plan. As such, they are not able to protect the financial interests of the Union in relation to breaches of the principles of the rule of law that already affect or risk affecting the implementation in Hungary of other spending programmes financed by the Union budget in a sufficiently direct way. Therefore, the application of the provisions of Regulation (EU) 2021/241 would not allow the Commission to protect the Union budget more effectively in this case.

- (18) In light of all the foregoing, no other procedure under Union law would allow the Commission to protect the Union budget more effectively than the procedure set out in Article 6 of Regulation (EU, Euratom) 2020/2092.

- (19) The potential impact of the identified breaches on the sound financial management of the Union budget or the protection of the financial interests of the Union is considered to be particularly significant, given that those breaches are intrinsically linked to the process under which Union funds are used by Hungary in that they consist in improper functioning of the public authorities deciding on the award of contracts financed through the Union budget. In addition, if the identified breaches are coupled with the limits and obstacles in the detection, investigation and correction of fraud, identified as additional grounds related to investigation, prosecution and the anti-corruption framework, the impact can be considered even more significant.
- (20) Considering the nature of the findings in relation to public procurement, the appropriate measures to be adopted under Article 4(1) of Regulation (EU, Euratom) 2020/2092 (the ‘appropriate measures’) should concern Union funding that is mainly implemented through public procurement. The Commission audits that identified deficient and irregular public procurement processes covered the area of cohesion policy, and despite the fact that the impact of those deficiencies and irregularities on the Union budget has been financially corrected in application of the cohesion policy rules, they demonstrate a systemic inability, failure or unwillingness by the Hungarian authorities to prevent decisions that are in breach of the applicable law as regards public procurement and conflicts of interest, and thus to adequately tackle risks of corruption.

- (21) The programmes to be protected by the appropriate measures should in priority be the cohesion policy programmes 2021-2027 that are expected to be implemented mainly through public procurement by analogy to the way Hungary implemented the equivalent programmes under the multiannual financial framework 2014-2020. Those programmes are the Environment and Energy Efficiency Operational Programme Plus, the Integrated Transport Operational Programme Plus and the Territorial and Settlement Development Operational Programme Plus (the ‘programmes concerned’). As regards the programmes concerned, the level of implementation through public procurement is estimated at 85 % to 90 %.
- (22) The appropriate measures should also concern actions under Union programmes implemented under direct and indirect management, for which public interest trusts and the entities maintained by them, which are considered as government entities within the meaning of Articles 2(b) and 5(1)(a) of Regulation (EU, Euratom) 2020/2092, may be beneficiaries or implementing entities. As regards the identified breaches relevant to public interest trusts, all Union programmes implemented under direct and indirect management should be targeted by the appropriate measures.
- (23) In line with the proportionality requirements set out in Article 5(3) of Regulation (EU, Euratom) 2020/2092, the appropriate level of the measures to be applied should be determined by a percentage that reflects the ensuing risk for the Union budget.

- (24) In light of the seriousness, frequency and duration of the systemic breaches identified in public procurement, the financial risk for the sound financial management of the Union budget can be considered as very significant and therefore, justifies measures with a very high level of financial impact.
- (25) In accordance with Article 6(6) of Regulation (EU, Euratom) 2020/2092, the information received and any observations made by the Member State concerned, as well as the adequacy of any proposed remedial measures, are to be taken into account when deciding on the appropriate measures. Therefore, the remedial measures proposed by Hungary should be included in the assessment.
- (26) In its second reply, Hungary submitted 17 remedial measures, the commitments of which were complemented with a letter submitted to the Commission on 13 September 2022. According to Hungary's opinion, they would address all issues raised by the Commission in the notification. The proposed remedial measures are as follows:
- (a) reinforcing the prevention, detection and correction of illegalities and irregularities concerning the implementation of Union funds through a newly established Integrity Authority;
 - (b) an Anti-Corruption Task Force;

- (c) strengthening the anti-corruption framework;
- (d) ensuring the transparency of the use of Union support by public interest asset management foundations;
- (e) the introduction of a specific procedure in the case of special crimes related to the exercise of public authority or the management of public property;
- (f) strengthening audit and control mechanisms to guarantee the sound use of Union support;
- (g) reducing the share of tender procedures with single bids financed from Union funds;
- (h) reducing the share of tender procedures with single bids financed from the national budget;
- (i) the development of a single-bid reporting tool to monitor and report on public procurement procedures closed with single-bids;
- (j) the development of the Electronic Public Procurement System to increase transparency;
- (k) the development of a performance measurement framework assessing the efficiency and cost effectiveness of public procurements;

- (l) the adoption of an action plan to increase the level of competition in public procurement;
 - (m) training to be provided for micro, small and medium-sized enterprises on public procurement practices;
 - (n) setting up a support scheme for compensating the costs associated with participating in public procurement of micro, small and medium-sized enterprises;
 - (o) the application of ARACHNE, the Commission's risk scoring tool;
 - (p) strengthening the cooperation with OLAF; and
 - (q) the adoption of a legislative act ensuring enhanced transparency of public spending.
- (27) Thirteen of the remedial measures set Key Implementation Steps to be fulfilled by 19 November 2022. Hungary committed to inform the Commission by 19 November 2022, and every three months thereafter, about the implementation of the remedial measures, including the additional commitments contained in the letter of 13 September 2022. For four remedial measures, namely remedial measures (h) and (l) to (n), the Commission indicated that there were no immediate Key Implementation Steps, as they require a longer implementation period, and that it shall monitor their implementation as part of its monitoring of all the remedial measures, on the basis of the quarterly reporting to which Hungary committed by its letter of 19 November 2022, until 31 December 2028.

- (28) In general, Hungary committed to take remedial measures proposed in its second reply to address the issues raised in the notification unconditionally and to maintain them and the related legislation in force without any time limit and to enforce duly the rules set out therein.
- (29) As clarified in the explanatory memorandum accompanying the Commission's proposal, the Commission considered that the proposed remedial measures, taken together, would in principle be capable of addressing the issues 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, provided that all the measures are correctly and effectively implemented.

- (30) However, the Commission also added that the detailed implementing rules for the proposed remedial measures were still to be determined, in particular how key elements of the measures would be transposed in the actual legal texts to be adopted for the implementation of the remedial measures. Given that several of the issues identified in Hungary are not only about changes in the legal framework, but more prominently about the concrete implementation of changes in practice, the latter requiring a more extended timeframe to produce concrete results, pending the implementation of at least the key elements of some of the remedial measures at the time of the Commission's proposal, as indicated in the timelines of the remedial measures submitted by Hungary in its second reply, a risk for the Union budget remained. Pending the entry into force of key legislative texts that would implement many of the proposed remedial measures and taking into account the assessment contained in the explanatory memorandum accompanying the Commission's proposal, as well as the possibility that the measures might not be correctly implemented, or that their effectiveness would be weakened in the details of the measures, the Commission estimated that the level of risk for the Union budget corresponded to 65 % of the programme concerned, i.e. 5 percentage points less than the risk estimated in the absence of remedial measures. It therefore proposed that the Council adopt appropriate measures under Article 6(9) of Regulation (EU, Euratom) 2020/2092.

- (31) Taking into account that Hungary had committed to take remedial measures to address the situation in accordance with a detailed calendar, and that the Commission considered that the proposed remedial measures, taken together, if correctly specified and implemented in accordance with that detailed calendar, could in principle be capable of addressing the issues, on 13 October 2022 the Council, following a request from Hungary, decided that exceptional circumstances existed pursuant to Article 6(10) of Regulation (EU, Euratom) 2020/2092 sufficient to justify extending the deadline for the adoption of the implementing decision by two additional months, so as to give the Commission and the Council sufficient time to assess the adoption and effective implementation of the remedial measures, bearing in mind their large number and technical complexity.
- (32) In order to meet the deadlines set in the Key Implementation Steps, Hungary proceeded with the adoption of several legislative acts between the end of September 2022 and the beginning of October. Further intense discussions between the Hungarian authorities and the Commission services were necessary to try to ensure that those acts would be fully aligned with the remedial measures and that they would be effective. As a result of those discussions, the Hungarian Government submitted to the National Assembly a so-called ‘service package’ on 15 November 2022, with a number of proposed amendments to the legal texts that were adopted at the end of September 2022 and the beginning of October.

The service package is composed of two draft bills, one (T/2033) for adoption according to the ordinary procedure, for which the final vote took place on 22 November 2022, and the other draft bill (T/2032) for adoption according to the procedure applicable for cardinal acts (requiring a two-thirds majority), for which the final vote took place on 7 December 2022. The National Assembly adopted both acts. By letters submitted to the Commission on 19 November, 26 November, 6 December and 7 December 2022 Hungary informed the Commission about the actions taken to implement the commitments previously undertaken.

- (33) On 30 November 2022, the Commission published a Communication on the remedial measures notified by Hungary, providing the Council with an assessment of the adequacy of the remedial measures as adopted by Hungary as of 19 November 2022. Following a request made by the Council on 6 December 2022, the Commission, on 9 December 2022, provided an updated assessment on the further measures taken by Hungary up to 7 December 2022. The Commission communication of 30 November 2022 and the updated assessment of 9 December 2022, taken together with the explanatory memorandum accompanying the Commission's proposal, constitute the basis for the Council's deliberations.

- (a) **Reinforcing the prevention, detection and correction of illegalities and irregularities concerning the implementation of Union funds through a newly established Integrity Authority**
- (34) Hungary committed to establishing a new Integrity Authority with the objective of reinforcing the prevention, detection and correction of fraud, conflicts of interest and corruption, as well as other illegalities and irregularities in the implementation of any Union financial support. The creation of the Integrity Authority, a new body in the Hungarian context, is a horizontal measure that aims at remedying the systemic breaches of the principles of the rule of law concerning public procurement affecting the Union's financial interests. It is therefore one of the central remedial measures proposed by Hungary to address the concerns raised by the Commission.

- (35) Hungary included in the proposed remedial measure a number of elements which were positively assessed at the time of the Commission's proposal, in particular regarding : (i) the purpose and objectives of the new Integrity authority, (ii) the scope of its mandate and extensive powers, including powers to instruct contracting authorities to suspend tenders, powers to request administrative investigative bodies to carry out investigations, powers to recommend the exclusion of specific economic operators from Union funding; the right to request a judicial review of all decisions of authorities concerning public procurement procedures that involve any Union support (and that may be subject to judicial review) etc.; (iii) the rules on the appointment of the Integrity Authority's board and on the involvement of an 'eligibility committee' aimed at guaranteeing that the Integrity Authority will be fully independent. In addition, Hungary committed that the Integrity Authority will rely on facts established by judicial decisions, it will be able to seize the courts, and its own decisions will be subject to judicial review.

For this reason, Hungary also committed that all courts in Hungary hearing civil, administrative and criminal cases including those relevant for the protection of the financial interests of the Union will comply with the requirements of independence, impartiality and being established by law, in accordance with Article 19(1) of the Treaty on European Union (TEU) and the relevant Union *acquis*. Hungary also undertook to take Key Implementation Steps for the creation of the Integrity Authority by 19 November 2022. Following the submission of the Commission's proposal, Hungary adopted on 4 October 2022 the Act establishing the Integrity Authority (Act XXVII of 2022 on the control of the use of European Union budget funds, the 'Integrity Authority Act'), which entered into force on 11 October 2022. Further amendments to the Integrity Authority Act were introduced as part of the two draft bills composing the 'service package' submitted to the National Assembly on 15 November 2022 and voted upon on 22 November 2022 and on 7 December 2022. As required in the remedial measure, Hungary consulted the Council of Europe and the OECD in the process leading to the adoption of the Integrity Authority Act, and took into account certain recommendations. In parallel to the legislative procedures, the Hungarian authorities launched on 23 September 2022 a selection and appointment procedure for members of the Eligibility Committee, and then on 14 October 2022, for members of the board of the Integrity Authority, who were finally appointed by 4 November 2022. The Integrity Authority held its first official meeting on 18 November 2022.

- (36) However, as the Commission found in its communication of 30 November 2022 and confirmed on 9 December 2022 after a thorough assessment, the regulatory framework for the Integrity Authority as set out in the Integrity Authority Act does not fulfil certain commitments taken under the remedial measure, which, therefore, cannot be considered fully effective and adequate pursuant to Regulation (EU, Euratom) 2020/2092. The weaknesses, risks and shortcomings of the remedial measure, which compromise the effectiveness and independence of the Integrity Authority and its capacity to address the Commission's findings, are in particular the following: (i) the lack of a clear rule stating that the Integrity Authority will retain its competence after a project is withdrawn from Union financing; (ii) the weaknesses of the system for the judicial review of the decisions of contracting authorities that do not follow the recommendations of the Integrity Authority; (iii) the weaknesses of the dismissal procedure; (iv) the direct, as opposed to the supervisory, powers of the Integrity Authority in relation to the various groups of declarants, and the lack of a transfer of powers to the Integrity Authority to verify the asset declarations of members of the Government; (v) the limited scope related to the lack of inclusion of all 'high-risk officials' in the scope of the Integrity Authority's verification powers in relation to asset declarations. The Council considers that for these reasons as further exposed in the Commission's communication, the weaknesses identified, and in particular the ones constraining the powers of the Integrity Authority, are of such gravity as to seriously undermine the capacity of the Integrity Authority to remedy the systemic breaches of the principles of the rule of law concerning public procurement affecting the Union's financial interests.

(b) Anti-Corruption Task Force

- (37) Hungary committed to the establishment of an Anti-Corruption Task Force with the task of, inter alia, examining the existing anti-corruption measures and elaborating proposals concerning the improvement of prevention, detection, investigation, prosecution and sanctioning of corrupt practices. A key element of the remedial measure concerned the full, structured and effective participation of non-governmental actors active in the field of anti-corruption along with government representatives. Furthermore, Hungary committed to extensive consultations with national and international stakeholders, including the Commission, during the preparation of the draft legislation. Hungary undertook to take Key Implementation Steps in order to set out the regulatory framework for the new Anti-Corruption Task Force by 30 September 2022. In line with the remedial measure, the relevant provisions of the Integrity Authority Act provide that 50 % of the members of the new Anti-Corruption Task Force are to represent non-governmental actors and be selected based on an open, transparent, non-discriminatory selection process with objective criteria related to expertise and merits. Following the submission of the Commission's proposal, Hungary consulted the OECD and the Council of Europe, and provided for the establishment of the new Anti-Corruption Task Force in the framework of the Integrity Authority Act. The new Anti-Corruption Task Force was finally established on 1 December 2022.

(38) In light of those developments, based on the Commission's assessment, the Council considers that Hungary took the relevant Key Implementation Steps and that the regulatory framework for the new Anti-Corruption Task Force as set out in the Integrity Authority Act fulfils the commitments set out in the remedial measure.

(c) Strengthening the anti-corruption framework

(39) Hungary undertook to adopt by 30 September 2022 anti-fraud and anti-corruption strategies defining the tasks of entities involved in the implementation of any Union financial support in relation to the prevention, detection and correction of fraud, conflict of interest and corruption. Hungary further committed to extend the personal and material scope of assets declarations as of 1 November 2022. This remedial measure has a horizontal and systemic nature in order to fight against corruption and ensure transparency in the political sphere. It is therefore one of the central remedial measures proposed by Hungary.

- (40) Following the submission of the Commission’s proposal, Hungary undertook a number of steps to address the Key Implementation Steps for that remedial measure. On 30 September 2022, Hungary adopted the strategy against fraud and corruption for the 2021-2027 programming period, and for the implementation of the Recovery and Resilience Plan (Government Decision 1470/2022). The strategy was subsequently amended, and a new version was adopted and published on 15 November 2022 (Government Decision 1540/2022). The National Assembly adopted the ‘Act on Asset Declarations’ (Act XXXI of 2022) on 25 October 2022, which entered into force on 1 November 2022 with certain exceptions. On 15 November 2022, Hungary submitted to the National Assembly an amending bill concerning the ‘Act on Asset Declarations’, as part of the service package adopted on 7 December 2022.

- (41) Regarding the anti-fraud and anti-corruption strategies, the Commission found in its Communication of 30 November 2022 that, despite the not meeting the agreed deadline due to the adoption of amendments, Hungary nevertheless fulfilled the commitments set out in the remedial measure. Regarding the asset declarations, the Commission found that in line with the remedial measure, the Act on Asset Declarations extends the personal scope of asset declarations to include persons entrusted with senior political functions and members of the National Assembly, as well as their relatives living in the same household. The Act also extends the material scope of asset declarations to include all relevant assets. However, on the basis of the Commission's assessment, important weaknesses, risks and shortcomings remain in the regulatory framework for asset declaration set up by Hungary, and in particular: (i) the lack of clarity and legal certainty relating to the disclosure obligations for real estate including property outside the jurisdiction of Hungary; (ii) the lack of clarity on the personal, material and temporal scope of the declaration of assets, income and economic interests of certain executives, officials and Members of the National Assembly, and for their spouses or cohabitants and child(ren) living in the same household; (iii) the failure to include in the Act on Asset Declarations an explicit reference to the establishment of a system of asset declarations filed electronically in a digital format, to be stored in a public database searchable without fees or the need to register. The Council considers that for these reasons as further set out in the Commission's communication, the weaknesses identified create possible loopholes in the law and as a consequence undermine the effectiveness of the remedial measure.

(d) Ensuring the transparency of the use of Union support by public interest asset management foundations

- (42) Hungary committed to ensure the transparency of the use of Union support by public interest asset management foundations by amending the relevant regulatory framework by 30 September 2022. Following the submission of the Commission's proposal, the National Assembly adopted a legislative Act amending certain Acts concerning public interest asset management foundations performing public duty, 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) which entered into force on 13 October 2022.

- (43) In line with the remedial measure, 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. However, the regulatory framework still does not prevent top-level officials, including senior political executives from the National Assembly and Hungary's autonomous bodies, from sitting on boards of public interest asset management foundations, as repeatedly requested by the Commission. Moreover, Hungary has reintroduced as of 1 November 2022 the possibility (by means of an exception from the general prohibition) for senior political executives to have other remunerated employment, including on boards of public interest asset management foundations. The Council considers that for these reasons as further set out in the Commission's communication, the weaknesses of the regulatory framework combined with the new legislative developments aggravate the possible conflict of interest that the remedial measure was meant to address and therefore renders it inadequate to address the concerns originally raised by the Commission.

- (e) **Introduction of a specific procedure in the case of special crimes related to the exercise of public authority or the management of public property**
- (44) Hungary committed to establish a new judicial review procedure concerning special criminal offences related to the exercise of public authority or the management of public property. Under the remedial measure, the new procedure must provide for the judicial review of the decision of the prosecution service or the investigating authority to dismiss a crime report or terminate the criminal proceedings (i.e. to close a criminal investigation without an indictment) regarding corruption and corruption-related practices. The new procedure must confer on an investigating judge the authority to order the commencement or the continuation of the criminal proceedings. Any natural person and legal person, with the exception of public authorities, could file motions under the procedure, which could also lead to the possibility to file an indictment before a court. This remedial measure is a horizontal measure that aims at remedying structural problems with the effectiveness of prosecutorial action in Hungary and ensuring that effective and deterrent measures are taken to ensure the protection of the Union's financial interests, in line with Article 325 TFEU. It is therefore one of the central remedial measures proposed by Hungary to address the concerns raised by the Commission.

- (45) Hungary included in the proposed remedial measure a number of elements which were positively assessed at the time of the Commission's proposal, such as the possibility for legal entities to file for the judicial review procedure, a guaranteed privileged procedural position for the person reporting a crime, a reference to the fact that exclusive competence to hear the cases under the new procedure will be attributed to a specialised court (i.e. the Buda Central District Court), a reference to the fact that all courts and the investigative judges involved in the new procedure will be compliant with Article 19(1) TEU and the relevant Union *acquis*, and a reasonable timeframe for the procedure in general. Hungary also undertook to take Key Implementation Steps for the adoption and entry into force of the necessary amendments to the Criminal Procedure Code and of relevant implementing regulations by 15 November 2022. Following the submission of the Commission's proposal, the National Assembly adopted an Act amending the Act XC of 2017 on the Code of Criminal Procedure (the 'Act on Judicial Review') on 3 October 2022, which entered into force on 15 November 2022 and was further modified following exchanges with the Commission and adopted in an amended version on 22 November 2022. Hungary initiated an ex-ante review before the Hungarian Constitutional Court, which found the Act on Judicial Review in compliance with the principle of the prosecution monopoly as laid down in the Hungarian Fundamental Law. Hungary finally submitted to the Commission the draft Decrees laying down the implementing regulations necessary for the application of the new review procedure and committed to adopt them without delay so to ensure their entry into force on 1 January 2023.

- (46) The Act on Judicial Review implements a number of the commitments proposed in the remedial measures by introducing relevant amendments to the Code of Criminal Procedure. Additional measures taken by Hungary in the framework of the amendment of the Act on Judicial Review, such as the power for the Integrity Authority to file a motion for revision or repeated revision and the abolition of the power of the Prosecutor General to file an extraordinary remedy against decisions, have also been welcomed by the Commission. However, as shown by the Commission's assessment, specific provisions of the Act on Judicial Review introduce a margin of discretion in the procedure which could be used to affect the outcome following a motion for revision or for prosecution, compromising the effectiveness and overall adequacy of the remedial measure. In particular, (i) the applicable rules do not clearly state the legal consequences for the prosecutor of a judicial decision setting aside its decision following a motion for revision. Since there is no guarantee that judicial review decisions will be duly followed up through correct prosecutorial action, the discretion granted to the prosecutor seriously undermines the effectiveness and thus the adequacy of the remedial measure. Furthermore (ii) for the cases where a motion for prosecution may be filed, the Act on Judicial Review requires an examination of the ground for the motion for prosecution by the trial court in camera and without hearing evidence, which is additional to the preliminary examination of formal grounds established under the new procedure.

On the basis of the Commission's assessment and of the reasons provided therein, such an examination by the trial court of the ground for the motion for prosecution amounts to a substantive filtering which would risk anticipating or preventing a ruling on the merits, without the possibility to seek and hear evidence in the case. This represents an unnecessary step and undermines the effectiveness of the remedial measure. Finally, the Act on Judicial Review does not clarify the scope of application in time of the new rules and, in particular, fails to clarify that the new procedure will also apply to (non-time-barred) criminal offences committed before 1 January 2023. The Council considers that for these reasons and those further set out in the Commission's communication, the weaknesses identified are of a such gravity as to seriously compromise the adequacy of the remedial measure to address the issues of ineffective investigations, prosecution and sanctioning of criminal offences in the domain of public property.

(f) Strengthening audit and control mechanisms to guarantee the sound use of Union support

- (47) Hungary committed to strengthen audit and control mechanisms to guarantee the sound use of Union support by including in the relevant national legislation provisions to strengthen rules and procedures to more effectively prevent, detect and correct conflicts of interest in the use of Union funds in accordance with Article 61 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council¹, including an effective control mechanism over the validity of conflict of interest declarations. Following the submission of the Commission's proposal, Hungary undertook a number of steps to address the Key Implementation Steps for this remedial measure. In particular, the National Assembly adopted and further modified Act XXVIII of 2022 which established the Directorate of Internal Audit and Integrity in the Prime Minister's Office and provides it with guarantees of independence and effectiveness. The service package also included a bill changing the regulatory framework governing the Directorate-General for Audit of European Funds ('EUTAF'). Hungary further adopted Government Decree 373/2022, amending decree 374/2022 as well as Government Decree 463/2022, strengthening the rules and procedures to more effectively prevent, detect and correct conflicts of interest. Based on the Commission's communication of 30 November 2022 and the reasons provided therein, the Council considers that Hungary has taken the Key Implementation Steps and that the relevant legislative texts fulfil the commitments set by the remedial measure.

¹ 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, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

- (g) Reducing the share of tender procedures with single bids financed from Union funds**
- (48) Hungary undertook to reduce the share of tender procedures financed from Union funds and closed in 2022 with single bids below 15 %, as measured with the Single Market Scoreboard methodology, by 31 December 2022. The Key Implementation Step for this measure was the performance of the first audit by the EUTAF on the compliance with the Single Market Scoreboard methodology by 30 September 2022. Hungary submitted the report on 7 October 2022 and, following comments from the Commission, submitted a revised final version on 3 November 2022. The audit concluded that the methodology used was adequate and in line with the methodology used by the Single Market Scoreboard, with one exception, for which EUTAF has formulated a recommendation. Based on the Commission's communication of 30 November 2022 and the reasons provided therein, the Council considers that Hungary took the Key Implementation Step as required by the remedial measure.

(i) The development of a single-bid reporting tool to monitor and report on public procurement procedures closed with single-bids

- (49) Hungary committed to develop a new monitoring and reporting tool for measuring the share of procurement procedures resulting in single bids financed from national resources or from Union support or from both by 30 September 2022. Following the submission of the Commission's proposal, Hungary undertook a number of steps to address the Key Implementation Steps for that remedial measure. In particular, Hungary developed a new monitoring and reporting tool which has been audited as operational, functional and capable of monitoring the ratio of single bid procurement procedures. In line with the remedial measure, the reporting tool will be developed further by 31 December 2022 to include data on geographic indications. Based on the Commission's communication of 30 November 2022 and the reasons provided therein, the Council considers that Hungary has taken the Key Implementation Steps and that the single bid reporting tool has been developed and is operational as required by the remedial measure.

(j) The development of the Electronic Public Procurement System to increase transparency

- (50) In order to increase transparency in public procurement, Hungary committed to create and publish on the Electronic Public Procurement System website a database containing information on all contract award notices of public procurement procedures in a structured form, including company identification numbers and the names of each individual member of the consortia and the subcontractors. That database is to be updated regularly and be available to the public free of charge. Following the submission of the Commission's proposal, Hungary informed the Commission that the development of a database with the required functionalities was completed by 30 September 2022. Based on the Commission's assessment of the functionalities of the new database, the Council considers that Hungary has taken the relevant Key Implementation Step for this measure and fulfilled it.

(k) The development of a performance measurement framework assessing the efficiency and cost-effectiveness of public procurements

- (51) In order to comply with its commitment to develop a performance measurement framework to assess the efficiency and cost effectiveness of public procurements by 30 September 2022, to be operational by 30 November 2022, Hungary adopted on 5 September 2022 Government Decision 1425/2022. On 30 November 2022, Hungary published on the Electronic Public Procurement System website a document laying down the performance measurement framework. Based on the Commission's assessment of the framework laid down in Government Decision 1425/2022, the Council considers that Hungary has taken the relevant Key Implementation Step and fulfilled its commitments for this measure.

(o) The application of ARACHNE, the Commission's risk scoring tool

- (52) As regards the concerns raised about the ability of Hungary to improve conflict of interest checks regarding the use of Union funds, Hungary undertook to apply procedures for the systematic and extended use of all functionalities of the single data-mining and risk-scoring tool (ARACHNE) which the Commission puts at the disposal of Member States for any Union support and for all programming periods, to effectively prevent and detect conflicts of interest, fraud, corruption, double funding and other irregularities. On 30 September 2022, the Hungarian Government adopted Government Decree 373/2022 and amending Decree 374/2022, which entered into force on the same day and set out provisions to ensure the transmission of certain data to ARACHNE on a regular basis. Also on the same day, the first package of data was transmitted to ARACHNE. Based on the Commission's assessment that the Government Decree 373/2022 and amending Decree 374/2022 set out the detailed rules for the systematic and effective use of ARACHNE, the Council considers that Hungary has taken the relevant Key Implementation Step and fulfilled its commitments for this measure.

(p) Strengthening cooperation with OLAF

- (53) Hungary committed to strengthen cooperation with OLAF by designating a competent national authority to assist OLAF when carrying out on-the-spot checks in Hungary when an economic operator subject to those checks refuses to cooperate. Hungary also committed to introduce a dissuasive financial-type sanction to be imposed in case an economic operator refuses to cooperate with OLAF for the purposes of OLAF's on-the-spot checks and inspections. Following the submission of the Commission's proposal, the National Assembly adopted on 4 October 2022 Act XXIX of 2022, which amended existing legislation so as to designate the National Tax and Customs Administration as the competent national authority to assist OLAF and to introduce a dissuasive financial sanction to be imposed in case an economic operator refuses to cooperate with OLAF. Based on the Commission's assessment, the Council considers that Hungary has taken the relevant Key Implementation Steps and fulfilled its commitments for this measure.

(q) The adoption of a legislative act ensuring enhanced transparency of public spending

- (54) As part of the set of remedial measures, Hungary committed to adopt by 31 October 2022 a legislative act ensuring enhanced transparency of public spending by setting out an obligation for all public bodies to proactively publish a pre-defined set of information on the use of public funds into a central register. Following the submission of the Commission's proposal, the National Assembly adopted on 8 November 2022 Act XL of 2022, which was subsequently amended on 22 November 2022 as part of the service package. An additional amendment of the provisions regarding the establishment of an additional administrative procedure for transparency was adopted on 7 December 2022. The Commission's assessment concluded that Hungary took the Key Implementation Steps required, despite a delay in their implementation. However, on the basis of the Commission's assessment as updated on 9 December 2022, a weakness remains in the regulatory framework which undermine its effectiveness, in particular the lack of an obligation for all contracting authorities to publish information in the absence of data on the 'responsible body' for public expenditure, contracting authority or service providers, suppliers, and capacity providers in the minimum set of data to be uploaded in the central register.

- (55) In summary, Hungary took a number of steps to address the (legislative and non-legislative) Key Implementation Steps listed in the annex to the explanatory memorandum accompanying the Commission's proposal, and many of the commitments undertaken by Hungary in the remedial measures may be considered as fulfilled, as set out above. These positive assessments are without prejudice to further developments in relation to those remedial measures which require to be substantiated in practice, or which require a longer implementation period in line with the engagements taken by Hungary.
- (56) Nevertheless, important weaknesses, risks and shortcomings remain in a number of remedial measures. In particular, significant weaknesses continue to seriously undermine the adequacy of the remedial measures which have horizontal, structural and systemic nature and are of central importance to remedy the systemic breaches of the principles of the rule of law concerning public procurement, the effectiveness of prosecutorial action and the fight against corruption in Hungary. Those weaknesses therefore jeopardise the effectiveness of the remedial measures taken as a whole.

- (57) Bearing in mind the horizontal, structural and systemic character of the measures which remain to be fulfilled, the fact that Hungary has satisfactorily fulfilled a number of commitments in relation to other punctual remedial measures is not sufficient to address the identified breaches of the principles of the rule of law and the impact they have or risk having on the Union budget. As clarified by the Commission in its updated assessment of 9 December 2022, with the sole exception of the remedial measure relating to public interest asset management foundations, the remedial measures have to be assessed in their entirety, as a global package, in light of their overall adequacy to put an end to the situation and on the basis of a qualitative, and not merely quantitative, assessment.
- (58) As a consequence, in light of the assessment carried out above, it should be concluded that the remedial measures notified by Hungary, taken as a whole, as adopted and in view of their details, and the ensuing uncertainty about their application in practice, do not put an end to the identified breaches of the principles of the rule of law. Because the identified cases of noncompliance refer to breaches of a systemic character, they largely affect the sound financial management of the budget of the Union and the protection of the financial interests of the Union in a sufficiently direct way.
- (59) When the Council finds that the conditions laid down in Regulation (EU, Euratom) 2020/2092 are met, it is to adopt measures of an appropriate level so as to ensure that the Union budget is protected from the actual or potential impact which ensues from the identified breaches of the principles of the rule of law.

(60) In view of the breaches of the principles of the rule of law identified in this Decision, and of their significant impact on the Union budget, and given that the remedial measures so far adopted by Hungary present significant weaknesses that seriously compromise their adequacy to address those breaches, the Council considers that the ensuing risk for the Union budget remains high. According to Recital (18) of Regulation (EU, Euratom) 2020/2092, the degree of cooperation of the Member State concerned should be duly taken into account when determining the measures to be adopted. The Commission initially considered that a reasonable approximation for the risk for the budget correspond to 65 % of the funds of the programmes concerned. However, in light of the number and significance of remedial measures that have been satisfactorily implemented by Hungary to address the identified breaches of the principles of the rule of law, it would be a 'reasonable approximation' to establish the risk for the budget in 55 % of the programmes concerned. Accordingly, 55 % of the commitments in the programmes concerned, once approved, should be suspended. That level can be considered as a reasonable approximation of the impact on, or the serious risks for, the Union budget of the identified breaches of the principles of the rule of law, taking into account the degree of cooperation of Hungary during the procedure, as resulting by the remedial measures implemented, and is therefore proportionate in view of the objective of protecting the Union budget laid down in Regulation (EU, Euratom) 2020/2092.

- (61) As regards the choice among the various types of measures envisaged by Article 5 of Regulation (EU, Euratom) 2020/2092, the Council considers that the suspension of budgetary commitments ensuing from programmes concerned once they will be approved provides for an effective and timely protection of the Union budget by preventing that the breaches of the principles of the rule of law identified in this Decision affect the budget allocated to the programmes concerned. At the same time, the suspension of the budgetary commitments 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. Moreover, unlike other possible measures, the suspension of budgetary commitments is of a temporary character and does not have definitive effects in accordance with Article 7(3) of Regulation (EU, Euratom) 2020/2092. The measure can therefore be lifted under the procedure foreseen by that Article without loss of Union funding, provided that the situation is fully remedied within two years. In line with the proportionality principle, the chosen measure is therefore sufficient to achieve the protection of the Union budget while being the least onerous, taking the circumstances of the case into account.

- (62) Concerning the identified breaches in relation to public interest trusts, the regulatory framework in Hungary has weaknesses, as set out above, which have not remedied the risk of conflict of interest that the remedial measure was meant to address. In light of the inadequacy of the remedial measure, a serious risk for the Union budget remains and can best be addressed by a prohibition on entering into new legal commitments with any public interest trust and any entity maintained by them under any programme under direct or indirect management. Such a measure does not affect the overall allocations of funds from Union programmes under direct and indirect management which may still be used for other entities and is therefore sufficient to achieve the protection of the Union budget while being proportionate to what is strictly necessary to achieve that objective.
- (63) Pursuant to Article 5(2) of Regulation (EU, Euratom) 2020/2092, this Decision does not affect the obligations of Hungary to implement the programmes and funds concerned by this Decision, and in particular its obligations towards final recipients or beneficiaries, including the obligation to make payments under the applicable sector-specific or financial rules. Hungary has to report to the Commission on its compliance with those obligations every three months from the adoption of this Decision.
- (64) Hungary should inform the Commission on a regular basis of the implementation of the remedial measures to which it has committed, and in particular of those which require to be substantiated in practice or which require a longer implementation period.

- (65) The Commission should continue monitoring the situation in Hungary and exercise, as appropriate, its prerogatives under Regulation (EU, Euratom) 2020/2092. In particular, the Commission should swiftly assess any development in the implementation of the remedial measures proposed by Hungary so as to submit to the Council without delay the necessary proposals for the lifting of the measures under Article 7 of Regulation (EU, Euratom) 2020/2092 in case the conditions for their adoption are no longer met. The Commission should keep the Council periodically informed,

HAS ADOPTED THIS DECISION:

Article 1

1. The conditions set out in Article 4(1) of Regulation (EU, Euratom) 2020/2092 are fulfilled for the adoption of appropriate measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.
2. The remedial measures proposed by Hungary on the basis of Article 6(5) of Regulation (EU, Euratom) 2020/2092, are not fully adequate to address the findings set out in the Commission notification sent to Hungary on 27 April 2022.

Article 2

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

2. Where the Commission implements the Union budget in direct or indirect management pursuant to of Article 62(1) points (a) and (c), of Regulation (EU, Euratom) 2018/1046, no legal commitments shall be entered into with any public interest trust established on the basis of the Hungarian Act IX of 2021 or any entity maintained by such a public interest trust.

Article 3

Hungary shall inform the Commission by ... [OJ: three months after the date of adoption of this Decision], and every three months thereafter, of the implementation of the remedial measures to which Hungary committed with its second reply, including the additional commitments included in Hungary's letter of 13 September 2022.

Article 4

This decision shall take effect on the day of its notification.

Article 5

This Decision is addressed to Hungary.

Done at ...,

For the Council

The President
