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PROPOSAL

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To:	General Secretariat of the Council
No. Cion doc.:	COM(2022) 485 final
Subject:	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

Delegations will find attached document COM(2022) 485 final.

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Brussels, 18.9.2022
COM(2022) 485 final

2022/0295 (NLE)

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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

(1) Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget[1] ('Conditionality Regulation') provides in its Article 4(1) that 'appropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.'

(2) Article 6(1) of the Conditionality Regulation provides that 'where the Commission finds that it has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, it shall, unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively, send a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings.'

(3) Pursuant to Article 6(9) of the Conditionality Regulation, 'Where the Commission considers that the conditions of Article 4 are fulfilled and that the remedial measures, if any, proposed by the Member State under paragraph 5 do not adequately address the findings in the Commission's notification, it shall submit a proposal for an implementing decision on the appropriate measures to the Council within one month of receiving the Member State's observations or, in the event that no observations are made, without undue delay and in any case within one month of the deadline set'.

(4) On 24 November 2021, the Commission sent a request for information ('Request for information') to Hungary pursuant to Article 6(4) of the Conditionality Regulation to which the Hungarian authorities replied on 27 January 2022.

(5) On 27 April 2022, the Commission sent a written notification to Hungary pursuant to Article 6(1) of the Conditionality Regulation (the 'notification'). The notification presented the findings of the Commission regarding a number of issues concerning the public procurement system in Hungary, including systemic irregularities, deficiencies and weaknesses in public procurement procedures; a high rate of single bidding procedures and low intensity of competition in procurement procedures; issues related to the use of framework agreements; issues in the detection, prevention and correction of conflicts of interest; concerns related to the use of Union funds by public interest trusts. These 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. Those breaches constitute breaches of the principle 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. In addition, the notification presented findings regarding investigation and prosecution, and the

[1] OJ L 433I, 22.12.2020, p. 1.

anti-corruption framework: there are additional issues as regard limitations to 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. These issues also 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. As specified in the notification, these breaches affect or seriously risk affecting the financial interests of the Union, and other procedures set out in Union legislation would not allow to protect them more effectively than the Conditionality Regulation. With the notification, the Commission also requested Hungary to provide certain information and data regarding the factual elements and grounds on which it had based its findings in the reply to the Request for information. Questions were also asked as regards potentially related issues concerning the independence of the judiciary. 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, the Hungarian Minister of Justice 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, which due to the submission at that very late stage of the process, shortly before the Commission was to adopt the next step of the procedure, could not be taken into account for the assessment of the first reply. The Commission took into consideration all the relevant elements in those additional letters in the course of the next stage of the procedure provided for by the Conditionality Regulation, in accordance with the principle of sincere cooperation with Member States.

(7) The Commission considered that the first reply and the additional letters sent on 30 June and 5 July 2022 did not contain adequate remedial measures appropriately committed in the context of the Conditionality Regulation.

(8) In line with Article 6(7) of the Conditionality Regulation the Commission sent a letter to Hungary on 20 July 2022 (the "intention letter") to inform that Member State of its assessment pursuant to Article 6(6) of the Conditionality Regulation and of the measures it envisaged to propose for adoption by the Council, pursuant to Article 6(9) of that Regulation, in the absence of adequate remedial measures. In line with Article 6(7) of the Conditionality Regulation, Hungary was therefore invited to submit its observations, in particular on the proportionality of the envisaged measures, within one month.

(9) Hungary replied to the intention letter on 22 August 2022 (the 'second reply') , within the one month deadline provided by Article 6(7) of the Conditionality Regulation.

(10) In its second reply, Hungary reiterated the arguments raised in its first reply, and expressed criticism on the way the procedure has been conducted. It contested the proportionality of the measures envisaged in the intention letter. At the same time, Hungary submitted seventeen remedial measures. This submission has followed technical discussions, conducted at the level of the services, between the Commission and the Hungarian authorities, in accordance with the principle of sincere cooperation with Member States. On 13 September 2022, Hungary sent the

Commission a letter which included clarification and further commitments under the remedial measures proposed (the "September letter").

2. ISSUES INDICATIVE OF BREACHES OF THE PRINCIPLES OF THE RULE OF LAW

2.1. Systemic irregularities, deficiencies and weaknesses in public procurement

2.1.1. Commission findings

(11) The Commission found in its notification and confirmed in the intention letter that there are systemic irregularities, deficiencies and weaknesses in public procurement procedures in Hungary. Such irregularities have been found following consecutive audits by the Commission services conducted for both the 2007-2013 and the 2014-2020 programming periods, as well as several European Anti-Fraud Office (OLAF) investigations that led to financial recommendations for the recovery of significant amounts. Based on the systemic nature of the irregularities, their recurrence over time and the magnitude of the financial corrections that were decided, among other things, the Commission found that it had reasonable grounds to consider that the conditions set out in Article 4 of the Conditionality Regulation were fulfilled.

(12) In addition, the available data indicate that there have been unusually high percentages of contracts awarded following public procurement procedures in which just one single bidder participated; attribution of contracts to specific companies, which have been gradually gaining large parts of the market; as well as serious deficiencies in the attribution of framework agreements. The Commission considered these elements as indicators of a clear risk for transparency and competition detrimental to the sound financial management of Union funds used in the relevant procedures, as well as an indicator, under certain circumstances, of an increased risk of corruption and conflict of interest.

(13) Moreover, the Commission referred to serious deficiencies identified by the Commission services concerning public procurement within certain framework agreements and found that there were serious concerns regarding future framework agreements.

2.1.2. Observations submitted by Hungary

(14) Hungary provided a description of its legislation and practice as regards public procurement. Hungary pointed out that, in its view, its public procurement system is both operational and in line with the European Union public procurement directives. In this respect, Hungary referred to certain provisions of Act CXLIII of 2015 on public procurement, as amended following Commission services' audits and to a number of elements of this public procurement system, as well as actions, that it took in recent years to promote competition and increase transparency[2]. On this basis, Hungary argued that the public procurement practice in Hungary would now be in

[2] Hungary referred to (i) amendment of the Public Procurement Act by Act No LXXXIII of 2018 abolishing the previous limitation of subcontracting, (ii) increasing of DPPC's staffing and operation of an internal training system, (iii) improvement of the DPPC's internal procedures and control practices and issuance of guidance note for practitioners in contracting authorities, (iv) review of the rules governing the use of assistance from certain Union funds.

line with the European Union's requirements in terms of prevention and detection of irregularities in public procurement.

(15) Concerning the irregularities referred to by the Commission, Hungary argued that the relevant financial corrections were only partially linked to weaknesses in public procurement that the weaknesses identified during audits were not of a systemic nature and that they did not lead to interruption or suspension of payments.

(16) In addition, Hungary argued that given that the Conditionality Regulation applies only as from 1 January 2021, the alleged irregularities identified before that date cannot be attributed to breaches of the principles of the rule of law under that Regulation. Hungary also argued that to establish that systemic deficiencies and irregularities identified in the course of Commission services audits constitute breaches of the principles of the rule of law in the sense of Article 2(a) in combination with Article 4(2)(a) of the Conditionality Regulation, it must also be established that the decisions of the authorities or bodies concerned cannot be subject to effective judicial review[3].

(17) According to Hungary, the fact that the share of public procurement procedures with single bids for Union funds is lower than the one for national funds shows that Hungary's control system in the context of Union funds is capable of effectively counteracting the factors behind limited competition in public procurement.

(18) Hungary also contests the veracity and reliability of the methodology and the underlying data contained in the studies on the intensity of competition in public procurement and the concentration of awards to a small number of companies mentioned by the Commission in the notification[4] and the intention letter.

(19) Concerning framework agreements, Hungary argued that the level of competition ensured is high. The tender procedure is conducted in two stages for the effective award of the contract: first, bidders compete for the right to take part in the framework agreement and then, if specific contracts are awarded following re-opening of competition, market competition comes back into play between the economic operators. According to Hungary, no decision has been taken at central government level, requiring anyone to apply framework agreements during the current multiannual financial framework (MFF) period.

2.1.3. Commission assessment

(20) Although Hungary introduced certain changes in its legislation and management of the public procurement system, given the data available, these changes do not seem to have led to improvements as regards the result of public procurement procedures in practice. Despite the actions taken in recent years, sufficient transparency has not yet been achieved and effective and efficient external scrutiny, which is one of the purposes of transparency, cannot be effectively conducted.

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3 According to Hungary's opinion, this would derive from paragraph 325 of the judgement of the Court of Justice of the European Union (the "Court") in case C-157/21.

4 *New Trends in Corruption Risk and Intensity of Competition in the Hungarian Public Procurement from January 2005 to April*, Flash Report 2020:1, May 2020; Corruption Research Center Budapest, https://www.crcb.eu/wp-content/uploads/2020/05/2020_hpp_0520_flash_report_1_200526_.pdf.

(21) Contrary to what Hungary argued, the financial corrections requested for the period 2014-2020 were mainly linked to systemic weaknesses in the management of public procurements, as it is documented by the results of the relevant audits carried out. These financial corrections were the highest for any Member State of the Union during that period[5], a fact that was not contested by Hungary. Moreover, these audits related also to the functioning of the management and control system to ensure compliance with public procurement rules. Thus they concerned systemic issues[6]. The Commission cannot agree with Hungary's argument that the absence of interruption or suspension of payments would mean that the Commission did not consider the presence of a serious deficiency. In that regard, it must be recalled that even a risk above 5% of the expenditure, the first flat rate financial correction set in the delegated regulation[7], can relate to a serious deficiency. A serious deficiency in the management and control system is not defined based only on quantitative thresholds, but also and specifically in this case in relation to breaches of the essential key requirements or a combination of requirements set in the applicable rules with potential systemic effects.

(22) As regards the temporal scope of application of the Conditionality Regulation, systemic breaches of the principles of the rule of law that have been established prior to 1 January 2021, have not been remedied and are recurrent and ongoing beyond that date, may be covered by the Conditionality Regulation, given the systemic and repetitive or continuous nature of the breaches, and the ongoing serious risk that they represent for the sound financial management of the Union budget and the protection of the Union's financial interests after 1 January 2021.

(23) The Commission cannot agree with the argument of Hungary that systemic deficiencies and irregularities may only constitute breaches of the principles of the rule of law within the meaning of the Conditionality Regulation, if the decisions of the authorities or bodies concerned cannot be subject to effective judicial review. It is clear from the Conditionality Regulation that any systemic deficiencies and irregularities indicative of breaches of the principles of the rule of law identified by the Commission are self standing and can be covered by the Conditionality Regulation. Thus no situation indicative of a breach of the principles of the rule of law needs an additional condition to be taken into account under the Conditionality Regulation[8].

(24) The Commission cannot agree either with the argument put forward by Hungary that as the share of public procurement procedures with single bids for Union funds

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5 Country Report Hungary 2020 Brussels, 26.2.2020 SWD (2020) 516 final, p. 43, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0516.

6 In particular Audit REGC214HU0068, cited in footnotes 10 and 13 of the notification, was an early preventive system audit.

7 Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund, OJ L 138, 13.5.2014, p. 5.

8 In paragraph 325 of its judgement in case C-157/21 , the Court does not add an additional condition to any type of breach of the principles of the rule of law within the meaning of the Conditionality Regulation, but only clarifies elements of the general concept of rule of law.

appear to be lower than the one for national funds, it must be concluded that Hungary's control system in the context of Union funds is capable of effectively counteracting the factors behind limited competition in public procurement. The fact that the single-bid rate is lower for procurement involving Union funds than for procurement involving national funds does not mean per se that controls in procurement involving Union funds work properly. This is also reflected in the Council recommendation on the 2022 National Reform Programme of Hungary, which confirms that these issues remain valid for the future[9][10].

(25) Hungary provided no evidence on the recent improvements in the procurement system (in particular as regards transparency, intensity of competition, conflicts of interests checks). The data available to the Commission shows not only an increase of concentration of awards in public procurement, but also an increase in the odds of winning of companies that can be considered as politically connected with actors of the Hungarian ruling party ("politically connected"). The Directorate-General for Budget procured a Study which provided statistical empirical analysis of more than 270,000 Hungarian public procurement contracts between 2005 and 2021[11]. The study demonstrates that the probability of obtaining public contracts (both nationally and EU-funded) of companies that can be considered as politically connected were between 1.5 to 2.1 times higher than the probability of success for companies that are not considered as politically connected in the period 2005-2010. This difference increased significantly in the period 2011-2021. Considering only the EU-funded contracts for the period after 2011, the probability of successful bidding for companies that can be considered as politically connected exceeded by 3.3 to 4.4 times the probability for companies that are not considered as politically connected. In the same period, considering both nationally and EU-funded contracts, the probability of obtaining public contracts for companies that can be considered as politically connected was between 2.5 to 3 times higher than those for companies that are not considered as politically connected. The study concludes that the direct or indirect political connections of some companies that can be considered as politically connected is a decisive factor for increasing their probabilities of success in tender procedures, as compared to companies that are not considered as politically connected, and for receiving a higher aggregated value of contracts won. In addition, it shows that the effect is stronger depending on how close an economic operator is

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9 Council recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary, paragraph 30 and Recommendation 4, at https://data.consilium.europa.eu/doc/document/ST-9764-2022-INIT/en/pdf : 'The procurement market remains vulnerable to anticompetitive practices. The proportion of contracts awarded in procedures where there was just one bidder remains among the highest in the Union. […] In February 2021, the government set itself an ambitious target of reducing the percentage of public-procurement procedures with only a single bid to less than 15%, *although without a fixed timeline*' (Recommendation 4 'Improve competition in public procurement. emphasis added').

10 See also Public Procurement Authority (2021), Flash Report: Hungarian Public Procurement in Numbers. In recent years, after 2018, a worsening trend in the overall number of single bid procurement procedures has begun, available at https://kozbeszerzes.hu/media/documents/FLASH_REPORT-2021.pdf.

11 Study on concentration of awards and potential risks of fraud, corruption and conflict of interest in public procurement procedures in Hungary with focus on EU funded public procurements - Empirical analysis of Hungarian public procurement data from 2005 to 2021, Corruption Research Center Budapest. The study was sent to Hungary separately for information purposes.

to the ruling party. In some cases, the odds of winning public contracts for companies that can be considered as politically connected is estimated up to 130% higher than for companies that are not considered as politically connected in the period after 2011. This data establishes a constant growing trend and includes the year 2021. The observations were corroborated with findings of an examination of certain tender data regarding contracts awarded to some of the companies identified as companies that can be considered as politically connected. Moreover, reports by media and stakeholders were collected in the tourism, communication and sports sector, pointing in the same direction.

(26) Concerning framework agreements, the Commission notes that it stems from the nature of the framework agreement that, once such an agreement is signed, companies that did not participate in the original process leading to the agreement cannot submit bids. Thus, given the signficiant irregularities in the conduct of public procurement procedures of such agremeents, established in Commission services audits, the significant amounts covered by framework agreements envisaged in sectors such as the IT sector, and their long duration, it is very likely that only certain companies grouped in certain consortia participating in each of the different agreements would be awarded all contracts involving Union funds in the relevant sector for the period 2021-2027.

2.2. Detection, prevention and correction of conflicts of interest; concerns regarding 'public interest trusts'

2.2.1. Commission findings

(27) The Commission raised concerns about the ability of Hungary to improve checks regarding conflicts of interest in the use of Union funds through specific IT tools, such as Arachne (i.e. the single data-mining and risk-scoring tool that the Commission puts at the disposal of Member States), due to the features of those tools and the data uploaded therein by the Hungarian authorities for analytical purposes.

(28) The Commission also raised concerns about public interest trusts not being subject to rules under the EU public procurement directives. It also raised concerns about issues related to conflict of interests and transparency for public interest trusts, including the explicit legal exception of members of the boards of these trusts from conflict of interest requirements and conflict of interest rules not being applicable to members of Parliament, state secretaries and other public officials of the government who may serve at the same time as board members of such trusts.

2.2.2. Observations submitted by Hungary

(29) Concerning conflict of interest checks, Hungary did not submit the information requested by the Commission but indicated that it regularly sends data to Arachne and it also uses it to a certain extent, while recalling that the use of Arachne is not compulsory under EU law. While contesting the usefulness of Arachne and arguing that the Hungarian IT system (FAIR EUPR) is more efficient, it referred to the ongoing negotiations of its Recovery and Resilience Plan (RRP) in relation to its commitment for the extensive use of Arachne in this respect.

(30) As regards the applicability of public procurement rules to public interest trusts, Hungary submitted that such concerns are merely theoretical, as those trusts are

already considered "contracting authorities" for public procurement purposes under the currently applicable rules (and in particular under the Hungarian Public Procurement Act). Concerning conflict of interest requirements for members of the board of those trusts, Hungary argues that the Commission's concerns are a mere hypothesis, while clearly indicating that the members of the board of such trusts are expressly excluded from the application of conflict of interest rules. It further pointed to a number of exclusion and conflict of interest rules that are allegedly contained in the articles of associations of all these entities.

2.2.3. Commission assessment

(31) Concerning the arguments raised by Hungary on Arachne, the Commission notes that, as a follow up of the 2016 preventive system audit[12], the Commission services concluded that the Hungarian IT system FAIR EUPR cannot be considered to have equivalent functionalities with Arachne and that the data uploaded by the Hungarian Authorities do not include certain categories of data[13] which are necessary for risk test functionalities.

(32) The Commission considers that even in the case where public interest trusts would qualify as contracting authorities because they meet the requirements of Article 2(1)(4) of Directive 2014/24/EU[14], this does not mean that they are considered as contracting authorities in all instances. Given the nomination rules of the members of the board there can be uncertainty as regards the 'state control' criterion set by the directive, while the threshold relevant to the 50% of state funding may not always apply. Therefore, public interest trusts will not be considered as contracting authorities within the meaning of the public procurement directives in all instances.

(33) As regards the issues related to conflict of interests and transparency of public interest trusts, Hungary did not provide any arguments in relation to the explicit legal exception of members of the boards of the trusts from conflict of interest requirements. Furthermore, Hungary did not provide more detailed information about these articles of association (e.g. if these provisions are to be included by law in the articles of associations of all public interest trusts) nor did it provide evidence on possible controls of conflict of interests conducted for the members of the boards of trustees of public interest trusts, as specifically requested. The Commission notes in this respect that the establishment of private law entities to which the state donated significant public assets may imply lack of public control over the functioning and governance of these entities. In particular, following the transfer of the founder's rights from the competent Minister to the board of trustees, the state seems to lose any form of control over these trusts. Furthermore, the Commission also notes, in the 2022 Rule of law Report, that conflicts of interest rules are not applicable to members of Parliament, state secretaries and other public officials of the government who serve, at the same time, as board members of public interest trusts, despite the

12 On the Operational programme Economic Development and Innovation.

13 Eg. supplier and contract level.

14 Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p.65.

fact that these entities receive significant public funding, entailing increased risks of corruption[15].

3. ADDITIONAL GROUNDS RELATED TO INVESTIGATION, PROSECUTION, ANTICORRUPTION FRAMEWORK

3.1. Investigation and prosecution

3.1.1. Commission findings

(34) The notification and the intention letter pointed out a serious risk of weakening the effective pursuit of investigations and prosecutions in cases involving Union funds, due to the concentration of powers in the hands of the Prosecutor General's Office, the strictly hierarchical organisation of the prosecution service, the lack of a requirement to give reasons when cases are attributed or reassigned, the absence of rules to prevent arbitrary decisions that could hamper an effective investigation and prosecution policy, as well as the lack of judicial review of decisions by the investigating authorities or the prosecution service not to pursue a case. In this respect, the Commission referred to Hungarian Country Chapter of the Commission 2021 Rule of Law report[16], pointing to the recommendations regarding prosecutors issued by the Council of Europe Group of States against Corruption (GRECO) since 2015[17] and to the lack of effective remedies against decisions of the prosecution service not to investigate or prosecute alleged criminal activity detrimental to the public interest, including corruption and fraud affecting the EU's financial interests and embezzlement of public funds[18].

(35) As Hungary only cooperates bilaterally with the European Public Prosecutor's Office (EPPO) and is not a participating Member State[19], OLAF remains the sole Union investigative administrative body competent to investigate allegations of fraud, corruption or any other illegal activity affecting the financial interests of the Union.

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15 See page 17 of the Commission Staff Working Document 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, Accompanying the document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Rule of Law Report, The Rule of law situation in the European Union, SWD(2022) 517 final "2022 Rule of law Report for Hungary".

16 Commission Staff Working Document 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary, SWD(2021) 714 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021SC0714, page 8.

17 GRECO Fourth evaluation round – Evaluation report of 27 March 2015, Greco Eval IV Rep (2014) 10E, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c6b9e.

18 Commission Staff Working Document 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary, SWD(2021) 714 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021SC0714, footnote 58.

19 Non-participating EU Member States cooperate bilaterally with EPPO.

3.1.2. Observations submitted by Hungary

(36) Hungary contested the reference by the Commission to GRECO recommendations that remain unaddressed, and compared Hungary's rate of implementation with that of other Member States, based on the latest data available from GRECO[20].

(37) Hungary also highlighted that it is not obliged to participate in the EPPO and stressed that it has concluded a cooperation agreement with it and that the European Chief Prosecutor stated in an interview that the Hungarian prosecution service replied to all EPPO's requests. Hungary argued that in the Member States which are parties to enhanced cooperation on the establishment of the EPPO, the EPPO is a body acting in its own right and acting independently of the national investigating authorities and public prosecutor's offices. For this reason, national law enforcement agencies do not deal with matters falling within the competence of the EPPO. By contrast, cooperation with OLAF can indeed have an efficiency-enhancing effect, as OLAF cooperates with national authorities, complementing their capabilities. In addition, Hungary highlighted that apart from Hungary, four other EU Member States are not members of the EPPO and that the efficiency of the prosecution services of these countries is not a matter of concern for the Commission.

(38) As regards (i) the possibility for the Prosecutor General to directly or indirectly instruct prosecutors and to attribute or remove cases, and (ii) the set of criteria for the transfer of cases between subordinate prosecutors, Hungary referred to the relevant provisions in national law and argued that the hierarchical structure of the prosecution service cannot in itself be a rule of law issue and it disputed the Commission's claim that this structure may affect the effectiveness of the adjudication of criminal cases. Hungary also stated that during the mandate of the current Prosecutor General, the latter has not removed cases from prosecutors. Hungary further referred to the possibility for the Union to exercise the victim's rights in the context of criminal proceedings related to fraud affecting the Union's financial interests and to the possibility to file a complaint against acts of the investigative authority or to act as a substitute private prosecutor. Hungary also stated that in cases initiated following transmission of a judicial recommendation from OLAF, the Hungarian prosecution service would always send decisions regarding dismissal of criminal proceedings to OLAF, on the basis of the cooperation arrangement concluded with OLAF on 11 February 2022. Hungary added that the failure of the Union to challenge the relevant decisions or to act as substitute private prosecutor would indicate its agreement with or non-objection to the said decisions.

3.1.3. Commission assessment

(39) The Commission set out the grounds regarding investigation and prosecution in connection with the other issues it raised in this case, notably irregularities, deficiencies and weaknesses in public procurement, and as such they were not based exclusively on the concerns at issue in the GRECO recommendations. A comparison of Hungary's performance in addressing the relevant GRECO recommendations with other Member States' performance does not address the concerns raised by the Commission. The Commission further notes in this respect that, under the

[20] GRECO 22nd General Activity Report (2021), available at https://rm.coe.int/greco-general-activity-report-2021/1680a6bb79.

Conditionality Regulation, the assessment of each case, the range and scope of evidence, is performed on its own merits, taking into account all relevant circumstances. Furthermore, although GRECO's most recent evaluation[21] of the degree of implementation of relevant recommendations by Hungary noted a slight improvement, a number of relevant recommendations in relation to corruption prevention as regards prosecutors remain not or only partly implemented.

(40) Contrary to what Hungary seems to argue in its second reply, the Commission did not imply that Hungary would be obliged to join the EPPO. The Commission is also fully aware of the bilateral cooperation between Hungary and EPPO, and welcomes a good response from Hungary to EPPO's requests, in line with its duty of sincere cooperation. That being said, in the absence of Hungary's participation in the EPPO, the Hungarian prosecution service is the only office conducting criminal investigations into crimes affecting the EU financial interests. Therefore, Hungary's non-participation in the EPPO is relevant in the light of concerns regarding the effective functioning of the Hungarian prosecution service. Furthermore, for Hungary and as set out in the notification, OLAF remains the sole Union investigative administrative body competent to investigate allegations of fraud, corruption or any other illegal activity affecting the financial interests of the Union. Whether or not a Member State participates in EPPO, it remains essential to have in place an effective and independent national prosecution service, a robust anti-corruption framework as well as an effective cooperation with OLAF.

(41) Concerning the observations Hungary submitted on the prosecution service, the Commission took note of the information provided, which confirmed the strictly hierarchical structure of the prosecution service and described the requirements for the removal and transfer of cases and the rules on disciplinary proceedings. Hungary did not provide complete replies relevant to the organisation and functioning of the prosecution service, including regarding proceedings relevant to OLAF judicial recommendations to allay the Commission concerns. Thus, concerns remain on systemic issues relevant to the actual proper functioning of investigative authorities and the prosecution service in relation to the investigation and prosecution of crimes or breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, as the discretionary powers of the prosecution service are amplified by its strictly hierarchical structure. The Commission is of the view that the extensive powers of the Prosecutor General coupled with the absence of checks and balances within the prosecution service may affect the effective functioning of the service, with an impact on the protection of the financial interests of the Union.

(42) The Commission disagrees with the argument of Hungary that not challenging a decision or not acting as substitute private prosecutor would indicate agreement with or non-objection to a decision to terminate proceedings. Not only does the argument not take into account decisions not to investigate or to terminate investigation of crimes that are relevant for the protection of the financial interests of the Union, but it also aims at shifting the responsibility for prosecutorial action to the Union, contrary to the division of responsibilities between the Union and the Member States, of which Article 325 Treaty on the Functioning of the European Union (TFEU) is an

[21] See GRECO Fourth Evaluation Round – Second Interim Compliance Report.

explicit expression. Similarly, the provision of the decision to dismiss proceedings on the basis of the administrative cooperation arrangement with OLAF cannot be understood to indicate agreement with or non-objection to a decision to terminate proceedings.

(43) In this regard, the Commission notes its assessment as endorsed by the Council in the context of the 2022 European Semester, by which '[w]hen serious allegations arise, there is systematic lack of determined action to investigate and prosecute corruption cases involving high-level officials or their immediate circle. Accountability for decisions to close investigations remains a matter of concern as there are no effective remedies against decisions of the prosecution service not to prosecute alleged criminal activity'[22], an issue leading to the recommendation to '[r]einforce the anti-corruption framework, including by improving prosecutorial efforts […]'[23]. The Commission further notes, that in the context of the 2022 Rule of law Report for Hungary it has been recommended to Hungary to strengthen its track record of investigations, prosecutions and judgments in high-level corruption cases[24].

3.2. Anticorruption framework

3.2.1. Commission findings

(44) The Commission noted that the anti-corruption strategy or the wider framework (including, for instance, rules on conflicts of interest, beneficial ownership, lobbying and declaration of assets) appeared not to contain provisions or activities regarding the effective prevention and repression of criminal offences that may affect the sound financial management of the Union budget or the protection of the financial interest of the Union. It also referred to persisting concerns regarding the prevention and correction of high-level corruption and noted that the Hungarian authorities had not provided information regarding the measures taken to recover the amounts affected by the irregularities which led to the withdrawal of projects from Union funding, nor did they provide data on recoveries. In that context, the Commission also pointed at limitations in national legislation regarding cooperation in case of resistance from economic operators that would affect the effectiveness of cooperation with OLAF.

3.2.2. Observations submitted by Hungary

(45) Hungary questioned the Commission's reference to the Corruption Perceptions Index (CPI), which, together with other indicators, suggests that Hungary ranks among the lowest Member States for performance on preventing, detecting and correcting corruption. In this respect, Hungary referred to the Joint Research Centre (JRC) analysis published in 2018[25], which called for caution when interpreting the CPI's results. Hungary also referred to the Eurobarometer 502 on corruption perceptions

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22 Council recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary, paragraph 26, at https://data.consilium.europa.eu/doc/document/ST-9764-2022-INIT/en/pdf.

23 Council recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary, Recommendation 4, at https://data.consilium.europa.eu/doc/document/ST-9764-2022-INIT/en/pdf.

24 2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary, available at https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf, p. 2.

25 See https://publications.jrc.ec.europa.eu/repository/handle/JRC113251.

(an indicator not cited in the notification) published in June 2020, showing that Hungary ranked better than eight other Member States. Furthermore, Hungary mentioned a Eurojust report of May 2022[26] to confirm that Hungary ranks in the middle in terms of involvement in corruption cases.

(46) In reference to the anti-corruption framework, Hungary referred to the Corruption Prevention Strategy 2020-2022 and contested the Commission's finding that the deadline for implementation of (almost half) of the measures was extended. According to Hungary, the reason for that would be that the COVID-19 pandemic made it impossible to carry out training, consultations or research physically and this is the reason why its implementation was extended to 30 June 2023. Moreover, Hungary indicated that the specific measures of intervention and timeline of the Anti-Corruption Strategy 2020-2022 were included in Government Decision No 1328/2020 of 19 June 2020.

(47) Hungary also contested that notifications from administrative authorities on possible irregularities reported by whistle-blowers play a smaller role in criminal investigations by indicating that the National Protective Service (NVSZ) does not have powers to investigate but verifies whether the allegations are correct and initiates appropriate follow up. It also contested the Commission's finding that the National Tax and Customs Authority can start proceedings only if investigative authorities have also opened criminal inquiries and referred to the relevant provisions in national legislation.

(48) Concerning asset declarations, Hungary stated that the Hungarian system of asset declaration for Members of the National Assembly and senior political executives is a transposition of the system used by the European Parliament as a good international practice.

(49) In addition, although initially Hungary argued that the EU legislation and Member States' legislation do not specifically define the concept of high-level corruption, in the second reply it referred to information it provided in the context of the 2022 Rule of law report as regards the fight against high level corruption. In addition it contested the scope of corruption under Union law.

3.2.3. Commission assessment

(50) It is to be noted that (i) the Commission clearly indicated that the CPI was taken into account as a complementary indicator, (ii) Hungary itself acknowledged that it was among the worst performers (the second last) in the 2021 CPI and, importantly (iii) the methodology to calculate the CPI score was changed immediately after the JRC's analysis to comply with the Commission's recommendations[27]. Concerning Hungary's argument based on the Special Eurobarometer, the Commission notes that the Special Eurobarometer on corruption 523[28], published on 13 July 2022, indicates that 91% of Hungarian respondents consider corruption widespread in their country,

[26] Eurojust Casework on Corruption: 2016-2021 Insights, May 2022, available at https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-casework-on-corruption-2016-2021-insights-report.pdf.

[27] See https://images.transparencycdn.org/images/CPI2020_TechnicalMethodologyNote_ENv2.pdf .

[28] https://europa.eu/eurobarometer/surveys/detail/2658

far above the EU average which corresponds to 68%. In addition, there are indications that more and more people consider that there is corruption between the business and politicians with 74% of people asked considering that the only way to succeed in business is to have political connections. Regarding the reference to the Eurojust report, the Commission recalls that Eurojust registers only cross-border cases[29]; thus, as such, the report is an indicator amongst others of the state of corruption registered within an individual Member State, and of the effectiveness of national authorities in tackling corruption without a cross-border element.

(51) In relation to the argumentation submitted on the measures under the Anti-corruption strategy, the Country Report in the context of the 2022 European Semester states that '[h]ad they been implemented, these measures would have helped to more effectively detect and prosecute corruption in public institutions and state-owned enterprises'[30]. The 2022 Rule of law Report for Hungary refers to this issue as well[31]. Furthermore, the Commission considers that several of the measures whose deadline for implementation has been extended to 2023 would not have been impeded by the COVID-19 pandemic[32].

(52) The Commission notes that as regards the 'relatively smaller role' played by preventive tools in criminal investigations, relevant information was received from the Hungarian prosecution service in the context of the preparation of both the 2021 and 2022 Commission Rule of Law Reports[33]. The prosecution service considers the National Protection Service to be the main and indispensable source for evidence-gathering to initiate corruption investigations and prosecutions. In the same context, the Hungarian authorities themselves indicated that criminal proceedings for corruption offenses are mainly initiated on the basis of the criminal investigation activities of the investigating authorities, with the majority of the investigated cases being detected by the (secret surveillance of the) National Protective Service[34].

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29 See https://www.eurojust.europa.eu/about-us/what-we-do, as well as the first point of the Executive Summary of the Eurojust Report cited by Hungary.

30 Commission Staff Working Document 2022 Country Report – Hungary Accompanying the document Recommendation for a Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary, Brussels, 23.5.2022, SWD(2022) 614 final, p. 14.

31 See Commission 2021 Rule of Law Report – Country Chapter on the rule of law situation in Hungary, SWD(2021) 714 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0714, page 13.2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary, available at https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf, p. 12.

32 That is the case, for instance, for (a) the development of an automated decision-support system to improve the transparency and accountability of the decision-making process (new deadline 31 January 2023), (b) a casebook on tackling corruption for practitioners (new deadline 30 June 2023), (c) data entries in the risk assessment system of the National Protection Service (new deadline 30 June 2023), (d) a legal framework on corruption in major infrastructure investments (new deadline 30 June 2023), (e) surveys on integrity management models for state entities and state-owned enterprises (deadline 30 June 2023) and (f) implementation report of the tasks set out in the Strategy 2020-2022 by the Minister of Interior (deadline 31 May 2023 for the report of the Ministers; 30 June 2023 for the summary report of the Minister of Interior)

33 See also 2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary, available at https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf, p. 13.

34 See Commission 2021 Rule of Law Report – Country Chapter on the rule of law situation in Hungary - See Commission Staff Working Document 2021 Rule of Law Report – Country Chapter on the rule of

Information resulting from detection tools, such as asset declarations, whistle-blower disclosures and registries, plays a relatively minor role in corruption investigations[35].

(53) In relation to the National Tax and Customs Authority, the Commission notes that Hungary itself acknowledges that such checks can take place only in case of a suspicion of criminal offences by the investigating authority, which confirms the findings in the notification.

(54) Moreover, it is important to note that State bodies with supervisory functions have seen political appointments raising questions as to their impartiality in detecting corruption[36]. Deficient independent oversight mechanisms and close interconnections between politics and certain national businesses are conducive to corruption[37].

(55) Concerning the argumentation provided by Hungary on the asset declarations, the Commission notes that long-standing concerns remain as regards the effective and transparent supervision, verification and enforcement of rules of codes of conduct, conflicts of interest and asset declarations for members of Parliament and other high-risk officials[38] . The amendments to the asset declarations rules for members of Parliament introduced in July 2022 do not aim to address these concerns. The new rules result in even less stringent requirements for asset declarations compared to the previous one applicable until 31 July 2022, as members of Parliament are no longer obliged to report on their assets[39]. In order to assess the effectiveness of an asset declaration system, one should take into account the overall situation to which such system applies. As explained in the notification, in the intention letter and above, the Hungarian context raises concerns and it therefore requires a more comprehensive asset declaration system.

(56) Hungary referred in its second reply to open investigations in high-level corruption cases that it mentioned in the context of the 2022 Rule of law report. This illustrates that in essence it understood the concept of high-level corruption and the difference with low-level/petty corruption, irrespective of the definition of corruption offences in EU or national law. At the same time, although the Commission welcomed the information provided, the latter does not amount to demonstrating a robust track record of investigations of corruption allegations concerning high-level officials and

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law situation in Hungary, SWD(2021) 714 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0714, page 13.

35 See also 2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary, available at https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf, p. 13

36 See, in this respect, 2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary, available at https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf, footnote 92.

37 See, in this respect, 2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary, available at https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf, footnote 93.

38 GRECO Fourth Evaluation Round – Second Interim Compliance Report, p. 5.

39 There is only a requirement to declare revenues and holdings, and not assets. Asset declarations need to include assets in the literal sense, i.e. immovable real estate properties, valuable movable possessions (such as vehicles, vessels, valuable antiques and works of art, etc.), savings in bank deposits and in cash, management arrangements, trusts (including any relation a public official or family member have regarding a trust), private equity funds, life insurance policies, and beneficial ownership information.

their immediate circle, which remains a serious concern[40]. Thus, it cannot be considered that Hungary addressed the concerns regarding the prevention and correction of high-level corruption.

4. CONCLUSION OF COMMISSION'S ASSESSMENT AS REGARDS BREACHES OF THE PRINCIPLES OF THE RULE OF LAW

(57) In light of all the foregoing, the Commission considers that the issues identified in the notification and reiterated in the intention letter are still valid and they constitute systemic breaches of the principles of the rule of law within the meaning of Article 2(a) of the Conditionality Regulation, in particular of the principles of legal certainty and prohibition of arbitrariness of the executive powers, pursuant to Article 4(1) of the Conditionality Regulation in light of Article 3(b) thereof. These concerns relate to several of the situations listed in Article 4(2) thereof, in particular:

- (a) the proper functioning of authorities implementing the Union budget, […] in particular in the context of public procurement procedures;
- (b) the proper functioning of the authorities carrying out financial control, monitoring and audit and the proper functioning of effective and transparent financial management and accountability systems;
- (e) the prevention and sanctioning of fraud, […], corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union […];
- (h) Other situations […] that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union, represented in this case by the constant failure to ensure that the regulatory framework and practice in public procurement avoid risks of corruption and other irregularities in the management of Union funds.

5. OTHER PROCEDURES DO NOT ALLOW TO PROTECT THE UNION BUDGET MORE EFFECTIVELY

5.1. Commission initial assessment

(58) The Commission considers that no other procedure under Union law would allow it to protect the Union budget more effectively than the procedure set out by the Conditionality Regulation. The identified deficiencies, weaknesses, limits and risks are widespread and intertwined. This prevents other procedures to be more effective than that provided for by the Conditionality Regulation. For more than ten years, Hungary has been the addressee of recommendations and corrections due to weaknesses and serious irregularities, in particular in the public procurement domain. Even if the Commission took action each time it identified breaches of public

[40] See, in this respect, 2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary, available at https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf, page 14.

procurement rules or applicable law to protect the Union budget based on procedures set out in Union legislation, year after year, programming period after programming period, public procurement in Hungary continued to present deficiencies and weaknesses that affected the sound financial management of the Union budget and the protection of the financial interests of the Union.

(59) The preventive approach of the Commission services audits showed, on the one hand, that Hungary has not been able to ensure the effective functioning of the authorities in charge of implementing and monitoring the Union budget, and, on the other hand, the need for constant, widespread and forward-looking action by the Commission to protect that budget.

(60) As regards the very recent reforms concerning public interest trusts, the retrospective nature of the procedures set out in other Union legislation, coupled with the serious risks that Union funds may be earmarked and disbursed without checking conflict of interest and not necessarily in compliance with procurement rules, makes the procedure established by the Conditionality Regulation the most effective instrument to protect the Union budget.

(61) Even if the use of certain other means available under sectoral rules could be envisaged, such as audits by the Commission services, which may identify irregularities not prevented, identified or corrected by the Hungarian authorities, those measures generally relate to expenditure already declared to the Commission. Financial corrections are not a sufficient remedy either in this case, as in principle they are not of a preventive nature and they may not always relate to systemic issues.

(62) Even a pro-active approach from the Commission, such as the Commission services' preventive audits, would remain limited to the specific funds concerned by the applicable sectoral rules. In addition, such an approach would not allow the Commission to protect the budget more or sufficiently effectively, as it would focus on specific programmes without addressing the full scope of the weaknesses identified.

(63) These weaknesses are reinforced by the concerns regarding investigation and prosecution, as well as the limits of the anti-corruption framework. These concerns and limits are particularly relevant in the case where projects that are investigated by OLAF are withdrawn from Union funding, as this generally entails that the root cause for the weakness is not addressed and will recur.

(64) In practice, these circumstances point to the conclusion that irregularities may also affect a significant part of the operations that have not been investigated or audited, taking into account that when irregularities are indeed uncovered, Union funds are replaced with national funds which are likely to reach their designed recipients, possibly without concrete consequences for the administrative or criminal irregularities committed, enabling the irregularities to continue or recur in other operations that are not investigated or audited, and without the adoption of effective and deterrent measures as required by Article 325(1) TFEU.

(65) In the same way, agreements, action plans and other instruments could in principle improve proper investigation of fraud, corruption or other relevant breaches of Union law or criminal offences affecting the Union's financial interests. However, given the

lack of evidence of their effective implementation, they cannot be considered as such as capable of protecting against serious risks for the sound financial management of the Union budget and the financial interests of the Union.

(66) In conclusion, the Commission's concerns in the case of Hungary affect a number of key areas for the implementation of the Union budget and the compliance with sound financial management principles and, cumulatively, they pose serious risks to the Union's financial interests. Indeed, there are issues in the implementation of the Union's budget in Hungary which do not seem to be properly investigated due to structural, legal or practical limits or obstacles in the detection, investigation and correction of fraud and other irregularities; this, constitutes an overall situation which directly and seriously risks affecting the Union's financial interests. In this respect, the issues identified are so widespread and serious that the overall financial risks for the Union budget and the Union's financial interests exceed the risks that can be addressed by other procedures set out in different sectoral instruments. Consequently, in the Commission's view, because of the complexity and intertwined nature of those issues, no other procedures set out in Union legislation would allow it to protect the Union budget more effectively.

5.2. Observations submitted by Hungary

(67) Hungary argued that Regulation 1060/2021 (CPR)[41], includes measures such as interruption of payment deadlines, suspension of payments and financial corrections, which are effective and appropriate to protect the Union budget. Hungary also referred to other means at the Commission's disposal to guarantee the protection of the Union's financial interests in the context of the adoption of the Partnership Agreement, the Programmes for structural funds, as well as the Recovery and Resilience Facility (RRF). Hungary also argued that, with regard to public procurement rules and their interpretation and practical application, the Commission could also intervene through infringement proceedings.

5.3. Commission assessment

(68) The Commission does not agree with Hungary that other Union measures could protect the Union budget better. As regards the application of the financial measures provided in Regulation 1060/2021 (CPR)[42], the Commission notes that those measures are by definition limited to the scope and criteria contained in that sectorial regulation and cannot achieve the general preventive and systemic protection that is possible under the Conditionality Regulation. The importance of this general

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41 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.

42 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.

preventive dimension of the Conditionality Regulation has been confirmed by the Court of Justice[43]. Concerning the observance and monitoring of the enabling conditions enshrined in the CPR, the Commission would firstly note that whereas the only consequence under Article 15 CPR of failure to fulfil an enabling condition is that the Commission does not reimburse declared expenditure, the Conditionality Regulation grants a larger scope of possibilities 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. Contrary to the procedure under Article 15 CPR, this also includes pre-financing. Moreover, the scope of the enabling conditions that could be of relevance in this case, in particular 'Effective monitoring mechanisms of the public procurement market' and 'Effective application and implementation of the Charter of Fundamental Rights', differs from and is more restrictive than the one of the Conditionality Regulation.

(69) As regards infringement proceedings concerning the application of the public procurement rules and their interpretation, recital (17) of the Conditionality Regulation clarifies that the 'legislation' to which Article 6(1) of the Conditionality Regulation refers, is financial and sector-specific legislation. Infringement procedures, which are not based on a legislative act but directly on primary law (Article 258 TFEU), cannot be considered as relevant within the meaning of Article 6(1) of the Conditionality Regulation.

(70) With regard to the Recovery and Resilience Facility, Regulation (EU) 2021/241 includes provisions linked with the protection of the financial interests of the Union[44], with which the Member State has to comply when implementing measures under the Facility. In addition, the primary responsibility to comply with Union and national law when implementing those measures remains with the Member States in accordance with Article 22(1) of Regulation (EU) 2021/241, whereas the Commission can proceed to corrective measures ex post 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 a serious breach of an obligation resulting from the loan agreement or the financing agreement in accordance with Article 22(5) of that Regulation. More importantly, the RRP of Hungary is not yet adopted and its content and capacity to protect the financial interests of the Union depends on the actual measures it will contain, but also how these measures will be implemented, by Hungary.

(71) In light of all the foregoing, the Commission considers that no other procedure under Union law would allow it to protect the Union budget more effectively than the procedure set out by the Conditionality Regulation.

6. GENERAL OBSERVATIONS SUBMITTED BY HUNGARY

(72) In addition to the arguments submitted by Hungary on the specific issues raised by the Commission, Hungary also submitted general observations, with which it

[43] See judgment of the Court (Full Court) of 16 February 2022, *Hungary v European Parliament and Council of the European Union*, Case C-156/21, ECLI:EU:C:2022:97, paras 262 and 266 in particular.

[44] Article 22 of 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.17-75.

contested several elements of the procedure. In particular, it argued that the initiation by the Commission of the procedure against Hungary was not based on sufficient factual or legal grounds, contesting in particular the reliability of the sources used by the Commission. It also argued that the Commission did not ensure non-discrimination and equal treatment among Member States, while referring in particular to the performance of other Member States in the Single Market Scoreboard and recommendations under the European Semester on strengthening the public procurement framework, establishing anti corruption frameworks and ensuring the independence of the prosecution service. Moreover, it argued that the Commission did not take due account of the specific features of Hungary's legal system, which provides for a margin of discretion in implementing the principles of the rule of law. Furthermore, it argued that the principles of the rights of defence in criminal proceedings, as well as in competition law, should apply in this context and that the Commission has not respected these rights.

(73) In its second reply, Hungary criticised that the intention letter on 20 July had been sent, without taking into account the fourteen corrective measures submitted to the Commission on 19 July. For twelve out of these measures, Hungary committed to maintain them unconditionally and indefinitely. Thus, it argued that the Commission ought to have taken these commitments into account in its assessment before sending that letter, in particular also because the deadline set by the Conditionality Regulation of one month for sending the letter was indicative. It further considered that the measures proposed by reference to the draft milestones of its planned RRP should have been accepted as remedial measures, arguing that neither the Conditionality Regulation nor the Guidelines of its application require a specific form in which remedial measures can be proposed in the course of the procedure. On this basis, it argued that the Commission was in serious breach of the principle of sincere cooperation between the Commission and the Member State, as well as of the requirement of an objective, impartial and fair assessment set out by the Conditionality Regulation.

Commission's observations

(74) The Commission considers that the arguments submitted by Hungary are unfounded, as the Commission carried out a thorough qualitative assessment that is objective, impartial, fair, and respectful of equality between Member States. The Commission duly took into account information from several available sources[45], to identify, crosscheck and assess relevant breaches of the principles of the rule of law, in line with the Conditionality Regulation as interpreted by the Court of Justice of the European Union,[46] including the information submitted by Hungary in its reply to the request for information. The Commission underlines in that context that the assessment of each case, the range and scope of evidence, is performed on its own merits, taking into account all relevant circumstances. While it is true that when looking at single indicators, other Member States might in some instances perform worse than Hungary regarding certain aspects, the Commission's assessment is a

45 Those sources have been indicated in the footnotes and annexes of the notification and of the intention letter and they are publicly accessible.

46 Judgment of the Court of Justice of 16 February 2022 *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97; judgment of the Court of Justice of 16 February 2022 *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98.

comprehensive qualitative assessment, which takes into account the relevant legal and institutional context, bringing together information, indicators and observations from multiple sources to form a more complete picture of the situation in Hungary than single indicators could provide.

(75) The notification, as well as the intention letter clarified that the continuation of the issues over more than ten years indicates that there is a continued risk for the sound financial management of Union funds, in breach of Union law, and a persistent failure by the Hungarian public authorities to prevent or correct those breaches and effectively protect the financial interests of the Union. Based on this, the Commission considered that unless further measures are taken to address the matter effectively as a matter of urgency, there are no grounds to assume that the situation will significantly improve.

(76) Finally, the Commission duly respected the rights of defence of Hungary, in line with the requirements of the Conditionality Regulation, as well as the principles of Union law, as it clearly stated its concerns and grounds for initiating the procedure, provided to Hungary the possibility to submit its observations at every step of the procedure and took duly into account the observations submitted by Hungary, as well as the remedial measures it proposed in its first and second reply.

(77) In relation to the measures or actions Hungary proposed on 19 July 2022, the arguments put forward by Hungary are unfounded for several reasons. Firstly, the remedial measures were not proposed with the observations on the notification letter and within the time limit specified in that notification letter, as provided for by Article 6(5) and (9) of the Conditionality Regulation, but later in the process. Secondly, the fact that the time limit in Article 6(6) of the Conditionality Regulation is indicative does not mean that the Commission is bound to unnecessarily extend it. Such an extension is possible when this is justified to analyse the observations and the adequacy of remedial measures, which must be submitted in good time. The Commission invited Hungary in the intention letter to submit as early as possible further details about the remedial measures proposed, both on their nature and on the different instruments which could be used to take these forward. In particular as regards the remedial measure relevant to the amendment of the judicial review of prosecutorial decisions, which was under discussion in the context of the RRP, the Commission clearly stated that the Commission had several reservations on technical aspects that could compromise its effectiveness. Thus, at that stage, the Commission did not have any reason to delay sending the intention letter. Finally, those remedial measures are now fully replaced with those formally submitted in the second reply, including the additional commitments included in the September letter.

(78) Furthemore, the Commission clearly explained in its intention letter that to be considered adequate for the purpose of the Conditionality Regulation, remedial measures, including draft legislation where appropriate, should be proposed unconditionally within the framework of the procedure under the Conditionality Regulation, and be sufficiently precise in terms of content and timeline of implementation, as well as not be limited in time. In many cases, the first reply included references to proposals considered in the context of the draft Hungarian RRP. Mere references to draft RRP milestones cannot be considered as remedial measures submitted in the context of the procedure under the Conditionality Regulation pursuant to its Article 6(5).At the same time, the Commission was not in

a position to assess whether they would be adequate to address the findings set out in the notification, in order to take them into account in the measures it proposed with its intention letter.

7. REMEDIAL MEASURES SUBMITTED BY HUNGARY AND ANALYSIS OF THEIR ADEQUACY UNDER THE CONDITIONALITY REGULATION

7.1. Remedial measures submitted by Hungary

(79) In accordance with Article 6(6) of the Conditionality Regulation, '[t]he Commission shall take into account the information received and any observations made by the Member State concerned, as well as the adequacy of any proposed remedial measures, when deciding whether to submit a proposal for an implementing decision on the appropriate measures.'

(80) In its first reply, and the additional letters of 30 June and 5 July 2022, Hungary did not submit adequate remedial measures, appropriately committed under the Conditionality Regulation.

(81) On 19 July 2022, Hungary sent an additional letter proposing a number of remedial measures to address the findings in the notification, which due to the submission at that very late stage of the process, could not be taken into account for the assessment of the first reply.

(82) In its second reply, Hungary submitted a number of remedial measures, complementing them with additional committements in the September letter, arguing they would adequately address all the issues raised by the Commission in the notification. These remedial measures are:

i. Reinforcing prevention, detection and correction of illegalities and irregularities concerning the implementation of Union funds through a newly established Integrity Authority;

ii. Anti-Corruption Task Force;

iii. Strengthening the Anti-Corruption Framework;

iv. Ensuring the transparency of the use of Union support by public interest asset management foundations;

v. Introduction of a specific procedure in the case of special crimes related to the exercise of public authority or the management of public property;

vi. Strengthening audit and control mechanisms to guarantee the sound use of EU support;

vii. Reducing the share of tender procedures with single bids financed from Union funds;

viii. Reducing the share of tender procedures with single bids financed from the national budget;

ix. Development of a single-bid reporting tool to monitor and report on public procurements closed with single-bids;

x. Development of the Electronic Public Procurement System (EPS) to increase transparency;

xi. Development of a performance measurement framework assessing the efficiency and cost effectiveness of public procurements;

xii. Adoption of an action plan to increase the level of competition in public procurement;

xiii. Training to be provided for micro, small and medium-sized enterprises on public procurement practices;

xiv. Setting up a support scheme for compensating the costs associated with participating in public procurement of micro, small and medium-sized enterprises;

xv. Application of ARACHNE;

xvi. Strengthening cooperation with OLAF; and

xvii. Adoption of a legislative act ensuring enhanced transparency of public spending

7.2. Commission assessment of the remedial measures

(83) The Commission welcomes that Hungary submitted remedial measures to address the issues raised in the notification as regards 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 and prosecution, anti-corruption framework. In general, Hungary has committed (as mentioned in its second reply) to unconditionally maintain in force the remedial measures (and the related legislations) without any time limit and to enforce duly the rules set therein.

(84) Concerning the assessment of the proposed remedial measures, the Commission considers that since the specific issues identified in Hungary concern both the legal framework and, to a large extent, practice, their adequacy to achieve their aim of putting an end to the breaches of the principles of the rule of law and/or to their risks for the sound financial management of the Union budget and the Union's financial interests cannot be properly evaluated without full knowledge of the details of the concrete measures and before certain key elements are effectively implemented. In this respect, further details and key steps for many of the proposed remedial measures mentioned above need to be taken by Hungary until 19 November 2022 (when the start of operations of the Integrity Authority is envisaged), as indicated in the timelines of the remedial measures submitted by Hungary on 22 August[47].

[47] A calendar of the key steps until 19 November is contained in the Annex to the explanatory memorandum.

7.2.1. Assessment per remedial measure

i. The Integrity Authority

(85) The Hungarian Government has committed to establish an 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 concerning the implementation of any Union financial support.

(86) This is a fundamental remedial measure aimed at addressing the issues and additional grounds mentioned above (see Sections 2 and 3). The remedial measure proposed contains specific rules on the appointment of the Integrity Authority's board and on the involvement of an 'eligibility committee'[48] aimed at guaranteeing that the Integrity Authority and the members of its board will be fully independent: they will be selected following an open call for applications on the basis of the candidates' professional qualities, their qualifications, their extensive and undisputed experience and reputation – including internationally – in legal and financial matters concerning public procurement and anti-corruption and their proven competence in such fields[49]. The members of the board will only be appointed following a binding opinion of the eligibility committee. Both the members of the eligibility committee and the members of the board will be subject to strict conflict of interest rules. The Integrity Authority will also be endowed with extensive powers, including the following: the power to instruct contracting authorities to suspend a procurement procedure (for a maximum of two months); the power to request administrative investigative bodies to carry out investigations; the power to recommend the exclusion of specific economic operators from Union funding for a certain period of time; the power to instruct relevant national authorities or bodies to carry out their supervisory or control functions, in particular as regards procedures to verify conflicts of interest declarations and suspicions in relation to the management of Union funds; the right to request access to all relevant files, including on ongoing or upcoming public procurement procedures; the power to recommend contracting authorities to use a specific procedure in a specific procurement or in a category of procurement procedures; the right to initiate procedures before the relevant national authorities or bodies with the aim of establishing suspected illegalities or irregularities; the competence to verify asset declarations[50]; the right to request the judicial review of

48 In line with the commitment in the September letter, the eligibility committee will be selected following an open call for expression of interest, on which the Commission will be consulted.

49 The September letter also contains clarifications on the remuneration package that is foreseen for the members of the Integrity Authority's board as a further means to guarantee their independence.

50 As committed by Hungary in the September letter, this includes the power to verify public asset declarations of all high-risk officials and, in this respect, have access to relevant databases and registries for the purpose of verifying the assets of the declarants in accordance with data protection and privacy regulations. Hungary also clarified that these commitments complement the already existing rules on asset declaration extensively covering other positions, including public servants, permanent state secretaries, deputy state secretaries, political advisors and political chief advisors, government and ministerial advisors and chief advisors, government officials holding executive position, governmental officials subject to national security control based on legislation, public notaries, bailiffs, leaders of the Hungarian Development Bank, leaders of the Hungarian National Asset Management Inc., officials and a members of the supervisory board of economic organizations operating with a majority state shareholding, judges, public prosecutors, members of the local governments. It also clarified that the rules applicable to the members of the National Assembly applies to the Prosecutor General and his/her deputy.

all decisions of authorities concerning public procurement procedures that involve any Union support and may be subject to judicial review, etc. The Authority will also issue annual reports on its activities, containing, inter alia, an analysis of the concentration of the awards, an assessment of the practice of using framework agreements, an analysis of how the control system in place helps identifying and effectively prevent risks of corruption, fraud and conflict of interests (and how to detect and address such cases; recommendations on the issues identified. The annual report will be published and the Government will have the obligation to explain in writing how it will address the findings of the Integrity Authority. Finally, the remedial measure proposed also contains a detailed timeline with different implementing steps including the consultation of the Commission and the OECD on the draft legislative text(s) that will establish the Integrity Authority and contain further necessary details about the above elements. The start of the Integrity Authority's operations, which is a key implementation step for this remedial measure, as set out in the Annex, is foreseen on 19 November 2022.

(87) Given the importance of the Authority as a new building block in the governance of the system, if correctly specified in detailed rules and implemented accordingly as envisaged in the remedial measure submitted by Hungary (including the further commitments included in the September letter), in a way which ensures full independence and effective powers on the ground as regards all procedures that may actually or potentially affect the sound financial management of the Union budget or the financial interests of the Union, the Integrity Authority would contribute to increase in principle the level of competition in public procurement procedures, preventing or reducing the risks of conflict of interests, and more generally strengthening the prevention, detection and correction of fraud, corruption, conflict of interests and other irregularities in breach of Union law in the Hungarian public procurement system, to the benefit of a more sound and efficient use of Union funding. 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, the Commission welcomes Hungary's additional commitment in the September letter that all courts in Hungary hearing civil, administrative and criminal cases including those relevant for the protection of the financial interests of the Union shall comply with the requirements of independence, impartiality and being established by law in accordance with Article 19(1) of the Treaty on European Union and the relevant EU acquis.

ii. Anti-Corruption Task Force

(88) The Hungarian Government undertook to establish an Anti-Corruption Task Force by 1 December 2022 with the following tasks: a) examining the existing anti-corruption measures and elaborating proposals concerning the improvement of detection, investigation, prosecution and sanctioning of corrupt practices, b) proposing measures aimed at improving corruption prevention and detection, c) drafting an annual report analysing the risks and trends of corruption and corrupt practices, proposing effective countermeasures and best practices for and assessing their effective implementation. The Government shall discuss the report and the proposals included therein within two months and if it does not decide on a proposal, it shall send a detailed reasoning for its decision to the chair of the Task Force. The regulatory framework of the Task Force will be included in the Act establishing the Integrity Authority (see remedial measure i, described above) and the chair of the

Integrity Authority will be the chair of the Task Force. Relevant non-governmental actors, that are demonstrably independent from the government, public authorities, political parties and business interests, proven to be active in the field of anti-corruption will be involved in the activities of the Task Force and their full, structured and effective participation will be ensured: the number of such members shall amount to 50% of the members of the Task Force, the chair excluded, and they will have the right to draft a shadow report. If the 50% representation cannot be achieved, the voting power of such members shall be modulated so as to cast 50% of the votes, the chair excluded. The Task Force shall hold its first meeting before 15 December 2022.It shall adopt its first report for the year 2022 and send it to the Government by 15 March 2023. The Anti-Corruption Task Force established by Government Decision 1337/2022 of 15 July 2022 shall be discontinued and the Government Decision repealed. The Government Decision repealing the previous one and providing for the timeline and tasking for the establishment of the Integrity Authority and the Anti-Corruption Task Force is a key element for this measure. Likewise, the submission to the National Assembly of a draft Act on the establishment of the Authority by 30 September 2022 is a key implementation step for this remedial measure, as set out in the Annex, as it will set out the regulatory framework for the Task Force.

(89) The Commission positively notes that the remedial measure aims to ensure full, structured and effective participation of non-governmental actors truly active in the field of anti-corruption along with government's representatives, which is a key element for the Commission. Furthermore, Hungary commits to extensive and meaningful consultations with national and international stakeholders, including the Commission during the preparation of the draft legislation. If correctly specified in detailed rules and implemented accordingly, this remedial measure would address in principle the issues raised as regards ineffective investigation and prosecution or sanctioning of breaches of law linked to the protection of the financial interests of the Union, as well as those related to systemic weaknesses of the public procurement system.

iii. Strengthening the Anti-Corruption framework

(90) With this remedial measure (including the additional commitments in the September letter), the Hungarian Government 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. The strategies shall include the assessment of the main risks, factors and practices of fraud, conflict of interest, and corruption. The Hungarian Government also commits to adopt a new National Anti-Corruption Strategy (NACS) and Action Plan (AP) by 30 June 2023, with special attention given to the strengthening of the institutional and normative framework for the fight against high-level corruption through enhancing the transparency of the work of public authorities including on senior political level. The Anti-Corruption Task Force will be involved in the preparation of the NACS and the AP as well as in the monitoring of their implementation. According to the commitments in the September Letter, the AP shall include specific actions aimed at introducing no later than 1 October 2023 an effective, proportionate and dissuasive sanctioning regime, including administrative and criminal sanctions with regard to serious violations related to obligations under the asset declaration system. Hungary

also commits to fully implement by 30 June 2023 all actions of the National Anti-Corruption Strategy for the period 2020-2022. In the September letter, Hungary also made further commitments on the personal and material scope of asset declarations. In this respect, Hungary committed to submit to the National Assembly draft legislation (to be effective as from 1 November 2022) which shall extend the personal scope of the asset declaration system to (i) persons entrusted with senior political functions under Articles 183 and 184 of Act CXXV of 2018 on government administration and their relatives living in the same household with the person concerned, and (ii) members of the National Assembly and their relatives living in the same household with the person concerned. As regards the material scope, Hungary committed to widen it to include not only revenues but also assets[51]. Additionally, with the September letter, Hungary committed to establish (by 31 March 2023) a system of asset declarations filed electronically in a digital format, to be stored in database which will be searchable for free and without the need to register. Furthermore, in the September letter, Hungary also committed to extensive consultations with the Commission during the preparation of all draft legislation related to the above points. Finally, the Integrity Authority will be tasked with the review of the regulatory framework and the functioning of the asset declarations system, including its scope and verification processes, which shall be included in a report by 31 December 2023. Key steps for this remedial measure, as set out in the Annex, are the adoption of effective anti-fraud and anti-corruption strategies by 30 September 2022, as well as the adoption by the National Assembly of the rules on the extension of the personal and material scope of asset declarations as described in the remedial measure and in the September letter, effective on 1 November 2022.

(91) In the Commission's view, this remedial measure, complemented by the additional commitments in the September letter, includes many positive elements such as the commitment to the adoption of anti-fraud and anti-corruption strategies covering also all bodies involved in the implementation of Union funds and the submission of the state of play of the implementation of the current 2020-2022 anti-corruption strategy, the widening of the personal and material scope of the asset declarations, introduction of sanctions specific actions to increase transparency of asset declarations. In this respect the database mentioned above should be publicly accessible. Moreover, the Integrity Authority should have the power to launch an asset verification process also on its own initiative in all cases. Overall, in the Commission's view, if correctly specified in detailed rules and implemented accordingly, this remedial measure would address in principle the issues raised as regards ineffective investigation and prosecution or sanctioning of breaches of law linked to the protection of the financial interests of the Union, as well as those related to systemic weaknesses of the public procurement system.

iv. Public Interest Management Foundations (or Public Interest Trusts)

(92) With this remedial measure, the Hungarian Government has committed by 30 September 2022 to a) the adoption of an amending act to ensure the generalised application of public procurement rules to public interest asset management

[51] In this respect, the September letter mentions real estate properties; other valuable properties (vehicles, vessels, valuable antiques and work of art, etc.); savings in bank deposits and in cash; assets in stocks, securities and private equity funds; life insurance policies; trusts, and beneficial ownership of enterprises.

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

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

v. Judicial review of prosecutors' decisions

(94) The Hungarian Government has committed to the amendment of the Code of Criminal Procedure with the aim of establishing a procedure concerning special criminal offences related to the exercise of public authority or the management of public property. The procedure provides 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). Based on the review, an investigating judge will have the authority to order the commencement or the continuation of criminal proceedings. The procedure may be triggered by any person; natural persons and legal persons could file motions under this procedure with the exception of public authorities. The procedure could also eventually lead to the possibility to file for an indictment before a court.

(95) The Commission notes that Hungary has included in the remedial measure (and in the related additional commitments undertaken with the September letter) several elements related to the new judicial review procedure against prosecutors' decisions, such as the possibility for legal entities (i.e. not only physical persons) to start this 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 TEU and the relevant EU acquis, and a reasonable timeframe for the procedure in general, which would ensure its effectiveness. It has also committed to extensively consult the Commission on the draft legislative text that will be proposed for adoption in line with the remedial measure, which will contain further important details which are relevant for the assessment. In that context, the draft law would also require in particular that the trial court does not decide on the merits of the indictment without having considered evidence. Hungary undertakes to conduct a review on the functioning of the procedure no later than 31 December 2023 and if necessary to adopt amendments to the legislative framework (following consultations with the European Commission)

no later than 30 June 2024. Key implementation steps and further details about this remedial measure, as set out in the Annex, are the finalisation and adoption of the draft text of implementing regulations (necessary for the application of the review procedure) by 31 October 2022[52], the initiation of an ex ante review of the law by the Constitutional Court and entry into force of the new law amending the Criminal Procedure Code by 15 November 2022.

(96) The Commission's view is that the remedial measure submitted by Hungary contains several elements that aim at ensuring the effectiveness of the procedure. In addition, Hungary has undertaken to review the procedure within a reasonable timeframe. This however, would have to be confirmed once the details of the relevant draft legislation are submitted to and reviewed by the Commission. If correctly specified in detailed rules and implemented accordingly, this remedial measure would address in principle the issues raised as regards ineffective investigation and prosecution or sanctioning of breaches of law linked to the protection of the financial interests of the Union, as well as those related to systemic weaknesses of the public procurement system.

vi. Strengthening audit and control mechanisms for the implementation of Union funds

(97) With this remedial measure, the Hungarian Government committed to establish a working group by 31 August 2022 to develop provisions, to be included in relevant Government Decrees on the implementation of Union support (e.g. RRF, Funds under shared management etc.) aiming to strengthen rules and procedures to more effectively prevent, detect and correct conflict of interest in accordance with the definition contained in Article 61 of the Financial Regulation and increase procedural capacities of managing authorities and intermediate bodies, and the national authority of the implementation of the Hungarian RRP to apply strengthened risk management and prevention, detection and correction of fraud, corruption and double funding and unconditionally maintain and enforce those provisions for an unlimited period of time. The provisions shall also ensure an effective control mechanism over the validity of conflict of interest declarations. The working group shall extensively consult with the Commission responsible for Union financial support with a view to seek their feedback and take it into account in the relevant Government Decrees. Furthermore, Hungary committed in the September letter to provide the necessary financial and human resources to the EUTAF, to be further specified by the working group established with this remedial measure, to guarantee the sound use of Union support, to safeguard its independence and enable it to carry out its current tasks and the additional tasks envisaged to be allocated to it by a number of the remedial measures submitted by Hungary on 22 August 2022. The key implementation steps of this remedial measure, as set out in the Annex, are the establishment of the Working Group by 31 August 2022, the establishment of the Directorate of Internal Audit and Integrity ("DIAI") in the Prime Minister's Office by 30 September 2022, and the adoption of relevant amendments to the relevant Government Decrees (413/2021 and 256/2021) by 30 September 2022. The Working Group has been set up by Hungary in line with the commitment in the remedial measure and, by the second week of September it has already met four times on 8, 9, 13, and 16 September.

[52] These regulations will be necessary once the law is adopted.

(98) If correctly specified in detailed rules and implemented accordingly, this remedial measure would address in principle (together with other remedial measures) the concerns raised as regards systemic weaknesses of the public procurement system as well as the concerns raised as to the effective prevention, detection and correction of possible conflicts of interest, since it aims at the adoption of provisions to strengthen rules and procedures to more effectively prevent, detect and correct conflict of interest in the use of Union funds, including an effective control mechanism over the validity of conflict of interest declarations.

vii. Reduction of single-bids in procurement procedures involving Union funds

(99) With this remedial measure, the Hungarian Government undertook to a) reduce by 31 December 2022 the share of public procurement tender procedures financed from Union funds and closed in the year of 2022 with single bids below 15%, as measured in line with the Single Market Scoreboard methodology, b) unconditionally fulfil the above-referred target and maintain it without a time limit, and c) in case the share of single bids would exceed 15% in any given calendar year, it would take additional measures within four months to facilitate reducing single bid procurements to bring it back below the threshold of 15% and inform the Integrity Authority and the Commission. The key implementation step of this measure, as set out in the Annex, is the performance of the first audit on the compliance with the Single Market Scoreboard methodology and every individual data provision to the Commission and to the public in this regard by the Hungarian Directorate General for Audit of European Funds ("EUTAF"), including for the baseline values, by 30 September 2022.

(100) The Commission also welcomes this remedial measures as it clearly aims to increase transparency and competition in public procurement which, if correctly implemented, can be considered as capable of addressing in principle the concerns raised by the Commission on this ground.

viii. Reduction of single-bids in procurement procedures involving national funds

(101) Similar to the previous remedial measure described above, the Hungarian Government undertook to a) reduce gradually (in three steps) by 31 December 2024 the share of public procurement tender procedures financed from the national budget and closed in a calendar year with single bids below 15%, as measured in line with the Single Market Scoreboard methodology, b) unconditionally fulfil the above-referred target for subsequent years and maintain it without a time limit, and c) in case the share of single bids would exceed 15% in any given calendar year, it shall propose additional measures within four months to facilitate reducing single bid procurements to bring it back below the threshold of 15% and inform the Integrity Authority and the Commission.

(102) As for the previous one, the Commission welcomes this remedial measure as it clearly aims to increase transparency and competition in public procurement provided it is correctly implemented.

ix. Single-bid reporting tool

(103) In addition to the remedial measures related to the reduction of single-bid procedures described above, the Hungarian Government committed to develop by 30 September

2022 a new monitoring and reporting tool for separately measuring the share of procurement procedures resulting in single bids financed either from national resources or from EU support or from both and maintain it for an unlimited period of time. A written report based on the information gathered by the single-bid reporting tool shall be prepared by the ministry responsible for public procurement and published by 15 February each year on the website of the Electronic Public Procurement System (EPS - accessible to the public without registration and free of charge). Key steps of this remedial measure, as set out in the Annex, are the development of a new monitoring and reporting tool based on data sources from the EPS by 30 September 2022, and the confirmation through an audit by the EUTAF that the single-bid reporting tool is fully functional and operational and its functionalities are in line with the methodology of the Single Market Scoreboard by the same date.

(104) This remedial measure is welcome and its features are positively assessed by the Commission. If correctly developed and implemented accordingly, it will in principle make the remedial measures on reduction of single-bids more effective and transparent.

x. Electronic Public Procurement System (EPS)

(105) The Hungarian Government undertook to, a) create and publish in the EPS website a regularly updated database (at least quarterly) available to the public free of charge which contains information on all contract award notices of public procurement procedures in a structured form (including data with company identification numbers and including the names of each individual member of consortia and sub-contractors), which is fit to be processed by machine means (in particular allowing structured research and bulk export of data related to procurement procedures), b) take all the necessary measures to develop the EPS, ensuring that newly developed functions are fully operational by 30 September 2022 and c) unconditionally maintain the EPS and the relevant functions for an unlimited period of time. Key step of this remedial measure, as set out in the Annex, is the full operability of the newly developed functions of the EPS by 30 September 2022.

(106) The Commission considers that if this remedial measure is correctly developed and implemented, it should increase transparency in public procurement procedures and therefore, can be considered as capable of addressing in principle the concerns raised by the Commission as regards systemic weaknesses in the public procurement system.

xi. Performance measurement framework

(107) With this remedial measure, the Hungarian Government committed to develop, by 30 September 2022, a performance measurement framework to assess the efficiency and cost effectiveness of public procurements. The remedial measure also envisages that the Hungarian Government will unconditionally maintain the regular use of the performance measurement framework and the publication of its results for an unlimited period of time. The performance measurement framework will be operational by 30 November 2022 and will involve independent non-governmental organisations (NGOs) and independent public procurement experts with the aim of assessing the efficiency and cost-effectiveness of public procurements in Hungary.

The key implementation step of this measure, as set out in the Annex, is the development, including the adoption of a Government Decision, of the said framework by 30 September 2022.

(108) Together with other remedial measures related to the public procurement system, this remedial measure, if correctly specified in detailed rules and implemented accordingly, can be considered as capable of addressing in principle the concerns raised by the Commission as regards systemic weaknesses in the public procurement system.

xii. Action plan to increase level of competition in procurement procedures

(109) The Hungarian Government committed to adopt, by 31 March 2023, a comprehensive action plan aiming at improving the level of competition in public procurement with clear and ambitious deadlines for implementing each of the actions to be set therein. The remedial measure also provides for a review of the action plan on an annual basis. The Hungarian Government also committed to make publicly available without delay the action plan and its review, as well as the annual state of play of the implementation of the measures in the action plan.

(110) The Commission assessment of this remedial measure aiming to increase the level of competition in public procurement is positive. Together with the other remedial measures related to the public procurement system, if correctly specified in detailed rules and implemented accordingly, it can be considered as capable of addressing in principle the concerns raised by the Commission in this respect.

xiii. Training for micro, small and medium-sized enterprises in public procurement

(111) This remedial measure is aimed to facilitate the participation of micro-, small and medium enterprises (with a focus on micro- and small enterprises) in public procurement by providing by 31 March 2024 for at least 1,000 micro, small and medium-sized enterprises free-of- charge training occasions. The Hungarian Government also committed to provide such training occasions for at least a further 1,200 (therefore a total of at least 2,200) micro, small and medium-sized enterprises by 30 June 2026, and to monitor and evaluate the efficiency and added value of the trainings.

(112) The Commission assessment of this remedial measure aiming to increase the level of competition in public procurement, and in particular to increase the level of participation of micro and small enterprises in procurement procedures, is positive. This remedial measure, together with other remedial measures related to the public procurement system, if correctly implemented, can be considered as capable of addressing in principle the concerns raised by the Commission in this respect.

xiv. Support scheme for participation in public procurement by micro, small and medium-sized enterprises

(113) In addition to the measure above related to training support, the Hungarian Government committed to set up and launch by 31 March 2023 a support scheme providing a lump sum compensation – based on objective, non-discriminatory and transparent selection criteria – for at least 1,800 eligible micro, small and medium-sized enterprises (with a focus on micro- and small enterprises by 30 June 2026 for

their costs associated with their participation in public procurement procedures, with the aim of facilitating their participation in public procurement and reducing their entry barriers. A mid-term evaluation should be performed by 30 September 2024 and a final evaluation should be completed at the end of the support programme by 31 July 2026.

(114) The Commission positively assesses this remedial measure aiming to increase the level of competition in public procurement, and in particular to facilitate the participation of micro- and small enterprises in procurement procedures. This remedial measure, together with other remedial measures related to the public procurement system, if correctly implemented, can be considered as capable of addressing in principle the concerns raised by the Commission in this respect.

xv. Extended use of the Commission's Arachne risk-scoring tool

(115) Under this remedial measure, the Hungarian Government undertook to apply procedures for the systematic and extended use of all the functionalities of the single data-mining and risk-scoring tool which the Commission puts at the disposal of Member States, i.e. Arachne, in the implementation of any Union support, for all programming periods, to effectively prevent and detect conflict of interest, fraud, corruption, double funding and other irregularities. It committed to unconditionally maintain the full and effective application of the Arachne system for an unlimited period of time, while undertaking that all the relevant audit and control bodies shall have full access to the data sets uploaded into the Arachne system. The key step of this measure, as set out in the Annex, is the application of the procedures for the systematic use of all the functionalities of Arachne in the implementation of any Union support by 30 September 2022. The procedures shall ensure that all relevant data is uploaded, the results of risk-scoring are followed-up, and the respective audit bodies have full access to Arachne.

(116) In addition to the establishment of the Integrity Authority (described above) and the remedial measure on strengthening the control and audit for the use of Union funds, as regards the concerns raised about the ability of Hungary to improve conflicts of interest checks regarding the use of Union funds, the Commission considers that the remedial measure submitted by Hungary on the extended use of all functionalities of the single data-mining and risk-scoring tool which the Commission puts at the disposal of Member States (i.e. Arachne) for any Union support, if correctly developed and implemented, is capable of addressing in principle the concerns raised by the Commission.

xvi. Strengthening cooperation with OLAF

(117) The Hungarian Government undertook to submit to the National Assembly a draft act on the amendment to Act CXXII of 2010 on Nemzeti Adó- és Vámhivatal, which shall be adopted by 30 September 2022 and by which it shall designate the National Tax and Customs Administration (Nemzeti Adó- és Vámhivatal, NAV) as the competent national authority to assist OLAF when carrying out on-the-spot checks in Hungary and when an economic operator subject to those checks refuses to cooperate. It also committed to submit to the National Assembly a draft act on the amendment to Act XXIX of 2004 to introduce a dissuasive financial-type of 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. The key step of this remedial measure, as set out in the Annex, is the adoption of both acts mentioned above by 30 September 2022.

(118) Concerning the remedial measure proposed on strengthening cooperation with OLAF, the Commission considers that it is capable of addressing the limitations identified, as it will designate a competent national authority to assist OLAF when carrying out on-the-spot checks in Hungary and when an economic operator subject to those checks refuses to cooperate. The new rules to be adopted by Hungary in line with the remedial measure submitted will also include a dissuasive financial-type of 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. Provided that the commitments taken are correctly specified in detailed rules and implemented accordingly, the Commission considers that this issue has been addressed in principle.

xvii. Enhanced transparency of public spending

(119) With this remedial measure, the Hungarian Government committed to a) submit to the National Assembly and have it adopted by it by 31 October 2022 a legislative act 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, b) provide information on the subcontractors in the central register and c) unconditionally maintain in force the above-referred legislative act for an unlimited period of time and ensure its enforcement (in particular that public bodies upload all relevant data in full and in a timely manner in the registry). An advanced draft of the legislative act will be sent to the Commission by 30 September 2022. The key steps of this remedial measure, as set out in the Annex, are (a) sending to the Commission an advanced draft of the legislative act setting out the obligation for all public bodies to proactively publish a pre-defined set of information on the use of public funds by 30 September 2022 and (b) adoption of that legislative act by 31 October 2022.

(120) In the Commission's view, this remedial measure also contributes (together with other remedial measures) to increase transparency in public procurement. If correctly specified in detailed rules and implemented accordingly, it can be considered as capable of addressing in principle the concerns raised by the Commission in this respect.

7.2.2. Conclusion of the assessment

(121) The Commission has to decide on the next step of the procedure within one month after receiving the Member State's observations. It welcomes the proposal made by Hungary, albeit at a late stage, and considers that the proposed remedial measures, taken together, if correctly specified in the enacting laws and implementing rules, and implemented accordingly, could in principle, depending on the details of the measures, be capable of addressing the issues described in the notification regarding systemic irregularities, deficiencies and weaknesses in public procurement, risks of conflicts of interest, and concerns regarding 'public interest trusts', as well as the

additional grounds regarding investigation, prosecution and the anti-corruption framework[53].

(122) However, important details of the proposed measures are still to be determined and assessed, notably how their key elements will be reflected in the actual legal texts (for example to ensure that the Integrity Authority has the power to verify asset declarations relevant for carrying out its tasks). Secondly, several of the issues identified in Hungary require not only changes in the legal framework, but more prominently concrete implementation of changes in practice, the latter requiring a more extended timeframe to produce concrete results. Pending the assessment of the details and of the implementation of the key implementaion steps of all the remedial measures as set out in Table 1 of the Annex, a risk for the budget remains. Therefore at this stage, pending the details and the correct, full and effective implementation of all the key implementation steps of these measures, the Commission cannot consider that they are adequate to address the findings set out in the Commission notification sent to Hungary on 27 April 2022 and to protect the Union budget.

(123) The Commission will continue to monitor the situation through this procedure and other relevant instruments, and to exchange with the Hungarian authorities after the adoption of this proposal. It is noted, in particular, that a number of the remedial measures proposed by Hungary are to be implemented by 19 November 2022. The Commission will keep the Council informed of any relevant element which may have an effect on its present assessment.

(124) Pursuant to Article 6(10) of the Conditionality Regulation, the Council shall adopt the implementing decision within one month, that could be extended by a maximum of further two months which would allow for consideration of the fulfilment of the commitments referenced in paragraph (123).

8. MEASURES PROPOSED FOR ADOPTION AND THEIR PROPORTIONALITY

(125) The proposal respects the principle of proportionality. It does not go beyond what is necessary to achieve the objectives sought by the instrument.

(126) The Conditionality Regulation requires that measures to be proposed to the Council be proportionate to the actual or potential impact of the identified breaches of the principles of the rule of law on the sound financial management of the Union budget or on the protection of the financial interests of the Union and, insofar as possible, target the Union actions affected by the breaches. In identifying the measures to be proposed, the Commission shall take into account all relevant elements, such as the nature, duration, gravity and scope of the breaches of the principles of the rule of law, as well as the adequacy of any possible remedial measure submitted by the Member State concerned in the context of the procedure.

[53] These findings do not pre-empt the Commission's monitoring and further analytical assessment under other Commission instruments, including the annual EU Rule of Law mechanism.

8.1. Proportionality of measures - potential impact of the breaches of the principles of the rule of law on the Union budget

(127) The identified breaches are intrinsically linked to the process under which Union funds are used by Hungary, as they consist in improper functioning and processes of the public authorities deciding on the award procedure of contracts financed through the Union budget. Therefore, their potential impact 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. In addition, if the identified breaches are coupled with the limits and obstacles in the detection, investigation and correction of fraud due to the additional grounds related to investigation, prosecution and anti-corruption framework, the abovementioned impact could be considered even more significant, as potentially affecting all Union funds implemented by Hungary.

(128) As regards the nature of the breaches, the Commission considers that the assessment of the breaches relevant to public procurement, as well as those relevant to conflicts of interest for public interest trusts has led to the conclusion that these issues are indicative of breaches of the rule of law, in particular of those of Article 3(b) of Regulation (EU, Euratom) 2020/2092, as they fail to prevent, correct or sanction arbitrary or unlawful decisions by public authorities and fail to ensure the absence of conflicts of interest. Thus the nature of the assessed breaches, which relates in essence with the way public funds, including Union funds, are being implemented entails a significant impact on the Union budget.

(129) Moreover in particular the breaches relevant to the issues identified in relation to public procurement are recurrent and with a long duration of over 10 years, entailing a risk for the sound financial management of the Union budget and the financial interests of the Union.

(130) The Commission furthermore considers that the identified breaches of the principles of the rule of law concern important parts of the public sector in Hungary, i.e. all public entities implementing Union funds that may be or become contracting authorities, as well as all public interest trusts, which despite being private entities, have a public interest objective, such as education, research, environment and climate protection and heritage protection. Thus, the identified breaches of the principles of the rule of law are systemic and widespread, and thus serious.

(131) Concerning the scope of the breach of the principles of the rule of law, the Commission considers that, when a breach of the principles of the rule of law affects or risks affecting multiple programmes or funds of the Union, its impact on the Union budget or the financial interests of the Union must be considered as being substantial. In this case, the identified issues risk affecting all programmes that are mainly implemented through public procurement, which relate most significantly to three of the Cohesion policy programmes in Hungary under the Multiannual Financial Framework 2021-2027, which correspond to the a significant part of the Union budget allocated to Hungary under Cohesion policy. The Commission audits which identified the public procurement issues described above covered the area of Cohesion policy and despite the fact that their impact on the EU budget has been financially corrected in application of Cohesion policy rules in relation to the individual audits, these findings demonstrated 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.

(132) In addition to the above, if the identified issues related to public procurement and the public interest trusts are coupled with the limits and obstacles in the detection, investigation and correction of fraud due to the additional grounds related to investigation, prosecution and anti-corruption framework, the financial impact could be considered to be even more significant. This aspect would indeed hamper the protection of the Union's financial interests both ex ante, hampering the deterrent effect of criminal proceedings, and ex post, blocking the repressive action of State institutions.

8.2. Union actions targeted by the measures

(133) Taking into account the Commission services' past audits (and despite the fact that their impact on the EU budget has been financially corrected in application of Cohesion policy rules), and the findings outlined above, the Union actions that are most likely to be affected again in the future by the breaches of the principles of the rule of law are those of the Cohesion policy programmes that are mainly implemented through public procurement, as well as programmes under which public interest trusts and the entities maintained by them may be beneficiaries.

(134) The Commission considers that, taking into account the established risk for the sound financial management of the Union budget and the Union's financial interests, as well as the preventive nature of the Conditionality Regulation, and to protect the budget against serious risks, the measures should concern in priority the Cohesion policy programmes 2021-2027 that are expected to be implemented mainly through public procurement taking as a benchmark the way the equivalent Cohesion policy programmes have been implemented under the MFF 2014-2020. The programmes under Cohesion policy that are concerned by the proposed measures (hereinafter the "programmes concerned") are the following:

(a) Environment and Energy Efficiency Operational Programme Plus,

(b) Integrated Transport Operational Programme Plus,

(c) Territorial and Settlement Development Operational Programme Plus.

(135) As regards the breaches of the principles of the rule of law affecting funds implemented by public interest trusts and the entities maintained by them, the Commission considers that, taking into account the nature of the activities in which these entities may be involved[54], all actions of programmes under direct or indirect management that may have public interest trusts or other entities maintained by them as beneficiaries or implementing entities, should be targeted by the measures the Commission intends to propose in this case.

[54] These activities would mainly relate to education and research, but also to many other activities, such as environmental and climate protection, heritage protection, and sports.

8.3. Choice of appropriate and proportionate measures

(136) In light of the foregoing analysis, which concludes that there is a significant potential impact of the identified breaches of the principles of the rule of law on the sound financial management of the Union budget or on the financial interests of the Union, the following measures are proposed.

- Programmes under shared management: suspension of commitments under cohesion policy programmes for the period 2021-2027

(137) To determine the level of suspension of commitments, the Commission notes that at this stage it is not possible to quantify precisely the potential impact on the Union budget, as the proportion of the funds that will be implemented through procurement under the MFF 2021-2027 period cannot be determined in advance with sufficient accuracy. Therefore, since it is not possible to define precisely the amount of expenditure linked to the serious irregularities that have been detected, the appropriate level of the measures to be applied is determined by a percentage that reflects the estimated ensuing risk for the Union budget. This percentage is determined in the light of the seriousness, frequency and duration of the systemic breaches identified, as well as of the expected maximum financial risk for the sound financial management of the Union budget, taking into account the remedial measures submitted by Hungary in the context of this procedure.

(138) Given the particularly significant potential impact of the identified breaches of the principles of the rule of law on the sound financial management of the Union budget and on the financial interests of the Union, and taking into account the nature, duration, seriousness and scope of those breaches, this could imply a very significant potential impact on the relevant funds and thus justify a very significant level of suspension of commitments as proportionate. As regards public procurement, appropriate and proportionate measures should therefore extend to the amount of Union funds that risks to be managed in breach of the principles of sound financial management. This being said, only part of the funds of the above identified operational programmes is expected to be implemented through procurement (in principle between 85% and 90% of funds) and, also in principle, some public procurement procedures may not be affected by those systemic breaches. On the other hand, those breaches could also involve serious risks for other Union programmes which are also, to a lesser extent, implemented through public procurement but would not be affected by the envisaged measures. Taking into account all the foregoing, in its intention letter, the Commission had estimated the risk for the budget to correspond to 70% of the funds of the programmes concerned. However, such risk could be significantly mitigated by the commitments made by Hungary in the remedial measures submitted with the second reply, should they be confirmed with the key steps to which Hungary committed.

(139) Indeed, while Hungary has submitted remedial measures that in principle could be able to address the Commission's concerns, and started taking first implementation steps, at this stage they are still insufficiently detailed considering that the key legislative texts and other key steps that would start implementing many of the remedial measures submitted by Hungary are still pending, so that it is difficult to conclusively evaluate whether they address the concerns. Therefore, the Commission considers that a reasonable approximation of the level of remaining risk for the

budget at this stage correspond to 65% of the funds of the programmes concerned. As this level can be considered as a reasonable approximation of the impact on or the serious risks for the Union budget, the Commission considers that the suspension of 65% of commitments in these operational programmes is a proportionate measure. The Commission will continue to monitor the situation and may suggest adaptations as necessary.

(140) Should the identified programmes not have been approved by the time the Council would take a decision, the suspension of approval of one or more of the programmes concerned, in proportion to the risk for the Union's financial interests, should be decided instead. This is based on the same line of reasoning set out in paragraph (139) above.

- Programmes under direct and indirect management: prohibition on entering into new legal commitments with public interest trusts and entities maintained by them

(141) The measures should also concern actions under programmes implemented under direct and indirect management, for which public interest trusts and the entities maintained by them may be beneficiaries or implementing entities. As regards the identified breaches relevant to public interest trusts, as the measure would concern only these entities as such, all programmes implemented under direct and indirect management should be targeted. The Commission considers proportionate as a measure the prohibition on entering into new legal commitments with any public interest trust and any entity maintained by them under any programme under direct and indirect management.

(142) As there is currently a general exception for board members of public interest trusts to abide by conflict of interest requirements, while the applicability of public procurement rules to trust funds would depend on a case by case assessment of whether they meet the criteria to be considered contracting authorities, such exceptions may affect any budget these entities may implement or manage. Thus it is practically impossible to consider that the prohibition should apply for some public interest trusts and the entities maintained by them, or that the Commission can enter in partial legal commitments with such entities. Moreover, as the prohibition of entering into new legal commitments is limited to these entities, the allocation of funds to from all Union programmes under direct and indirect management may still be used for any other entity, as beneficiary or implementing entity. Thus, in light of the list of measures applicable to direct and indirect management pursuant to Article 5(1)(a) of the Conditionality Regulation, the prohibition of entering into any new legal commitment with these entities can be considered proportionate to address the risk for the sound financial management of the Union budget and the Union's financial interests, pending the adoption of the relevant legislative text.

(143) Provided that the measure is specified in detailed rules and enacted in the necessary legislative text and implemented as Hungary has committed, it can be considered as addressing all of the Commission's concerns in this regard.

8.4. Observations submitted by Hungary on the measures proposed in the intention letter

(144) Hungary argued that the remedial measures it submitted address all the issues identified by the Commission in this case. It recalled the principle of sincere cooperation with which it complied with a view to submitting the remedial measures. Furthermore, it referred to the Court's judgement[55] requirement that the measures taken under the Conditionality Regulation must be "strictly proportionate" to the impact of the established breach of the principles of the rule of law on the Union budget or on the Union's financial interests, to argue that a potential impact or effect on the sound financial management of the EU budget or on the protection of the Union's financial interest may not justify measures on all Unionfunds used by a Member State. Moreover, it argued that the systemic and widespread character of breaches cannot automatically render the breaches serious. Furthermore, it stated that there is no justification as to why and to which extent the Operational programmes concerned by the measures have been identified as being implemented through public procurement.

(145) In addition, it argued that there is an infringement of the requirements for an objective, impartial and fair assessment, given that the conclusion on 70% reduction of commitments is not justified. By referring to the 10% flat rate corrections applied in the course of the 2017 audit, it argues that the principle of proportionality would require that only 10% of the 70%, i.e. 7%, of the commitments of the relevant operational programmes could be suspended. It further argues that the Commission did not justify why it proposed suspension of payments which were higher than financial correction levels set out in the Commission Guidance on financial corrections for non-compliance with the rules on public procurement[56].

(146) As regards the alternative measure of suspension of approval of operational programmes in case they have not been approved by the Commission at the time the Council will take its decision, it states that it was not given the opportunity to comment, given that the Commission has not defined the specific programmes that would be concerned in such a case.

(147) Concerning the prohibition of entering into new legal commitments with public interest trusts and the entities maintained or managed by them, Hungary argues that it is unnecessary and disproportionate, given the alleged remedial measures submitted on 19 July 2022, the fact that the Commission did not present any specific case where these entities did not act as contracting authorities or that did not comply with EU rules on conflict of interest.

Commission assessment

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55 See judgments of the Court (Full Court) of 16 February 2022, *Hungary v European Parliament and Council of the European Union*, Case C-156/21, ECLI:EU:C:2022:97, para 271 and *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, para 302.

56 Commission Decision of 14 May 2019 laying down guidelines for determining financial corrections to be made to expenditure finances by the Union, for non-compliance with the rules on public procurement, C(2019)3452 final.

(148) The Commission welcomes the remedial measures submitted by Hungary with its second reply, as well as its cooperation in this respect. This being said, the intention letter sets out the reasons why the remedial measures proposed on 19 July 2022, could not be taken into account in the definition of the measures that the Commission intended to propose to the Council. Concerning the measures submitted by Hungary with its second reply, the Commission explained above in paragraphs (121) and (122) why at this stage they cannot be considered as adequate to address the issues identified by the Commission.

(149) Concerning the argument made by Hungary relevant to the potential impact or effects on the Union budget, the Commission notes that article 4(1) of the Conditionality Regulation requires the Commission to propose measures to the Council also when breaches of the principles of the rule of law seriously risk affecting the sound financial management of the Union budget in a sufficiently direct way. As the Commission has established such a serious risk for the future, it did not need to establish a specific risk as argued by Hungary, in order to propose measures to the Council. The interpretation suggested by Hungary would deprive the Conditionality Regulation from its purpose, which is the preventive protection of the sound financial management of the Union budget and the Union's financial interests.

(150) As regards the application of the rates of financial corrections applied in case of Commission services audits, the Commission notes that the Conditionality Regulation is a preventive instrument that aims at protecting the sound financial management of the Union budget and the Union's financial interests in a more horizontal manner than other Union financial rules. Thus the application mutatis mutandis of the financial correction levels included in the CPR and the above-mentioned Commission decision would not serve its purpose, which is separate and additional.

(151) Concerning the alternative measure of suspension of the approval of programmes, the Commission has clearly indicated the operational programmes that could be subject to this measure. The Commission could not indicate at the time of the intention letter, and it cannot indicate at this stage either, precisely which concerned programmes would be included in the alternative measure of suspension of approval of programmes. This would depend on the stage of approval of programmes at the time the Council adopts its decision. However, the Commission has indicated that, in case the suspension of approval of programmes is to be applied, this should concern one or more programmes in proportion to the risk for the Union's financial interests.

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

9. LEGAL BASIS

(153) The legal basis for this instrument is Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

10. MEASURES PROPOSED FOR ADOPTION

- **Programmes under shared management**

(154) Suspension of 65% of the commitments in three operational programmes for the period 2021-2027 financed from the European Regional Development Fund (ERDF), Cohesion Fund (CF), Just Transition Fund (JTF), European Social Fund Plus (ESF+).

(155) Should the identified programmes not have been approved by the time the Council adopts its decision, the suspension of approval of one or more of the programmes concerned, in proportion to the risk for the Union's financial interests, should be decided instead. This is based on the same line of reasoning set out in paragraph 140 above.

- **Programmes under direct and indirect management**

(156) Prohibition on entering into new legal commitments with any public interest trust and any entity maintained by them under any Union programme under direct and indirect management. This does not necessarily have a budgetary impact as the prohibition of entering into new legal commitments is limited to these entities and the corresponding allocation of funds from all Union programmes under direct and indirect management may still be used for any other entity, as beneficiary or implementing entity.

2022/0295 (NLE)

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 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 budget[57] , and in particular Article 6(10) thereof,

Having regard to the proposal from the European Commission,

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 that 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) high rate of single bidding procedures and low intensity of competition in procurement procedures;

(c) issues related to the use of framework agreements;

(d) detection, prevention and correction of conflicts of interest;

[57] OJ L 433I, 22.12.2020, p. 1.

(e) issues related to public interest trusts.

(3) These 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 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. These 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, the 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 ('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 address the Commission's concern and therefore the Commission should not propose any measures to the Council.

(10) The main findings of the Commission are summarised in the following recitals.

(11) Firstly, there are serious systemic irregularities, deficiencies and weaknesses in public procurement procedures. Such irregularities have been found following consecutive audits conducted by the Commission services for the both 2007-2013 and 2014-2020 programming periods. These audits closed with significant overall amounts of financial corrections, as well as several OLAF investigations that led to financial recommendations for the recovery of significant amounts from Hungary. In addition, the available data indicate that there have been unusually high percentages of contracts awarded following procedures in whichparticipated just one single bidder; attribution of contracts to specific companies, which have been gradually gaining large parts of the market; 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 principle 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 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 covering also the most relevant corruption prevention areas; an under-utilisation of the full range of preventive tools to assist corruption investigation, 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) 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 it 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 concentration of awards in public procurement, but also an increase in the odds of winning for actors of the Hungarian ruling party (the 'politically connected companies'). 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[58]. 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 application in practice) of conflict of interest rules relevant for the protection of the Union budget in relation to public interest trusts.

(14) Other procedures set out in Union legislation would not allow the Commission to protect the Union budget more effectively. 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 correctionson 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 current either 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 Council[59], 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 shall 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

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58 *Study on concentration of awards and potential risks of fraud, corruption and conflict of interest in public procurement procedures in Hungary with focus on EU funded public procurements - Empirical analysis of Hungarian public procurement data from 2005 to 2021*, Corruption Research Center Budapest.

59 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).

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.

(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, which are not based on a legislative act but directly on Article 258 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 Council[60] 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. The primary responsibility to comply with Union and national law when implementing those measures 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. More importantly, the Recovery and Resilience Plan of Hungary is not yet finalised and its content and capacity to protect the financial interests of the Union depends on the actual measures it will contain, but also on how those measures will be implemented by Hungary. 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 by 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 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

[60] 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).

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 MFF 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 this appropriate measure.

(23) In line with the proportionality requirements set out in Article 5(3) ofRegulation (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 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 it then 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'). These remedial measures are as follows:

(a) Reinforcing prevention, detection and correction of illegalities and irregularities concerning the implementation of Union funds through a newly established Integrity Authority;

(b) 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) 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 EU 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) Development of a single-bid reporting tool to monitor and report on public procurements closed with single-bids;

(j) Development of the Electronic Public Procurement System to increase transparency;

(k) Development of a performance measurement framework assessing the efficiency and cost effectiveness of public procurements;

(l) 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) Application of ARACHNE, the Commission's risk scoring tool;

(p) Strengthening the cooperation with OLAF;

(q) Adoption of a legislative act ensuring enhanced transparency of public spending.

(27) 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 therein.

(28) However, since the issues identified in Hungary concern both the legal framework and, to a large extent, administrative practices, the assessment of the adequacy of the remedial measures proposed by Hungary to achieve their aim of putting an end to the breaches and/or to the risks for the Union's financial interests will depend on the analysis of the details of the measures and of the correct, full and effective implementation of all key implementation steps as indicated in the relevant timelines

submitted by Hungary on 22 August. In this respect, key steps for many of the proposed remedial measures still need to be taken by Hungary.

(29) Hungary committed to establish a new Integrity Authority reinforcing the prevention, detection and correction of illegalities and irregularities concerning the implementation of Union funds. Hungary has included in the proposed remedial measure a number of elements which are positively assessed at this stage by the Commission, notably on: (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, 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 shall comply with the requirements of independence, impartiality and being established by law in accordance with Article 19(1) of the Treaty on European Union and the relevant EU acquis. The proposed remedial measure includes a timeline outlining the first key implementation steps, going from a Government Decision charging the Hungarian government with submitting draft legislation to the National Assembly by 30 September 2022 for the establishment of the Integrity Authority (this Government Decision was adopted on 5 September 2022) to the start of the activities of the Integrity Authority on 19 November 2022.

(30) If correctly and effectively implemented as envisaged in the proposed remedial measure, with full independence and effective powers on the ground as regards all procedures that may actually or potentially affect the sound financial management of the Union budget or the financial interests of the Union, the Integrity Authority could contribute to increased levels of competition in procurement procedures, preventing or minimising the risks of conflict of interests, and in general enhance the prevention, detection and correction of fraud, corruption, conflict of interests and other irregularities in breach of Union law in the Hungarian public procurement system, to the benefit of a more sound and efficient use of Union funding. However, details and key steps of this proposed remedial measure are still pending, including in particular on the Integrity Authority's powers and tools to effectively verify asset declarations.

(31) Hungary has committed to the establishment of an Anti-Corruption Task Force addressing the Commission's concerns, in particular to ensure full, structured and effective participation of non-governmental actors active in the field of anti-corruption along with government's representatives. Furthermore, Hungary commits to extensive consultations with national and international stakeholders, including the Commission during the preparation of the draft legislation. However, details and key steps of this proposed remedial measure are still pending.

(32) The proposed remedial measure on the anti-corruption framework includes most of the elements considered by the Commission as fundamental to ensure the effectiveness of the measure, such as the adoption of anti-fraud and anti-corruption strategies covering all bodies involved in the implementation of Union funds and the submission of the state of play of the implementation of the medium-term National Anti-Corruption Strategy for the period 2020-2022, as well as the widening of the personal and material scope of asset declarations, rules aimed at increasing transparency of asset declarations and the introduction of administrative and criminal sanctions. However, details and key steps of this proposed remedial measure are still pending. Notably, the database mentioned above should be publicly accessible. Moreover, the Integrity Authority should have the power to launch an asset verification process also on its own initiative in all cases.

(33) As regards public interest trusts, the proposed remedial measure is in principle capable of addressing the issues raised, as it will enable the generalised and unconditional application of public procurement rules to public interest trusts and the entities maintained or managed by such trusts (all of them will be considered contracting authorities for the purposes of public procurement rules), and as the measure will establish clear conflict of interest rules for such entities and their board members. However, details and key steps of this proposed remedial measure are still pending.

(34) Furthermore, Hungary committed to establish a new judicial review procedure, which has many positive elements, such as the possibility for legal entities to file for this 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 of the Treaty on the European Union and the relevant EU acquis, and a reasonable timeframe for the procedure in general. Finally, Hungary has committed to review the procedure within a reasonable timeframe. The proposed remedial measure is capable of addressing the limitations identified by the Commission. However, details and key steps of this proposed remedial measure are still pending.

(35) As regards the concerns raised about the ability of Hungary to improve conflicts of interest checks regarding the use of Union funds, the proposed remedial measure on the extended use of all functionalities of the single data-mining and risk-scoring tool which the Commission puts at the disposal of Member States (i.e. Arachne) for any Union support, is in principle capable of addressing the concerns raised by the Commission, if implemented correctly. Moreover, the proposed remedial measure on strengthening audit and control mechanisms to guarantee the sound use of Union support would also address the concerns raised, if implemented correctly and timely, as it will allow for the adoption of provisions to strengthen rules and procedures to more effectively prevent, detect and correct conflict of interest in the use of Union funds, including an effective control mechanism over the validity of conflict of interest declarations. However, details and key steps of these proposed remedial measures are still pending.

(36) Furthermore, the proposed remedial measures aiming to address the systemic irregularities, deficiencies and weaknesses in public procurement are positively

assessed by the Commission. However, some of the measures still appear at this stage insufficiently detailed in certain aspects, and their key steps have not yet been taken. Therefore, they cannot be considered as sufficiently adequate to address the issues raised in the procedure under Regulation (EU, Euratom) 2020/2092. On this basis, the adoption of the appropriate measures pursuant to Article 4(1) of Regulation (EU, Euratom) 2020/2092 is required.

(37) The proposed remedial measure on strengthening cooperation with OLAF is capable of addressing the limitations identified by the Commission, as it will designate 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. It also introduces 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. However, details and key steps of this proposed remedial measure are still pending.

(38) 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

(39) However, the detailed implementing rules for the proposed remedial measures are still to be determined, notably how key elements of the measures will 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 this stage, as indicated in the timelines of the remedial measures submitted by Hungary on 22 August, a risk for the Union budget remains. Pending the entry into force of key legislative texts that would implement many of the proposed remedial measures and taking into account the assessment above, as well as the possibility that the measures may not be correctly implemented, or that their effectiveness is weakened in the details of the measures, a reasonable estimation of the level of risk for the Union budget currently corresponds to 65% of the programmes concerned, i.e. 5 percentage points less than the risk estimated in the absence of remedial measures.

(40) As the level of 65% of the programmes concerned can be considered as a reasonable approximation of the impact on or the serious risks for the Union budget, taking into account the remedial measures submitted, a suspension of [65% of the commitments in the programmes concerned is a proportionate measure.

(41) [Alternative wording should the programmes concerned not be approved at the time of the adoption of this implementing decision: Given the programmes concerned have not been approved yet, the only possible appropriate measure that may be adopted under Article 5(1)(b) of Regulation (EU, Euratom) 2020/2092 is the suspension of approval of one or more programmes. In line with the principle of

proportionality, the suspension of approval of one or more programmes should be proportionate to the risk for the Union's financial interests] .

(42) Concerning the identified breaches in relation to public interest trusts, the general exception from conflict of interest rules and the lack of transparency may have an impact on any budget that these public interest trusts and any entity maintained by them s may implement or manage. Hungary has committed in its proposed remedial measures to address all of the Commission's concerns in this regard. In light of this impact and pending the entry into force of the corresponding Hungarian legislation, the Union budget can best be protected by a prohibition to enter into new legal commitments with any public interest trust and any entity maintained by them under any programme under direct or indirect management.

(43) 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 the Decision, and in particular its obligations towards final recipients or beneficiaries, including the obligation to make payments under the applicable sector-specific or financial rules. Hungary has to report to the Commission on its compliance with those obligations every three months from the adoption of this Decision.

(44) Hungary should inform the Commission on a regular basis of the implementation of the remedial measures it has committed to,

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) 65% of the budgetary commitments under the following operational programmes in Cohesion Policy 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.

Alternative wording in case the identified programmes have not been approved by the Commission at the time of the adoption of the Council implementing decision

The approval of the following programs shall be suspended: Environmental and Energy Efficiency Operational Programme Plus and/or Integrated Transport Operational Programme Plus and/or 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 of the European Parliament and of the Council[61], no legal commitments shall be entered into with any public interest trust estalished 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 19 November 2022, and every three months thereafter of the implementation of the remedial measures Hungary has committed to with its second reply including the additional commitments included in the letter of 13 September 2022.

Article 4

This Decision is addressed to Hungary.

Done at Brussels,

For the Council
The President

[61] 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).